No. 45582-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEPHEN ADAM YOUNG,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-04933-1
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting minimally probative but unfairly prejudicial evidence of Stephen Young's white supremacist beliefs under ER 404(b).

2. Stephen Young was denied his right to effective assistance of counsel when his trial attorney failed to request an instruction informing the jury that it could only consider evidence of Young's white supremacist beliefs for the limited purpose of establishing motive for the crimes.

3. The State failed to present sufficient evidence to prove beyond a reasonable doubt the essential element of premeditation.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where evidence of Stephen Young's white supremacist beliefs was not necessary to establish a motive for the crime, did the trial court err in admitting the evidence under ER 404(b)? (Assignment of Error 1)

2. Did the trial court err in admitting evidence of Stephen Young's white supremacist beliefs where any probative value was minimal and where the potential for prejudice was extremely high? (Assignment of Error 1)

3. Was Appellant denied his right to effective assistance of counsel where trial counsel fought vigorously to exclude evidence of Stephen Young's white supremacist beliefs due to its prejudicial nature, and where the evidence was admitted only for limited purposes, but trial counsel failed to propose a jury instruction expressly limiting the purpose for which the evidence could be considered? (Assignment of Error 2)

4. Did the State present sufficient evidence to prove beyond a reasonable doubt the essential element of premeditation, where the facts showed an opportunity to reflect and deliberate but no evidence of actual reflection and deliberation? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Stephan Adam Young by Information with: (1) attempted murder of Bryan Branch (RCW 9A.32.030); (2) first degree assault of Bryan Branch (RCW 9A.36.011); (3) second degree assault of Brandon Crowe (RCW 9A.36.021); (4) unlawful possession of a firearm (RCW 9.41.040); (5) first degree assault of Heather Martin (RCW 9A.36.011); (6) first degree assault of Marlon Green (RCW 9A.36.011); (7) first degree assault of Deanna Treptow

(RCW 9A.36.011); (8) first degree assault of David Moore (RCW 9A.36.011); (9) unlawful possession of a firearm (RCW 9.41.040); (10) intimidating a witness (RCW 9A.72.110); and (11) tampering with a witness (RCW 9A.72.120). (CP 31-39) The State alleged that Young was armed with a firearm when he committed the attempted murder and assault offenses. (CP 31-35)

The trial court denied Young's pretrial motion to sever the counts and to instead group them by incident. (RP 102-11)[1] The trial court also denied Young's motion to have full access to information relating to an ongoing internal affairs investigation of one of the detectives involved in Young's case. (RP 1216-18, 1250-681; CP 123-28, 142) But the trial court allowed some limited access. (RP 1281; CP 104-05, 141, 142)

Young's first trial ended with a mistrial because improper testimony was elicited by the State. (RP 1147-48, 1203) After a second trial, the jury found Young guilty of the murder, assault, and tampering with a witness charges, and not guilty of intimidating a witness. (CP 247-68; RP 2651-56) Young had previously waived his right to have the jury decide the two unlawful possession of a

[1] Citations to the transcripts in this case are to the numbered volumes only (Volumes 1-20). The transcript of the hearing on 04/06/12 is not referred to in this brief.

firearm charges, and the trial court found Young guilty of those charges. (RP 2671-75; CP 52, 146, 147, 379-85)

Young filed a motion for a new trial because potential impeachment evidence had come to light; that one of the detectives who investigated Young's case had failed to turn over relevant information to the prosecutor in a different case. (CP 344-47) The trial court denied that motion as well. (RP 2671)

The trial court also denied Young's request to merge the two unlawful possession of a firearm convictions, but the court merged the first degree assault conviction relating Bryan Branch with the attempted murder conviction relating to Branch. (RP 2674-75, 2675-76, 2677) The trial court sentenced Young as a persistent offender to a sentence of life without the possibility of parole. (RP 2679-80; CP 364) This appeal timely follows. (CP 373)

B. SUBSTANTIVE FACTS

In the fall of 2010, Stephen Young and Deanna Treptow were in a dating relationship. (RP 1530-31, 1535) On October 27, 2010, Treptow spent the day with Marlon Green, Heather Martin and David Moore. (RP 1346, 1347, 1501-02, 1503) That night, they went to a known drug house in the area of 143rd Street and Pacific Avenue in Tacoma. (RP 1348, 1350, 1371, 1499, 1503-04) Sometime after

midnight of October 28, 2010, Green's friend, Riki Perasso, received a phone call. (RP 1350-51, 1739-40) Perasso turned to Green and asked if he was "fucking" Treptow. (RP 1350) Green grabbed the phone from Perasso and began arguing with an unknown person on the other end. (RP 1352) As he talked, Green took the phone outside to the car they arrived in, and handed the phone to Treptow. (RP 1354)

Green, Treptow, Moore and Martin got into the car. Martin sat in the driver's seat, Green sat in the front passenger seat, and Treptow and Moore sat in the back seat. (RP 1364, 1505, 1506) As they drove away, Martin noticed a dark-colored SUV parked on the side of the road, and a female sitting inside talking on the telephone. (RP 1508-09) She also noticed a masculine figure standing next to the SUV. (RP 1511-12)

As they passed the SUV, shots were fired at the car. (RP 1357, 1509) Several bullets lodged in the side of the car, and several entered the passenger compartment. (RP 1398, 1401, 1403-04) A bullet grazed Green's elbow, Martin was struck in her shoulder and foot. (RP 1357, 1363, 1510) Martin drove to a nearby 7-Eleven parking lot. (RP 1512) Green got out of the car and left, and Treptow drove Martin to the hospital. (RP 1358, 1359, 1512-13)

Martin was not cooperative with police who arrived at the hospital to investigate the shooting. (RP 2095-96) She eventually gave an interview, and told the detective that Young and Treptow spoke on the phone the night of the shooting, and that the conversation involved Young's belief that Treptow was sleeping with Green. (RP 2101, 2103)

That same night, Carrie Taylor-Edwards gave Stephen Young a ride from the Western Motel on South Tacoma Way to the area of 143rd Street and Pacific Avenue. (RP 1541, 2372-72) Taylor-Edwards drives a black GMC Jimmy SUV. (RP 1539) Taylor-Edwards testified that Young directed her where to drive, then instructed her to pull over and turn off the headlights. (RP 1542) According to Taylor-Edwards, Young exited the SUV while he talked and argued on his cellular phone. (RP 1542)

Taylor-Edwards heard shots and saw flashes as a light-colored SUV drove past her. (RP 1542, 1543) The shots came from the area where she believed Young was standing, but she did not see Young fire a weapon. (RP 1543, 1555) Taylor-Edwards testified that Young ordered her to follow the SUV, and she saw the SUV pull into a 7-Eleven parking lot. (RP 1544) But she refused to follow and instead drove Young back to the Western Motel. (RP 1544)

Sarah Smith, Jacqueline Souza, Bryan Branch, and Billy Heatwole were at the motel when they returned. (RP 1582, 1672) According the Smith, after they returned, Young seemed worried and Taylor-Edwards was uncharacteristically quiet. (RP 1584, 1585) Souza testified that Taylor-Edwards was "freaking out" and said that Young had shot people. (RP 1677)

According to Souza, Young was pacing the room, and saying that people were after him. (RP 1676, 1679) He kept looking out of the motel room window, and had a gun in his hand. (RP 1679, 1681) Smith also testified that Young expressed concern that someone was setting him up. (RP 1586) In the first trial, Smith testified that Young said some "nigger is fucking his girl," but she did not recall that statement at the second trial. (RP 1590)

Green testified that he was a member of a group called the Goons. (RP 1364) He explained that Goons commit crimes together, like stealing things and beating people up. (RP 1383) According to Green, a lot of people do not like him and when he tried to think about who might have been trying to shoot him, he realized the "possibilities were endless." (RP 1383)

Later on the night of October 28, Branch drove Young and another friend, Brandon Crowe, to a home in Puyallup where they

could take drugs. (RP 1590, 1682, 2213, 2214, 2217, 2375-76) As the men smoked methamphetamine and chatted with friends, a woman arrived and Branch went outside to talk to her. (RP 2218, 2219-20) When he returned, Young began questioning Branch about the woman and demanded to know what they were talking about. (RP 2220-21, 2379)

The three men left, again with Branch driving, Crowe in the front passenger seat and Young in the back seat. (RP 2216, 2221) According to Crowe, Young said he had seen Treptow sitting in a parked car and asked Branch why she was there. (RP 2222, 2383) Branch responded that he did not know what Young was talking about. (RP 2222) Young continued to press Branch as they drove, and said he could not believe Branch was lying to him. (RP 2224, 2383-84) Young also asked Branch where Green was. (RP 2225)

Branch was not driving well because he had smoked marijuana, and Crowe noticed that Branch was not taking the most direct route to Crowe's house. (RP 2228, 2255, 2268) Finally, Young told Branch to turn onto Vickery Avenue. Branch completed the turn but the car stalled as soon as Branch reached a stop sign. (RP 2228, 2386) Then Young leaned forward and shot Branch twice in the face. (RP 2229, 2386) Young then turned towards Crowe,

pointed the gun at him, and told him to get out of the car. (RP 2229) Crowe jumped out, ran to a nearby house, and asked to use the phone. (RP 1928, 2231-32, 2233) He did not call 911, however, and instead called his girlfriend. (RP 2233)

Neighbors called 911, and police and medical aid responded soon after. (RP 1635, 1716, 1841, 1922) Branch was transported to the hospital, and Crowe was detained as he ran from the scene. (RP 1843, 1846) Crowe told the officer that "Steven just shot Bryan in the face." (RP 1845) Branch survived, but suffered traumatic facial injuries and required numerous surgeries to repair the damage. (RP 2000-03) While he was still in the hospital, Branch was shown a picture of Young and he non-verbally indicated that Young was the shooter. (RP 2046, 2049-50)

Young told his friend, Robert Toulouse, that he had not shot at the car containing Treptow and Green. (RP 1858) Young told Toulouse that he believed he was being set up to take the blame for the shooting, and believed someone was planning to retaliate against him. (RP 1859, 1872, 1860) According to Toulouse, Young believed he saw flashing headlights just before he shot Branch. (RP 1860-61, 1864) Toulouse also testified that Young told him that he hid in blackberry bushes and that he dropped his gun as he ran from

the scene of the second shooting. (RP 1863)

About a year and a half after the incidents, police conducted a search of property near the second shooting. They found a .45 caliber gun in blackberry bushes behind a nearby home. (RP 1934, 1936, 1937-38, 2015, 2024) Casings and bullets collected from the two shooting scenes and the two cars involved, and bullets recovered from Branch's body, were all determined to have been fired from that same .45 caliber gun. (RP 1403-04, 1407, 1795, 1805, 1954, 1957, 2169-70)

Investigators also obtained and reviewed cellular phone records for the various persons involved, including a phone they believed belonged to Young. (RP 2362, 2363-64, 2387, 2398, 2464-65, 2472-73) The records indicated that the phone believed to be Young's was being used around the time both shootings occurred, and the calls had connected through cell phone towers in the vicinity of the shootings. (RP 2480, 2482, 2483, 2489, 2490, 2491, 2494, 2498, 2499) However, cellular phones do not always connect through the closest tower, and instead generally connect to the tower with the strongest signal. (RP 2511-12)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED IN ADMITTING MINIMALLY PROBATIVE BUT UNFAIRLY PREJUDICIAL EVIDENCE OF YOUNG'S WHITE SUPREMACIST OR SKINHEAD BELIEFS.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Bad acts under ER 404(b) include "acts that are merely unpopular or disgraceful." State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, WASH. PRACT., EVIDENCE § 114 at 383-84 (3rd ed. 1989)); *see eg.* State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009) (admission of gang evidence measured under the standards of ER 404(b)).

Before such evidence may be admitted, the trial court must first identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Next, the court must determine that the proffered evidence is logically relevant to prove a material issue. Powell, 126 Wn.2d at 262. The test is whether such evidence is relevant and necessary to prove an

essential fact of the crime charged. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Evidence is logically relevant if it tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Finally, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice. Saltarelli, 98 Wn.2d at 362-63; State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983); ER 403.

Over defense objection, the State was allowed to elicit evidence that Young is a white supremacist. (RP 101-10, 1294-98, 1533-34) The State presented photographs of Young's tattoos, which included a Nazi swastika and a portrait of Adolph Hitler. (RP 1532-34, 1850; Exh. P110, P111) The State also elicited testimony that Young may have been a skinhead and that he said he was upset because "some nigger is fucking his girl." (RP 1590, 1593-94) The trial court allowed this evidence because it supposedly established Young's motive for the first shooting: that Young was angry that his

girlfriend had been sleeping with a black man.[2] (RP 101-10, 1294-96)

Cases involving gang affiliation evidence are instructive. Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. *See* State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (1995). Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); Campbell, 78 Wn. App. at 822.

In this case, the trial court abused its discretion when it admitted evidence of Young's white supremacist beliefs, his possible affiliation with skinhead groups, and his related tattoos, because the State did not show a nexus between the evidence and the crime, the evidence was not necessary to prove a material issue in the case,

[2] A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. McBride, 74 Wn. App. 460, 463, 873 P.2d 589 (1994). The court abuses its discretion if there are no tenable grounds for its decision. State v. Tharp, 27 Wn. App. 198, 206, 616 P.2d 693 (1980).

and the probative value was slight in comparison to its potential for prejudice.

First, the evidence was totally unnecessary to prove Young's motive for shooting at Treptow and Green. The jury certainly could have grasped the idea that Young was angry that his girlfriend was sleeping with another man, regardless of Young's views about the race of the other man. And this is certainly not the first time that infidelity has led to violence. The State could have easily established a motive without this evidence.

In fact, the State never made any connection between Young's beliefs and Young's motive for the first shooting. There was no evidence that Young only responded violently because Green was black, or that Young's belief system compelled him to respond violently. When there is no connection made between a defendant's affiliations and the charged offense, admission of such evidence is prejudicial error. *See* Scott, 151 Wn. App. at 527, 528 (when no connection made between a defendant's gang affiliation and the charged offense, admission of gang evidence is prejudicial error) (citing State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009)).

Finally, any probative value was slight at best, but the

potential for prejudice was quite high. Evidence of unpopular beliefs and associations is prejudicial to a defendant. *See* Scott, 151 Wn. App. at 526 (evidence of gang affiliation is considered prejudicial); United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to "prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged"). Admission of such evidence also implicates a defendant's constitutional rights of freedom of association and freedom of expression. *See* State v. Monschke, 133 Wn. App. 313, 331, 135 P.3d 966 (2006) (citing Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)) (the First Amendment protects an individual's right to hold and express unpopular views and to associate with others who share that viewpoint). Thus, there was a danger that the jury would view Young as a bad person with anti-social or violent tendencies, and that the jury would feel compelled to punish him for holding such unpopular or offensive views. This is exactly what ER 404(b) is designed to prevent.

Without a strong showing that the evidence regarding Young's white supremacist beliefs and associations was necessary to establish Young's motive, and that there was in fact a nexus between

his beliefs and the crime, the evidence should not have been admitted. The admission of the evidence was improper, unnecessary, and highly prejudicial. Young's convictions should therefore be reversed.

B. YOUNG WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO REQUEST A LIMITING INSTRUCTION.

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) such conduct must have prejudiced the defendant, i.e., there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987) (adopted test from Strickland). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270

(1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

As noted above, evidence of other bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of a defendant's affiliation with gangs or other unpopular groups or beliefs is not automatically precluded under this rule. There are certain limited circumstances under which a jury may consider such evidence for a non-propensity purpose. See Campbell, 78 Wn. App. at 821-22 (evidence properly admitted to show premeditation, motive, and intent).

But as a number of courts have recognized, such evidence is inherently prejudicial. And when a jury may have considered this evidence for an improper purpose, a new trial is the only sufficient remedy. *See* Scott, 151 Wn. App. at 526. Therefore, where evidence of other misconduct, such as gang affiliation or, as in this case, unpopular or repugnant beliefs about race, is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing the jury to disregard the propensity aspect of the evidence and focus solely on its proper purpose. State v. Griswold,

98 Wn. App. 817, 825, 991 P.2d 657 (2000); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out "vital importance" of a limiting instruction to stress limited purpose of evidence).

In this case, the trial court admitted evidence of Young's white supremacist or skinhead beliefs and tattoos for the purpose of establishing a motive for the first shooting. (RP 101-10, 1297-98) Unfortunately, the jury was never told that they could consider this evidence for this limited purpose only.

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. See Thomas, 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Defense counsel made every effort to prevent jurors from hearing about Young's beliefs, arguing vigorously that it was irrelevant and highly prejudicial. (RP 101-02, 108, 1295-96, 1533-34) Yet once the trial court ruled the evidence admissible, counsel

failed to ensure that jurors would only consider the evidence for the narrow purpose for which it was admitted. This was not the result of legitimate tactics; it was the result of inattention and was therefore ineffective.

Young suffered significant prejudice from this inattention. Without a limiting instruction, the jurors were free to use this evidence to judge his character and to judge his propensity to commit any of the charged crimes. The jury was free to base its determination of guilt on Young's character. This is the exact result that ER 404(b) seeks to avoid. The failure to request a limiting instruction was prejudicial and constituted ineffective assistance of counsel. Young is therefore entitled to a new trial.

C. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT YOUNG ACTED WITH THE PREMEDITATED INTENT TO KILL BRANCH.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential

elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The jury convicted Young of attempted first degree murder pursuant to RCW 9A.32.030(1)(a), which requires that the State prove "a premeditated intent to cause the death of another." Accordingly, the State is required to prove both intent and premeditation, which are not synonymous. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

While intent means only "'acting with the objective or purpose to accomplish a result which constitutes a crime'", premeditation involves "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) and State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)); Brooks, 97 Wn.2d at 876.

Thus, premeditation must involve "more than a moment in point of time," and mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); Pirtle, 127

Wn.2d at 644. It is therefore possible for a person to act with an intent to kill that is not premeditated. Brooks, 97 Wn.2d at 876. For this reason, premeditation cannot simply be inferred from the intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984).

In Ortiz, the Court found sufficient evidence of premeditation from the defendant's infliction of multiple wounds, procurement of a weapon from another room, and his prolonged struggle with the victim. 119 Wn.2d at 312-13. In State v. Rehak, premeditation was proved where there was evidence showing that the victim was shot three times in the head, twice after having fallen to the floor. 67 Wn. App. 157, 834 P.2d 651 (1992).

Conversely, in State v. Bingham, an autopsy of the victim indicated that the "cause of death was 'asphyxiation through manual strangulation', accomplished by applying continuous pressure to the windpipe for approximately 3 to 5 minutes." 105 Wn.2d 820, 822, 719 P.2d 109 (1986). The State relied on the length of time required to cause death to support the charge of premeditated murder. Bingham, 105 Wn.2d at 822. However, on appeal the Court found that "no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation. The opportunity

to deliberate is not sufficient." Bingham, 105 Wn.2d at 827.

The State argued in this case that it proved premeditation because Young and Branch were in the car together for a period of time, during which they argued about Young's belief that Branch was setting him up. However, simply showing that Young had sufficient time to reflect and deliberate is not sufficient. "[H]aving the opportunity to deliberate is not evidence the defendant did deliberate, which is required for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection." Bingham, 105 Wn.2d at 826.

Like Bingham, there was no evidence showing actual deliberation and reflection before or during the shooting, just the shooting itself. Both Crowe and Branch testified that the shooting happened suddenly, moments after Branch's car stalled at a stop sign. (RP 1846, 2228-29, 2386) There was simply no evidence presented of Young deliberating before or during the assault on Branch.

The State must present some evidence that Young actually reflected and deliberated and made a conscious choice to take Branch's life. The State failed to offer this evidence. The facts

presented simply cannot sustain a finding that Young formed a premeditated intent to kill Branch, and Young's attempted first degree murder conviction must be reversed.[3]

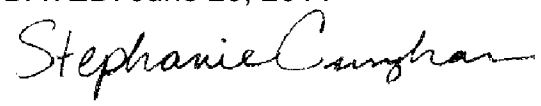
V. CONCLUSION

Evidence of Young's white supremacist beliefs or affiliations was completely unnecessary to establish a motive for the first shooting, and the State failed to show a nexus or connection between those beliefs and the crime. Furthermore, the probative value, if any, was far outweighed by the potential of this evidence to prejudice the jury against Young. And without an accompanying limiting instruction, the jury was free to apply this evidence in any way it saw fit, and to any of the charged crimes. The error in admitting this evidence without a limiting instruction requires that Young's convictions be reversed and that he receive a new trial. Furthermore, the State failed to meet its burden of presenting evidence establishing beyond a reasonable doubt that Young reflected and deliberated before shooting Branch. Young's attempted first degree murder conviction must be reversed on this

[3] The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

ground as well.

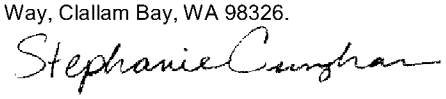
DATED: June 20, 2014



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Stephen Adam Young

CERTIFICATE OF MAILING

I certify that on 06/20/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Stephen A. Young, DOC# 824846, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

June 20, 2014 - 12:42 PM

Transmittal Letter

Document Uploaded: 455820-Appellant's Brief.pdf

Case Name: State v. Stephen Adam Young
Court of Appeals Case Number: 45582-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us