

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARLOS BENITEZ, JR.,

Appellant.

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No. 65942-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: December 10, 2012

Appelwick, J. — Benitez appeals from his numerous convictions related to delivery of drugs, unlawful firearm possession, and theft. He argues the prosecutor acted vindictively by adding charges in the second amended information. He argues there was insufficient evidence to support his unlawful possession of a stolen firearm conviction, or to support the conclusion that he was armed with a firearm during the commission of his drug crimes. He argues the trial court erred by failing to give a unanimity instruction on the firearm sentencing enhancement. He also argues he received ineffective assistance of counsel when his attorney agreed to consecutive sentences for the firearm counts, rather than arguing that they be treated as the same

criminal conduct and sentenced concurrently. Finally, he argues the trial court erred by failing to suppress evidence seized from his person in a warrantless search. Finding no error, we affirm.

FACTS

In 2009, the Skagit County Drug Task Force was investigating a drug operation in Burlington, based in the home of Able Cantu, Jr. and his wife Jessica Gonzalez. Over the course of that operation, officers conducted surveillance, observing a high volume of suspected drug traffic to and from the residence and its detached garage.

Officers obtained the assistance of a confidential informant, and set up two controlled drug purchases in order to get an introduction to Cantu. During the first buy, on September 4, 2009, the informant purchased methamphetamine. After debriefing the informant, officers became concerned about the presence of firearms inside the house, as well as counter-surveillance being conducted by Cantu's associates outside the house. The informant stated that he observed individuals in the house cutting a kilo of cocaine, and that two of the individuals present were armed with handguns. The informant also told officers that Carlos Benitez, Jr. was present.

Officers set up a second controlled purchase that occurred on September 17, 2009. The informant again purchased a quantity of methamphetamine, and also inquired about purchasing a machine gun that he had previously discussed with Cantu. An undercover officer who remained outside during the transaction posed as the potential buyer of the machine gun. Cantu told the informant to take the machine gun out to show it to the officer. The officer arranged for the purchase of the gun, despite

an extremely high sale price. After the transaction, the informant described the weapons he had observed while inside, including two rifles, a couple shotguns, and pistols. In additional surveillance on September 23, 2009, an officer observed both Benitez and Cantu outside the house. After what appeared to be a drug transaction, the officer followed the apparent purchaser when he left the house, noting he appeared to be under the influence of narcotics.

On October 24, 2009, Burlington Police, unaffiliated with the drug task force, went to the house while looking for a suspect. The Burlington officers knocked on the door, and Gonzalez gave consent to search for the suspect in the residence. While inside the house, they saw numerous firearms, drug paraphernalia, and possible stolen items. The officers obtained a search warrant for weapons in the house and the garage.

Although officers knew someone was inside the garage, their initial knocks went unanswered. Eventually, after seeing four males sitting inside through a window and informing them of the search warrant, Cantu opened the door. The garage was cluttered, and there was a bed and a dresser. Officers first spotted a nylon shoulder holster hanging on the bed post, holding what looked like a real gun, but turned out to be an Airsoft pistol. Under the mattress, officers found a cache of guns, including two illegally shortened shotguns. There were also three rifles found behind the headboard of the bed. And, there was a bag of suspected heroin lying on the floor near the bed, as well as a large digital scale with brown residue on the plate.

After searching the garage for approximately 20 minutes, officers finally spotted

Benitez hiding under a blanket, hugging his knees and pretending to be asleep. They ordered Benitez to show his hands, but it took multiple demands before he complied. There were guns and ammunition within arm's reach of the location where Benitez was found. Officers testified the firearms were readily accessible, and that they were concerned by his proximity to them. Upon initial questioning, Benitez stated that his name was Carlos Mejia, though he later admitted his true name was Carlos Benitez. After detaining Benitez, officers also located a wallet in his pocket, with the identification of an older white male. He stated he had found the wallet, but the cash inside was his. The wallet had \$700 of cash in it. The officers also found a sheet of paper that contained the personal information of the owner of the wallet, including a credit card number and expiration date, full name, date of birth, driver's license number and expiration, address, and social security number. The wallet contained other items including a photograph, dated August 24, 2009, of Benitez standing in the garage beside a marijuana plant. It also included gift cards, a phone activation card, a Quest card for public assistance, and a business card for a horticultural supply store that was well known as a locale frequented by individuals purchasing supplies for marijuana growing operations. Officers testified that each of these items had commonly known ties to the drug trade.

Officers continued to search the garage and found other drugs and trafficking paraphernalia. There was a bag of syringes. There was a plastic bag labeled baking soda, a known drug-manufacturing ingredient. They found numerous other drug-related items including Ziploc bags containing a brown substance, another digital scale

with residue on it, a dirty mixing bowl with residue, spoons for cooking heroin, and marijuana plants growing inside. A drug detection dog arrived, and along with the search team, identified drugs including heroin, cocaine, methamphetamine, ecstasy, and marijuana. There were numerous apparently stolen goods, including items such as stereos. There was a scanner in the garage which had the numbers for law enforcement frequencies.

The State first charged Benitez on October 28, 2009, with counts of: conspiracy to deliver a controlled substance; possession with intent to manufacture or deliver a controlled substance with firearm and school zone enhancements; two counts of possession with intent to manufacture or deliver; unlawful possession of a firearm in the first degree; and possession of a stolen firearm.

On May 21, 2010, after failing to reach a plea agreement with Benitez, the State filed a second amended information that added charges. It included the following counts: conspiracy to deliver a controlled substance (Count I); three counts of possession with intent to manufacture or deliver a controlled substance with firearm and school zone enhancements (Counts II-IV); manufacture of marijuana (Count V); criminal impersonation in the first degree (Count VI); identity theft in the first degree (Count VII); seven counts of unlawful possession of a firearm in the first degree (Counts VIII, X-XIII, XV, XVII); possession of a stolen firearm (Count IX); and two counts of unlawful possession of short-barreled shotgun or rifle (Counts XIV, XVI). The State also filed a third amended information in June 2010, correcting clerical errors in the second amended information. The case proceeded to trial on June 28, 2010.

The informant testified that Benitez took care of the garage for Cantu and did small transactions for him; that Benitez knew where things were, knew how to find Cantu, and had cooked drugs as part of the operation. The informant also testified that guns and drug trafficking go hand in hand and are important to make buyers feel they cannot steal from the operation.

There was evidence from the owner of the wallet about when he lost it and what it contained at that time. There was testimony from another man that he had five firearms and other items stolen from his house. One of the pistols found in the drug house was registered to him, and he recognized the gun and the holster. There was evidence that the school district has a designated bus stop within 100 feet of the residence. Benitez stipulated that the stop was within 1,000 feet. He also stipulated to the fact that he had a prior serious felony conviction for the strategic decision not to admit that prior conviction to the jury, and that his conviction constituted recent recidivism for the purpose of an exceptional sentence.

The jury returned guilty verdicts on all 17 counts, as well as the two enhancements each on three counts. Benitez had four prior adult and four prior juvenile convictions, and was on community custody at the time of the offenses, which impacted his standard range sentence. The standard range calculation was 765 to 992 months. On August 25, 2010, the trial court sentenced Benitez to an exceptional sentence downward of 368 months. The trial court entered written findings of fact and conclusions on law on the exceptional sentence. The State objected to those findings of fact, but did not appeal that sentence. Benitez timely appeals.

DISCUSSION

I. Prosecutorial Vindictiveness

Benitez argues he was deprived of his due process rights because the prosecuting attorney's decision to add additional criminal counts and sentencing enhancements amounted to prosecutorial vindictiveness.

Constitutional due process principles prohibit prosecutorial vindictiveness. State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). Prosecutorial vindictiveness occurs when “the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.” Id. (quoting United States v. Meyer, 258 U.S. App. D.C. 263, 810 F.2d 1242, 1245 (1987)). Thus, a prosecutorial action is vindictive only if it is designed to penalize a defendant for invoking legally protected rights. Id. There are two kinds of prosecutorial vindictiveness: a presumption of vindictiveness and actual vindictiveness. Id. A presumption of vindictiveness arises when a defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” Id. (quoting Meyer, 810 F.2d at 1246). The prosecution may then rebut the presumption by presenting objective evidence justifying the prosecutorial action. Id. Actual vindictiveness must be shown by the defendant through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. Meyer, 810 F.2d at 1245.

Benitez asserts the trial court made a finding of actual vindictiveness in this case. In its findings of fact to support an exceptional sentence downward, the trial court found, in relevant part:

5. Carlos Benitez, Jr. was a temporary resident and voluntarily participated like a groupie, and got some status and self worth being part of the group.

6. However, the trial evidence showed that Mr. Benitez was not a major participant.

....

16. Mr. Cantu was the one running this operation and he received 8 years on a plea agreement with no exceptional and some charges dropped. He didn't have criminal history.

17. Mr. Hernandez, the other co-defendant, received 4 years, less than the standard range, with 9 counts being dropped as part of either plea negotiations or facts that didn't rise to the level that the State can prove.

....

19. *The only reason that I can explain 17 counts against Mr. Benitez and the other number against the co-defendants is because he chose to exercise his constitutional right to go to trial.*

....

22. Based on my experience of 16 years in the prosecutor's office and 14 years on the bench, a range of 63.75 years to 82.66 years screamed that this was not fair or appropriate under the circumstances.

(Emphasis added.) Benitez asserts that these findings—and finding number 19 in particular—amount to a finding that the prosecutor impermissibly punished Benitez for his decision to go to trial. We reject that argument.

First, the context of the trial court's findings does not support Benitez's assertion. They were entered in response to his request for an exceptional sentence downward and intended to provide the trial court's reasoning and justification for that exceptional sentence. Significantly, they were not findings entered in response to any assertion of

vindictiveness. Benitez never raised such an assertion either before or after trial, so the trial court was never asked to strike the additional charges or to find prosecutorial vindictiveness. Second, outside of the trial court judge's expectations based on his own personal experience on the bench and as a prosecutor, there is no evidence that the decision to add charges was based on a desire to punish Benitez. Beyond the relative magnitude of the sentence, neither the trial court nor Benitez point to any evidence that reflects vindictiveness. The mere filing of additional charges after a defendant refuses a guilty plea cannot, without more, support a finding of vindictiveness. Korum, 157 Wn.2d at 629, 631.

In Korum, under facts that were much more suggestive of prosecutorial vindictiveness, the Washington Supreme Court nevertheless held that there was insufficient evidence to give rise to a presumption of prosecutorial vindictiveness, let alone a finding of actual vindictiveness. Id. at 636. In that case, the defendant initially pleaded guilty and received a sentence of 135 months. Id. at 621. In exchange for that plea agreement, the State agreed to amend its information to reduce the substantive charges and agreed not to file additional charges for other crimes it was concurrently investigating. Id. at 620-21. After the defendant successfully moved to withdraw his guilty plea, the State amended the information to a total of 32 counts and firearm enhancements. Id. at 621. The jury convicted him of 30 of those counts. Id. The trial court imposed a sentence of 1208 months, a 100 year sentence that was 10 times greater than the 10 year sentence that would have followed Korum's earlier guilty plea. Id. at 622. The Court of Appeals found prosecutorial vindictiveness and dismissed the

charges added after the defendant withdrew the guilty plea. Id. But, the Supreme Court disagreed and reversed the Court of Appeals, holding that the addition of the charges did not support a finding of prosecutorial vindictiveness. Id. at 620.

As part of that holding, the Supreme Court noted, “[T]he mere filing of additional or more serious charges after the withdrawal of a plea agreement, without proving additional facts, does not give rise to a presumption of vindictiveness.” Id. at 631. It also noted:

[N]either Korum nor the Court of Appeals ever contended that the prosecutor lacked probable cause for the additional charges, or that the added charges exceeded the 16 additional charges that the prosecutor had promised to file if Korum did not plead guilty. . . . We conclude that the increased number and the consequent severity of the collective charges cause the discrepancy in the sentences, not prosecutorial vindictiveness.

Id. at 632-33.

In Benitez’s case, as in Korum, it was never asserted that the prosecutor lacked probable cause for the additional charges. The original information was filed only three days after the arrest, such that both the State and Benitez were aware of the ongoing nature of the investigation and the corresponding possibility of additional charges being added. Benitez’s counsel stated, “[W]e are well aware that his exposure on this is very great. . . . [W]e did as we were working on this have notice that these charges were potentially going to be added. We went through omnibus. We knew there would be an amended information.” The prosecutor and the defense attorney understood from very early on that the prosecution would seek greater charges at trial than in a plea agreement, and Benitez never objected to the amended information. And, here, unlike

in Korum, there was no increase of charges as a response to Benitez withdrawing a guilty plea, since one was never entered in the first place. The facts of this case simply do not support Benitez's argument that the State was punishing him for his decision to exercise his right to trial. The trial court's finding does not amount to a finding of actual vindictiveness, nor is there evidence to support such a finding.

Under the initial charged counts, Benitez's sentence range would have been 243 to 296 months.¹ The potential sentence under the second and third amended information was 765 to 992 months, and the actual sentence imposed by the trial court following the downward departure was 368 months. That amounts to an order of magnitude that is much less significant than the resulting sentence in Korum, which was 10 times larger after the additional charges were added. As the Supreme Court noted, "Just as the prosecuting attorney has the discretion to determine the number and severity of charges to bring against a defendant, the sentencing court has the discretion to determine whether the circumstances warrant an exceptional sentence downward." Id. at 637. In Benitez's case, this was precisely the discretion the trial court properly exercised in declaring the exceptional downward sentence. Under these facts, there is no evidence to support a finding of prosecutorial vindictiveness, particularly in light of the Supreme Court's plain holding in Korum.

II. Stolen Firearm Conviction

Benitez argues there was insufficient evidence to support his conviction for possession of a stolen firearm. In reviewing a challenge to the sufficiency of the

¹ The proposed plea agreement is not in our record.

evidence, we view the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. Bencivenga, 137 Wn.2d at 711. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State presented evidence from the rightful owner of the firearm that it had been stolen nearly a year before officers found it in the garage near Benitez. Benitez does not dispute that the firearm was stolen, but argues the State failed to prove he had knowledge that it was stolen. He correctly asserts that bare possession of a stolen firearm is insufficient to justify a conviction. State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028, 241 P.3d 413 (2010). "However, possession of recently stolen property in connection with other evidence tending to show guilt is sufficient." Id. (quoting State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967)).

The jury received an instruction on knowledge that provided, in part:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

This instruction amounted to a definition of constructive knowledge, entitling the jury to

draw reasonable inferences about what Benitez did or did not know. While there was no direct evidence to prove Benitez's knowledge of the gun's origin, the State did present ample circumstantial evidence to enable a rational trier of fact to conclude Benitez had constructive knowledge that the firearm was stolen. It was established that he was a part of the drug trafficking operation. The informant testified it was known that the drug transactions frequently involved stolen property. One of the task force officers gave testimony that reinforced this proposition, establishing that stolen property like electronics, power tools, or firearms were used by the drug dealers as trading commodities. There were car stereos found in the garage with cut cords and wires. There were ledgers, one of which showed Benitez had been a part of the trafficking activity and had made exchanges for other such property that was found in the garage. Benitez was also found to be in actual possession of a wallet belonging to someone else that contained the credit card, identification, and social security card of another person. The credit card had been recently used to purchase property and gift cards, much of which was found in the garage along with corresponding packaging.

Taking this evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find that Benitez had information that would lead a reasonable person to believe the firearms were stolen. The jury was entitled to conclude that he had constructive knowledge and knowingly possessed a stolen firearm.

III. Evidence Benitez was Armed

Benitez argues the State failed to prove beyond a reasonable doubt that he was

armed with a firearm when officers found him in the garage near the heroin, cocaine, and ecstasy. The State charged him with three counts of possession with intent to deliver (counts II, III, and IV). And, on each count the jury returned special verdicts finding that Benitez was armed with a firearm at the time of the crimes, in violation of RCW 9.94A.533 and 9.94A.825.

A person is “armed” if a weapon is “easily accessible and readily available for use, either for offensive or defensive purposes.” State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In addition to this test, where a weapon is constructively possessed, there must also be a two part analysis, requiring “a nexus between the weapon and the defendant and between the weapon and the crime.” State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). “The nexus requirement refines the analysis and serves to place ‘parameters . . . on the determination of when a defendant is armed, especially in the instance of a continuing crime such as constructive possession’ of drugs.” State v. Gurske, 155 Wn.2d 134, 140-41, 118 P.3d 333 (2005) (alteration in original) (quoting Schelin, 147 Wn.2d at 568). Here, there was a nexus between Benitez and the firearms. At the time Benitez was found, guns were located on the bed and behind the headboard within his arm’s reach, easily accessible and readily available at the time the police found him.

There must also be a nexus between the weapons and the crime. As the court in Schelin noted:

[T]he mere presence of a weapon at a crime scene may be insufficient to establish the nexus between a crime and a weapon. If an assault with a beer bottle occurs in a kitchen, a defendant is not necessarily “armed” with a deadly weapon because knives are kept in the kitchen. One

should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer).

Schelin 147 Wn.2d at 570. Here, the crime underlying the firearm enhancements was possession with intent to deliver. The testimony from both the narcotics task force detective and the informant established that firearms often go hand in hand with drug dealing. They are used for security and to deter people from trying to steal drugs, property, or money from the operation. The facts in Schelin are similar and that court's reasoning and holding are dispositive:

[T]he evidence established Schelin was in close proximity to a loaded gun which he constructively possessed to protect his marijuana grow operation. When we apply the nexus test . . . the inferences support a conclusion that Schelin was "armed." Schelin admitted to being in close proximity to an "easily accessible and readily available" deadly weapon. The jury was entitled to infer he was using the weapon to protect his basement marijuana grow operation. Schelin stood near the weapon when police entered his home and could very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police.

Id. at 574-75. The evidence in Benitez's case is sufficient to support the jury's conclusion that he was armed with the firearms, by virtue of his close proximity to them. The weapons were easily accessible and readily available. And, the jury was similarly entitled, based on the proximity of the drugs at issue and the totality of the evidence about the drug dealing operation, to conclude that there was a connection between the firearms and the counts of drug possession. The jury was entitled to infer that the firearms were used in furtherance of the drug dealing operation.

IV. Jury Instructions on the Firearm Enhancements

Benitez argues for the first time on appeal that his constitutional right to a

unanimous jury was violated, because the jury was not instructed to reach a unanimous verdict on the firearm enhancements. The State presented evidence of numerous guns, both in the home and in the garage. Benitez argues that, because the State did not elect which gun it was relying on for purposes of the enhancements, the trial court was required to instruct the jury that it must unanimously agree on which gun it thought he was armed with.

Benitez cites to State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) and State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) for the general proposition that unanimity is required as to the criminal act charged in the information. “When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” Kitchen, 110 Wn.2d at 409. But, Benitez fails to cite to any authority suggesting how the general jury unanimity analysis applies to a firearm enhancement, which is not an independent crime. The firearm and deadly weapon enhancement statutes do not provide that the State must specify which weapon it is relying on. RCW 9.94A.533, .825. And, Benitez similarly fails to cite to relevant authority suggesting that a jury must be unanimous as to the specific weapon used when returning a firearm or deadly weapon special verdict. The trial court was not required to provide a unanimity instruction for the firearm enhancement.

V. Ineffective Assistance of Counsel

Benitez next argues he received ineffective assistance of counsel when his

attorney failed to assert that the multiple firearm possession counts constituted the same criminal conduct. He was convicted of one count of possession of a stolen firearm and seven counts of unlawful possession of a firearm.

Before sentencing, Benitez's counsel agreed with the State that sentences for unlawful possession of a firearm in the first degree or possession of a stolen firearm must run consecutive to one another. She stated,

Unlawful possession of a firearm and possession of a stolen firearm, as far as my reading, it has to be consecutive. Enhancements have to be consecutive. . . .

Anyway, I looked carefully at that, and the RCW [9.94A.533] says the Court shall impose and they have to be consecutive. So, yes. I'm asking you to mitigate down the unlawful Possession of Firearms, First Degrees, the consecutive nature of that.

Benitez now argues that concession by his attorney amounted to ineffective assistance of counsel, because the seven unlawful possession offenses should have been deemed the same criminal conduct and sentenced concurrently, rather than consecutively. See RCW 9.94A.589(1).²

² RCW 9.94A.589(1) establishes "same criminal conduct," providing, in relevant part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Prejudice is present if there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 334-35. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689.

Benitez relies primarily on State v. Haddock, 141 Wn.2d 103, 114-15, 3 P.3d 733 (2000), where the Supreme Court held that same criminal conduct analysis was applicable in a comparable scenario with multiple unlawful firearm possession convictions. Therefore, the provisions of RCW 9.94A.589(1)(a) require those sentences based on same criminal conduct to be served concurrently. But, the court in

(Ephasis added.)

³ Benitez is not challenging his offender score based on same criminal conduct. His criminal history indicated a score of 7. Even applying same criminal conduct to his current offenses, his score would be 9+.

Haddock, “accepted review only on the issue of the validity of the sentencing court’s calculation of Haddockk’s offender score.” Id. at 106. It analyzed same criminal conduct under former RCW 9.94A.400, recodified as RCW 9.94A.589, only for offender scoring purposes. It never mentioned, let alone interpreted, the provision of RCW 9.41.040(6) requiring consecutive sentences. Haddock was charged with crimes committed in 1995. The sentencing statute in effect did not include the current consecutive sentencing provision contained in RCW 9.94A.589(1)(c), which Benitez ignores. See Laws of 1998 ch. 235 § 2. Thus, the Haddock opinion does not impact our present analysis or interpretation of RCW 9.41.040(6).⁴

RCW 9.41.040(6) addresses the punishment of unlawful possession of firearms, providing in part:

Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

The plain language of this provision demonstrates that for such firearm crimes, the sentences must run consecutively rather than concurrently. In State v. McReynolds, this court has considered the statutory provision of RCW 9.41.040(6) at issue:

This provision clearly and unambiguously prohibits concurrent sentences for the listed firearms crimes. State v. Murphy, 98 Wn. App. 42, 48-49, 988 P.2d 1018 (1999), review denied, 140 Wn.2d 1018[, 5 P.3d 10] (2000). Although Randy McReynolds urges this court to apply various rules of statutory construction, there is no need for such an analysis

⁴ Benitez also relies on two other cases, State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998) and State v. Stockmyer, 136 Wn. App. 212, 219, 148 P.3d 1077 (2006). But, as with Haddock, neither of these two cases acknowledges or interprets RCW 9.41.040(6).

because the statute is unambiguous. See, State v. Smith, 117 Wn.2d 263, 270-71, 814 P.2d 652 (1991).

117 Wn. App. 309, 343, 71 P.3d 663 (2003). The McReynolds court concluded that Haddock was inapplicable, since it did not interpret RCW 9.41.040(6). Id. In addition, RCW 9.94A.589(1)(c) which is applicable to Benitez' sentencing provides in part:

If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

In light of McReynolds and the unambiguous language of RCW 9.41.040(6) and RCW 9.94A.589(1)(c), we hold that the firearm convictions were properly sentenced consecutively, rather than treated as the same criminal conduct. Benitez's attorney's concession about the consecutive nature of a sentence for such firearm convictions was not erroneous and did not amount to ineffective assistance.

VI. Search and Seizure

Benitez argues that the search of his person and the seizure of his wallet when he was placed into custody just before arrest was unconstitutional, and the fruit of that search should have been inadmissible. He did not raise an objection at trial, nor did he seek a suppression motion.

As a general rule, a party must raise an issue at trial in order to preserve the issue for appeal, unless the error is a "manifest error affecting a constitutional right." RAP 2.5(a); State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 894 (2011). Without an

affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable. McFarland, 127 Wn.2d at 333. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” Id. An appellate court must look to the facts to determine whether a motion to suppress would properly have been granted or denied. State v. Contreras, 92 Wn. App. 307, 313-14, 966 P.2d 915 (1998).

Here, because Benitez did not raise an objection or an unlawful search claim at the trial court, the State never had an opportunity to question the arresting officers about the timing of their detention of Benitez, his initial misrepresentation about his identity, the search and seizure of his wallet, or the actual arrest. Benitez argues the officers’ intention in the search was to find identification, not weapons, and that it was therefore outside the scope of a permissible investigative detention or search under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). But, without an objection by Benitez or the benefit of a suppression hearing, the State never had the opportunity to elicit answers that directly resolved questions about the officers’ intentions, concerns, or timing related to the detention and subsequent arrest of Benitez. Benitez cannot show that he would have prevailed on this issue if he had had a full suppression hearing, and his argument thus does not raise a manifest error affecting a constitutional right. Benitez has failed to preserve the issue for appeal.

VII. Statement of Additional Grounds

A. Insufficiency of the Evidence

In his statement of additional grounds, Benitez raises three additional

insufficiency of the evidence arguments. As addressed above, in such a challenge, we review the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Bencivenga, 137 Wn.2d at 706. A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. Bencivenga, 137 Wn.2d at 711. Credibility determinations are for the trier of fact and are not subject to review. Camarillo, 115 Wn.2d at 71.

He first contends there was insufficient evidence that he constructively possessed the drugs and firearms. This argument was raised and addressed in part in section two above, where Benitez argued there was insufficient evidence to support his possession of a stolen firearm conviction. "Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the [property] or over the premises where the [property] was found." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). The ability to reduce an object to actual possession is an aspect of dominion and control. Id. Other aspects include knowledge of the illegal items on the premises and evidence of residency or tenancy. State v. Jeffrey, 77 Wn. App. 222, 227, 889 P.2d 956 (1995).

Here, the evidence showed Benitez was staying in the garage, where a mattress and dresser were set up. It is undisputed that myriad drugs and weapons were found in the garage. The informant testified Benitez took care of the garage, knew where

things were located, and helped Cantu with small transactions, including, for example, going to get the piece of the machine gun. Benitez was present during at least one of the drug transactions, his name appears in one of the ledgers that was found, and he was also identified in a photograph standing beside a marijuana plant. Taking this evidence in the light most favorable to the State, the jury had ample support for its conclusion that Benitez possessed the drugs and firearms found in the garage.

Second, Benitez argues there was insufficient evidence showing that he acted as an accomplice. A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he aids or agrees to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a). Mere presence at the commission of a crime, even coupled with knowledge that the presence will aid in the commission of the crime, is not sufficient to show accomplice liability. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). While Benitez argues the facts showed only that he was present in the garage, the same evidence addressed above, particularly when taken in the light most favorable to the State, illustrates that Benitez actually aided in the commission of the crimes.

Third, Benitez argues there was insufficient evidence he was a part of a conspiracy to deliver a controlled substance. A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in the pursuance of such agreement. RCW 9A.28.040(1). Again, the same evidence supports the jury's conclusion that several individuals,

including Benitez, were working together in concert to produce, process, and sell the controlled substances. We reject Benitez's sufficiency of the evidence arguments.

B. Ineffective Assistance of Counsel

Benitez next argues he received ineffective assistance of counsel, based on his attorney's failure to object to certain evidence of his prior convictions and warrants for arrest. For the first time on appeal, he objects first to his counsel's stipulation to a jury instruction that provided: "The parties have stipulated that the defendant has previously been convicted of a serious offense." He contends this reference to the prior conviction served no purpose other than to prejudice him or improperly demonstrate his propensity to commit crimes. But, the existence of a prior conviction was a vital element to the seven counts of unlawful possession of a firearm—his prior conviction was the basis for why it was unlawful for him to possess the weapons. RCW 9.41.040. The fact of the prior conviction was admitted for the limited and proper purpose of establishing that element of the charged crime. The decision by his attorney to agree to the stipulation was tactical and prevented the State from more directly probing into the past conviction. This decision was reasonable, particularly in light of the presumption of effective representation—there was not an absence of legitimate or tactical reasons for the concession. He thus cannot establish ineffective assistance of counsel. See Strickland, 466 U.S. at 687.

C. Denial of Benitez's Motion for a Mistrial

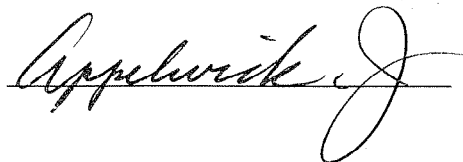
Finally, Benitez argues he was entitled to a mistrial based on evidence that several jurors expressed concern about possible friends or family members of the

defendant milling around their parking area during lunch and after court. At least two jurors suggested they were concerned or intimidated. A trial court should grant a mistrial only when the irregularity is so prejudicial that nothing short of a new trial will ensure the defendant of a fair trial. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Here, the trial court stated:

If you want me to interview the individual jurors [who have expressed concern], I can attempt to do that without tainting the panel. But simply a concern that someone is watching them in the parking lot is . . . not a discussion or deliberation of the case, in my mind, and based on any case law that I'm aware of.

The trial court also noted: "I will be happy to consider any type of remedial instruction, but I think that will only emphasize the matter. There may be many jurors that have not expressed any concerns and aren't aware of these concerns being expressed." Ultimately, the trial court decided to speak with the jurors individually about any concerns. After those conversations, the trial court was persuaded that the jurors could be fair and impartial in deciding the case free from any outside influence. Benitez also fails to prove that the stated concerns prejudiced his trial. The trial court was in the best position to evaluate the impact of the jurors' stated concerns. We hold that the trial court properly exercised its discretion in denying Benitez's motion for a new trial.

We affirm.



WE CONCUR:

