NO. 45582-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEPHEN ADAM YOUNG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 10-1-04933-1

Brief of Respondent

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was evidence of defendant's white supremacist beliefs properly admitted under ER 404(b) when they motivated him to commit four of the charged first degree assaults by shooting into an SUV carrying his girlfriend, an African American male defendant believed to be in a sexual relationship with her, and two other people who happened to be in the vehicle at the time?

2. Has defendant failed to prove his counsel was constitutionally ineffective when counsel refrained from requesting a limiting instruction for the ER 404(b) evidence since it was a legitimate trial tactic to avoid emphasizing defendant's white supremacist beliefs consistent with counsel's expressed lack of confidence in the efficacy of such instructions?

3. Did the State adduce sufficient evidence of defendant's premeditated attempt to murder Bryan Branch when it proved defendant became convinced Branch betrayed him, directed Branch to drive off a main road amidst accusations of betrayal, then fired two hollow point bullets into Branch's head with a .45 caliber pistol lethally repositioned between shots?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant Stephen Young was charged by Amended Information with first degree attempted murder of Bryan Branch (Count I); first degree assault of Bryan Branch (Count II); second degree assault of Brandon Crowe (Count III); first degree unlawful possession of a firearm (Count IV); first degree assault of Heather Martin (Count V); first degree assault of Marlon Green (Count VI); first degree assault of Deanna Treptow (VII); first degree assault of David Moore (Count VIII); first degree unlawful possession of a firearm (Count IX); intimidating a witness (Count X);and tampering with a witness(Count XI). CP 31-39. Several firearm enhancements were also alleged.

The Honorable Vicki L. Hogan presided over two trials on the charges. 9RP 1147, 1149-50, 1200, 1341.[1] The first ended in mistrial after a witness unexpectedly revealed defendant's prior imprisonment while testifying. 9RP 1147-49, 1152, 1199-1200. Defense counsel urged the mistrial, contending a curative instruction would only bring unwanted attention to the objectionable remark. 9RP 1149.

The court denied the motion to exclude testimony and physical evidence establishing defendant's white supremacist beliefs in the first trial

[1] Defendant proceeded to bench trial on the two counts of first-degree unlawful possession of a firearm. CP 146-47; 1RP 130-31.

because they were admissible under ER 404(b) [2] to prove his motive for committing the first degree assaults charged in Counts V-VIII. 1RP 100-10, 113; 5RP 511, 526-27; 6RP 688, 691, 699, 707, 716-17. The ruling was reaffirmed before defendant's second trial. 10RP 1294-98. Evidence in both trials established him to be a racist Skinhead (or Neo Nazi) moved to the extreme act of shooting into an SUV occupied by his girlfriend, two African American males, and another female passenger out of racist anger over what he described as "some nigger fucking his girl". 5RP 511, 526-27; 6RP 688, 707, 716-17; 11RP 1351-52; 12RP 1589-90, 1593-98, 1613; 14RP 1869-70, 1881. Defendant's fear of retribution for the shooting became his motive for attempting to murder Bryan Branch (Counts I-II), which coincided with the second degree assault of Brandon Crowe (Count III), when defendant convinced himself Branch was conspiring with the shooting victims to retaliate against him. 14RP 1859-63; 17RP 2224-25;18RP 2380-83.

The jury was accurately instructed on the law before it found defendant guilty as charged except for the witness intimidation count. 20RP 2651-58; CP 165-218, 247, 249, 251-52, 254, 256, 258, 260, 261-68. Convictions on the firearm counts were entered by the court. CP 384;

[2] ER 404(b) Other Crimes, Wrongs, or Acts. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake."

20RP 2674-75. The first degree assault conviction charged in Count II merged with the attempted murder conviction. 20RP 2688. Defendant was sentenced as a persistent offender to life without the possibility of parole when the current "most serious offense" convictions combined with his prior "most serious offense" convictions for first degree robbery and second degree assault with a deadly weapon. 20RP 2679; CP 272-73; 353-55, 364-66. A notice of appeal was timely filed. CP 373.

2. Facts

Defendant is a Neo-Nazi white supremacist or "Skinhead" open about his antipathy toward African Americans. 12RP 1532-34; 1588-90, 1592-98, 1613-14;14RP 1850; 16RP 2097; CP 225, Ex. 110-111. He was dating Deanna Treptow in the fall of 2010. 12RP 1588-90, 1592-98, 1613-14; 16RP 2097. On October 27, 2010, he became enraged by what he characterized as "some nigger fucking his girl." 11RP 1351-55;12RP 1590, 1613; 18RP 1869-70, 1881. Treptow had just spent most of the day with an African American male named Marlon Green. 11RP 1345-47; 12RP 1501-02; 14RP 1857, 1869-70.

Later in the evening she went to a Tacoma drug house with Green, another African American male named David Moore, and Heather Martin. 11RP 1345, 1348, 1350-52, 1371. A few hours later Green engaged in an argument on a cellular telephone with a man believed to be defendant

about whether Green had "fucked" Treptow. 11RP 1350-54; 13RP 1731, 1746; 19 RP 2484-89, 97-99. Green subsequently left the drug house in an SUV with Treptow, Moore, and Martin sometime in the early morning hours around midnight October 28, 2010. 11RP 1348, 1352-54;12RP 1508-09,1624-25.

They were violently ambushed by defendant moments later. 12RP 1540-43. He walked into the road firing .45 caliber hollow point bullets into their SUV as it passed. 11RP 1357-58, 1397-98, 1400-01, 1407, 1430, 1442; 12RP 1509-11,1540-43;17RP 2151, 2166, 2168, 2226; CP 219-20, Ex. 5-15, 19. The first bullet blew out the driver's side window. 12RP 1510. Another travelled into Martin's back. 11RP 1427-28; 12RP 1510. A third struck her foot. *Id.* One of the bullets grazed Green's elbow. 11RP 1357. Two bullets lodged in the driver's side door. 11RP 1406.

Defendant got back into the truck he arrived in with driver Carrie Taylor-Edwards, directing her to chase the SUV. 12RP 1543. Taylor-Edwards broke off pursuit when the SUV turned into a 7-Eleven parking lot despite defendant's desire to continue. 12RP 1544. Defendant told Taylor-Edwards to keep her mouth shut or she would end up like the people he just shot at. 12RP 1544. They drove on to a motel where several friends were staying. 12RP 1544; 13RP 1672.

Jacqueline Souza and Bryan Branch were at the motel when they arrived. 13RP 1674, 1678, 1687. Defendant walked into their room announcing he just "shot at some girls". 13RP 1676-77. Taylor-Edwards trembled in tears when she confirmed he "shot at people". 13RP 1677. Defendant became increasingly paranoid about the prospect of retaliation as time passed. 13RP 1679. He repeatedly looked out the window with the gun in his hand, claiming people were coming to get him. 13RP 1680.

Several hours later, in the evening hours of October 28, 2010, Branch, his friend Brandon Crowe, and defendant drove to a Puyallup drug house where they smoked methamphetamine in a garage. 17RP 2116-18; 18RP 2377. Defendant decided Branch was working with Green to retaliate against him for the shooting. 17RP 2220-25; 18RP 2379-83. He accused Branch of betraying him, convinced the detour to the drug house was part of Branch's plot to set him up for Green to strike back. 14RP 1859-61; 17RP 2224.

They eventually left for defendant's residence in Branch's car. 17RP 2221, 2224-28; 18RP 2384-85. Branch drove, Crowe sat in the front seat, defendant sat behind Branch. 17RP 2216, 2221. Defendant interrogated Branch about Green's whereabouts while fidgeting with the .45 caliber pistol—pulling it in and out of its holster as his accusations of

betrayal intensified. 17RP 2224-28; 18RP 2384-85. The interrogation continued for approximately 10 minutes as Branch drove along a direct route to their destination. *Id.* Dissatisfied with Branch's responses, defendant abruptly directed him to turn at an approaching intersection. 17RP 2228;18RP 2384. Branch followed defendant's directions, believing defendant's claim to know a short cut through the area. 18RP 2384.

The car stalled at the intersection of Vickery and 120th. 14RP 1841;17RP 2228;18RP 2384-85. As Branch attempted to restart it, defendant reached around Branch's headrest, put the barrel of the .45 caliber pistol just beyond the surface of Branch's right cheek, and pulled the trigger. 14RP 1845-46; 15RP 2008, 2049; 17RP 2156, 2169-70, 2228-29; 18RP 2385-86, 2390. A hollow point bullet bore through Branch's face, blowing out the roof of his mouth with all his top teeth. *Id.*; CP 225-26. Ex. 146, 166, 197. Defendant repositioned the gun to the base of Branch's skull then pulled the trigger a second time. *Id.*; 13 RP 1799; 15RP 2002-04; 17RP 2229; CP229, Ex. 165-175. The bullet cut a culvert across Branch's skull before exiting his head and traveling through the windshield. *Id.*; CP 225-26, Ex. 147-49, 165-175, 208, 212-213, 216-17, 233, 238-39. Defendant later explained the shooting was prompted by a mistaken perception Branch flashed the car's lights—an act defendant interpreted as signal related to Green's retaliation. 14RP 1857-62.

Defendant turned the gun on Crowe. 17RP 2229. Crowe ran for his life believing Branch was dead.17RP 2233, 2291. Defendant inadvertently dropped the gun in a bush as he fled. 14RP 1863, 1935-40. Law enforcement eventually matched the gun to hollow point ammunition defendant fired at both incidents. 11RP 1403-04, 1408-09; 13RP 1795, 1805; 14RP 1864-65, 1935-40; 15RP 1955-57, 2019; 17RP 2169-70.

Neighboring residents found Branch moaning as he stumbled in the street covered in blood. 12RP 1636; 13RP 1716-18; 14RP 1921. Emergency responders saved him from what would have been a fatal wound. 15RP 2006. He quickly fell into a coma. 15RP 2004-05. Twenty-four reconstructive surgeries were performed to mitigate the damage defendant did to his face. 15RP 2001. He was ultimately able to identify defendant as the man who shot him. 18RP 2385-86, 2390; 15 RP 2049.

Defendant tried to convince Robert Toulouse to give him an alibi for the time period of the second shooting. 14RP 69-81;15RP 2010-12. Once arrested, defendant attempted to distribute a copy of the State's witness list containing addresses and phone numbers with instructions to eliminate several witnesses perceived to be necessary for conviction. 13 RP 1669, Ex. 313 at 5, 10-11; 15RP 1974-79; 18RP 2305, 2318-20. Two incarcerated witnesses chose contempt sanctions over testifying against defendant in the second trial. 13RP 1656-57, 1660, 1763-64.

C. ARGUMENT.

1. THE EVIDENCE OF DEFENDANT'S WHITE SUPREMACIST BELIEFS WAS PROPERLY ADMITTED UNDER ER 404(b) BECAUSE THEY MOTIVATED HIM TO SHOOT INTO AN SUV OCCUPIED BY HIS GIRLFRIEND, THE AFRICAN AMERICAN MALE DEFENDANT BELIEVED WAS IN A SEXUAL RELATIONSHIP WITH HER, AND TWO OTHER PEOPLE WHO HAPPENED TO BE IN THE VEHICLE AT THE TIME.

The decision to admit evidence of other misconduct lies within the sound discretion of the trial court; it will not be disturbed absent an abuse of discretion. ***State v. Brown***, 132 Wn.2d 529, 571–72, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds. *Id.*; ***State v. Johnson***, 172 Wn. App. 112, 124-26, 297 P.3d 710 (2013) (citing ***State v. Magers***, 164 Wn.2d 174, 189 P.3d 126 (2008), *review granted*, 178 Wn.2d 1001, 308 P.3d 642 (2013); ***State v. Johnson***, 159 Wn. App. 766, 773, 247 P. 3d 11 (2011) (citing ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Evidence of other misconduct is admissible under ER 404(b) to prove premeditation, motive, intent, opportunity, and to explain the circumstances surrounding an alleged offense. ***State v. Brown***, 132 Wn.2d 529, 570-70, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L. Ed. 2d 322 (1998); ***State v. Cook***, 131 Wn. App. 845, 849-50, 129 P.3d 834 (2006). "ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but ... to prevent the State from suggesting ... a defendant is guilty because he... is a criminal-type person who would likely commit the crime charged." ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)(*quoting* ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

A trial court applying ER 404(b) is to: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, i.e., whether the purpose for which the evidence is offered is of consequence to the outcome of the action and tends to make the existence of an identifiable fact more probable; and (3) balance the probative value of the evidence against its prejudicial effect on the record. ***State v. Campbell***, 78 Wn. App. 813, 901 P.2d 1050 (1995); ***State v. Dennison***, 155 Wn.2d 609, 628, 801 P.2d 193 (1990). Although balancing should

always be articulated on the record, a trial court's ER 404(b) ruling may be affirmed in the absence of explicit balancing if the appellate court can determine the evidence was properly admitted from its review of the entire record. *See* ***State v. Powell***, 126 Wn.2d at 264-65; ***State v. Carleton***, 82 Wn. App. 680, 685, 919 P.2d 128 (1996); ***State v. Gomez***, 75 Wn. App. 648, 651-52, 880 P.2d 65 (1994).

Defendant is incapable of showing the trial court's decision to admit evidence of his white supremacist beliefs in the second trial was based on untenable grounds. The decision was logically grounded in evidence already adduced at the first trial, which established a direct connection between defendant's racism and the violent attack on his girlfriend, the African American male he believed to be having a sexual relationship with her, and two people who happened to in the vehicle at the time. 1RP 100-110; 5RP 511, 525-27; 6RP 688, 691, 699, 707, 716-17; 10RP 1294-98. Defendant's extreme racism, as well as the direct link between those beliefs and the first degree assaults charged in Counts V-VIII, was then persuasively reestablished through evidence adduced in the second trial. 12RP 1532-34, 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881; 14RP 1850; CP 225, Ex. 110, 111. Defendant's claim the challenged ruling was manifestly unreasonable cannot be reconciled with the record.

a. Defendant's white supremacist beliefs were properly admitted under ER 404(b) to explain defendant's motive for shooting at his girlfriend and the Africa American male defendant believed to be in a sexual relationship with her.

A defendant's adherence to white supremacist beliefs should be admitted as evidence of motive under ER 404(b) when they were an inducement that motivated him to commit a charged offense. *See* ***State v. Monschke***, 133 Wn. App. 313, 323, 135 P.966 (2006); ***State v. Boot***, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998); ***United States v. Mills***, 704 F.2d 1553, 1559 (11th Cir.1983) (dealings of white supremacists admissible to show motive for revenge killing); ***United States v. Winslow***, 962 F.2d 845, 850 (9th Cir.1992) (Aryan Nation link relevant to gay bar bombing); ***King v. State,*** 29 S.W.3d 556, 565 (Tex.Crim.App.2000) (hatred for African Americans was motive to kill); ***State v. Novak***, 949 S.W.2d 168, 171–72 (Mo.Ct.App.1997) ("white pride" tattoo admissible to show motive for murder); ***People v. Wagner***, 27 A.D.3d 671, 811 N.Y.S.2d 125, 126 (N.Y.App.Div.2006) (white supremacist tattoos relevant as to motive and intent). A racist motive may be established through proof of a racist impulse, desire, or moving power which led to the criminal act. *See Id.*; *see also* ***State v. Baker***, 162 Wn. App. 468, 473-74, 259 P.3d 270 (2011)(*quoting* ***State v. Powell***, 126 Wn.2d 244, 259, 893 P.2d 615 (1995)).

Evidence of defendant's white supremacist beliefs was appropriately admitted to establish his motive for the first shooting. 10RP 1297-98. It advanced a well supported non-propensity theory, for it proved him to be an ardent white supremacist who committed the first degree assaults charged in Counts IV-VIII out of racially-charged anger over the belief his girlfriend was having sex with an African American male. 5RP 511, 525-27; 6RP 688, 699, 707, 716-17; 12RP 1532-34, 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881; 14RP 1850; CP 225, Ex. 110, 111.

Defendant's racially-motivated rage could have also been properly admitted to prove his specific intent to inflict great bodily harm on at least one of his four victims as was required to convict him of first degree assault. *See* ***Monschke***, 133 Wn. App. at 323; RCW 9A.36.011(1)(a); RCW 9A.08.010(1)(a); ***State v. Tharp***, 27 Wn. App. 198, 208, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981); ***State v. Kelly***, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992) (A trial court may be affirmed on any valid basis). The challenged evidence was allowed for a valid ER 404(b) purpose.

b. Defendant's white supremacist beliefs were highly relevant to understanding why he was willing to fire four .45 caliber bullets into an occupied SUV on a public street in response to unconfirmed suspicion his girlfriend was having a sexual relationship with an African American male.

Adherence to white supremacist beliefs may be admitted under ER 404(b) when it is relevant to the defendant's motive for committing a charged offense. *See* ***Monschke***, 133 Wn. App. at 323; ***State v. Mollet***, ___ Wn. App. ___, 326 P.3d 851, 858, (2014); ***State v. Boot***, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998); ***State v. Campbell***, 78 Wn. App. 813, 822, 901 P.2d 1050 (2012). Relevant evidence tends to make the existence of any material fact more or less probable. ER 401; *see also* ***State v. Smith***, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(*quoting* ***State v. Saltarelli***, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982)). The trial court is generally in the best position to evaluate relevance. ***Foxhoven***, 161 Wn.2d at 176.

The link between defendant's white supremacist beliefs and the first October 28th shooting was proved through the testimony of several witnesses. 12RP 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881. Their testimony established defendant shot into an SUV occupied

by his girlfriend, two African American males and another female, after becoming incensed by the belief his girlfriend was having sex with one of those African American males, whom defendant referred to as "some nigger" due to his antipathy toward members of the black race. 12RP 1589-90, 1593-94; 14RP 1869-70.

In addition to explaining why defendant fired four hollow point bullets at his girlfriend and the African American male she was with, defendant's extreme racial animus also tended to prove the specific intent element of first degree assault. Counts V-VIII required the State to prove defendant fired into the SUV with a specific intent to inflict great bodily harm on at least one of its occupants. RCW 9.A.36.011(1); CP 187 (Instruction No. 20); CP 197 (Instruction No. 28); ***State v. Elmi***, 166 Wn.2d 209, 220-221, 207 P.3d 439 (2009).

Accurately understood in terms of defendant's extreme racism, the first shooting was not merely the violent overreaction of a jealous suitor, it was an example of defendant "standing up for the white race" as the Skinhead he held himself out to be. *See* ***Monschke***, 133 Wn. App. at 330. Defendant was established to be an ardent white supremacist, or Neo-Nazi "Skinhead". 12RP 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881. His deep commitment to white supremacist dogma was very publically manifested through a "ϟϟ" scalp tattoo, swastika neck tattoo,

and Adolph Hitler leg tattoo. 12RP 1532-34, 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881; 14RP 1850; CP 225, Ex. 110 , 111.

"[W]hite supremacists ... can be identified by their common ideology ... white people are [a] superior [yet] threatened [race]." ***Monschke***, 133 Wn. App. at 330; ER 201.[3] Social standing within their culture is tied to being perceived as "[s]omeone ... standing up for the white race ... [or] being a white warrior". *Id.* The fact defendant perceived his girlfriend's purported sexual relationship with an African American to be an affront to nature, as well as an act of emotional betrayal, makes the existence of defendant's specific intent to inflict great bodily harm on her and her alleged African American sexual partner far more likely than it would be without such evidence.

Defendant appears to maintain those valid ER 404(b) purposes cannot support the trial court's ruling, since the State allegedly failed to prove he was *exclusively* motivated by racial animus. App.Br. 14. There is no support for the "exclusive motivation" requirement he reads into ER 404(b). The absence of such an unnatural requirement is to be expected for "[t]he law recognizes ... there may be multiple motives for human

[3] ER 201. Judicial Notice of Adjudicative Facts. (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

behavior[.]" *See* ***United States v. Tachnodyne LLC***, 753 F.3d 368, 385 (2nd Cir., 2014); ***State v. Arreola***, 176 Wn.2d 284, 297-98, 290 P.3d 983 (2012). Defendant's extreme racism was relevant to understanding his motive for committing the firearm enhanced first degree assaults charged in Counts IV-VII, in addition to his specific intent in committing them, regardless of whether he was *also* motivated to shoot into an occupied SUV traveling on a public road out of jealousy.

c. Defendant's white supremacist beliefs were more probative than prejudicial as they gave the jury an accurate understanding of why he reacted so violently to the belief his girlfriend was having an affair with an African American male given the defense that one of Green's unidentified enemies was responsible for the shooting.

The probative value of relevant ER 404(b) evidence must outweigh its prejudicial effect. ***State v. Saltarelli***, 98 Wn.2d at 363; ***State v. Jackson***, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). A trial judge is best suited to evaluate a piece of evidence's potential for prejudice within the dynamics of a jury trial. ***State v. Posey***, 161 Wn.2d 638, 648, 167 P.3d 560 (2007)(*citing* ***State v. Taylor***, 60 Wn.2d 32, 40, 371 P.2d 617 (1962)).

i. Defendant's extreme racism was highly probative to explain his motive for shooting at his girlfriend and the African American male she was with as well as his intent to inflict great bodily harm upon them.

ER 404(b) balancing tips in favor of admissibility when the evidence of a defendant's racist ideology tends to explain his state of mind in committing a crime charged. *See* ***Monschke***, 133 Wn. App. at 330; ***Mollet***, 326 P.3d at 858 (use of phrase "white power" properly admitted to explain the relationship motivating Mollet to criminally assist a State Trooper's murderer); ***State v. Maesse***, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981); ***State v. Boggs***, 80 Wn.2d 427, 495 P.2d 321 (1972). Such circumstantial evidence may be indispensably probative due to the inherent difficulty of proving a defendant's subjective state of mind. *See* ***Monschke***, 133 Wn. App. at 330; ***Mollet***, 326 P.3d at 858; ***Maesse***, 29 Wn. App. at 649; ***Gray v. First Winthrop Corp.***, 82 F.3d 877, 884 (9th Cir., 1996)(citing ***Herman & MacLean v. Huddleston***, 459 U.S. 375, 390 n. 30, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983). It may also be necessary to explain the crime in context. ***Boot***, 89 Wn. App. at 789.

Defendant's adherence to white supremacist ideology was established as his reason for the first October 28th shooting, i.e., he was an

ardent white supremacist irate about his girlfriend "fucking" an African American male, defendant referred to as "some nigger". 12RP 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881. It likewise provided critical circumstantial evidence of defendant's specific intent to inflict great bodily harm on them as the likelihood defendant perceived his girlfriend and Green as engaging in an interracial relationship that violated his deeply held Neo-Nazi mores makes it far less likely the shooting was a recklessly indifferent warning to discontinue the relationship. The first October 28th shooting was no less critical *res gestae* to defendant's subsequent attempt to murder Branch several hours later, for defendant shot him twice in the head based on a belief Branch was assisting the targeted African American male to retaliate in response to the first shooting. 13RP 1680, 1799; 14RP 1845-46, 1857-62; 15RP 2002-04, 2049; 17RP 2224, 2229; 18RP 2384-85.

Similar to ***Yarbrough***, defendant's white supremacist beliefs were inextricably linked to the State's theory of the case, for they explained the hatred instigated by Treptow's purported interracial relationship with Green in terms of Green's perceived membership in a racial group defendant openly despised. *See* ***State v. Yarbrough***, 151 Wn. App. 66, 84, 210 P.3d 1029 (2009). That of itself would provide an insightful explanation for why defendant would do something as extreme as fire four

hollow point bullets into an occupied SUV on a public street over an unverified suspicion of his girlfriend's infidelity. *See Id.*

Defendant contends evidence of his racial animus was unnecessary for the State to meet its burden since the first October 28th shooting could have been plausibly—even if incompletely—explained in terms of simple jealousy. App.Br. 14. This suggestion about how the State might have overcome its burden of proof once persuasive evidence of defendant's guilt is artificially removed from an accurate account of his crimes relies on a misconception of ER 404(b)'s intended purpose. The rule is not designed to keep a jury ignorant of the unflattering truth about a defendant's reasons for committing violent crime whenever less repugnant motivations are also at work. *See* ***Foxhoven***, 161 Wn.2d at 175; ***Monschke***, 133 Wn. App. at 330; ***Mollet***, 326 P.3d at 858; ***State v. Rice***, 110 Wn.2d 577, 601, 757 P.2d 889 (1988) *cert. denied*, 491 U.S. 910 (1989). A racially motivated crime need not be explained as anything other than a racially motivated crime. *See Id.*; ***State v. Stackhouse***, 90 Wn. App. 334, 358, 957 P.2d 218, *rev. denied*, 136 Wn.2d 1002 (1998); ***State v. Lough***, 70 Wn. App. 302, 333, 853 P.2d 920 (1993).

Defendant's proposal for weakening the State's proof seemingly overlooks the fact he put the State to its entire burden to prove Counts V-VIII despite his careful efforts to convince the jury one of Green's

unidentified enemies committed those crimes in the course of an unrelated conflict. 11RP 1372, 1383, 1385; 20RP 2610. The State was consequently called upon to establish defendant was the shooter in addition to his specific intent in pulling the trigger. To meet its high burden, the State was entitled to present the jury an accurate account of defendant's crimes in the racially-charged context in which they were committed. *See* ***State v. Lane***, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A defendant cannot use ER 404(b) as a tactical weapon to increase the chance of an unjust acquittal by forcing the State to present an incomplete version of the evidence. *See* ***Foxhoven***, 161 Wn.2d at 175; ***State v. Lillard***, 122 Wn.App. 422, 431-32, 93 P.3d 969 (2004). Jealously compounded by racist hatred for Treptow's interracial relationship with Green set defendant apart as the most likely shooter when the incident occurred and provided helpful insight into the lethal intent with which he acted. The probative value of his white supremacist beliefs was tremendous for they were an inextricable component of his crimes.

ii. The tremendous probative value of defendant's racial motivation for the shooting was not outweighed by its prejudicial effect.

The potential prejudice adhering to the truth of a defendant's adherence to white supremacist dogma will not justify its exclusion when

it is directly relevant to establishing an essential element of a charged offense. *See* ***Monschke***, 133 Wn. App. at 330; ***Mollet***, 326 P.3d at 858; *see also* ***Yarbrough***, 151 Wn. App. at 84; ***Boot***, 89 Wn. App. at 789; ***Maesse***, 29 Wn. App. at 649.

Any prejudice adhering to defendant's militant brand of racism could not outweigh the probative value of that evidence since it was an inseparable part of the charged offenses. Once admitted, the evidence was judiciously limited to its proper purpose of proving defendant's culpability for Counts V-VIII, as well as his intent in their commission. True to the State's proffer, the case was never transformed into a trial gratuitously focused on defendant's Skinhead beliefs. *See* 10RP 1297-98. His racism was only touched upon to the extent necessary to provide needed insight into his case-related words and deeds. *See* 12RP 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881 CP 225, Ex. 110 , 111. For example, the State refrained from pursuing evidence of defendant's validated membership in the white supremacist prison gang know as the "Aryan Skins". 1RP 24. Eighteen photographs documenting the entirety of defendant's white supremacist tattoos were not introduced. CP 226, Ex. 112-129. The State hardly referenced defendant's racism in closing other than to remind the jury defendant committed the first October 28th shooting because he was angry about a black guy having sex with his

girlfriend. *See* e.g. 20RP 2588, 2591. Defendant's summary of the State's case further evinces its disciplined use of the evidence:

> "[W]hat the prosecution did in this case is ... tell you a story [that] went essentially like this: That Mr. Young and Deanna Treptow were having a relationship, and that Deanna Treptow was seeing an African American man by the name of Marlon Scrappy Green, and that he was so incensed by this that he decided to shoot at the car in which Ms. Treptow and Mr. Green were riding."

20RP 2606. The State did not return to defendant's racism in rebuttal. 20RP 2633-45.

The record is devoid of any effort to exploit the jury's presumed dislike for white supremacists to obtain an emotionally biased verdict. Rather, it firmly establishes the State scrupulously abided by the trial court's direction not to put defendant's racism on trial. 10RP 1297-98. The challenged evidence helped to explain but did not replace evidence of defendant's guilt. It was properly admitted.

iii. Implied ER 404(b) balancing was sufficient in this case since the court adopted the State's reasoning on admissibility after extensive argument from the parties on which way the scale should tip.

There is no erroneous failure to conduct ER 404(b) balancing if the trial court adopted a party's express argument on the relative weight between probative value and prejudicial effect. ***State v. Hughs***, 118 Wn. App. 713, 725, 77 P.3d 681 (2003)(citing ***State v. Barragan***, 102 Wn.

App. 754, 759, 9 P.3d 942 (2000); ***State v. Carleton***, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). While trial courts should always be careful to conduct the required balancing on the record, its omission is harmless if the appellate court can determine the evidence was properly admitted from the record. ***State v. Hepton***, 113 Wn. App. 673, 54 P.3d 223 (2002); ***State v. Sublett***, 156 Wn. App. 160, 231 P.3d 23, *rev. granted*, 170 Wn.2d 1016, 245 P.3d 775 (2010); ***Powell***, 126 Wn.2d at 264-65. ***Carleton***, 82 Wn. App. 680, 685, 919 P.2d 128 (1996); ***Gomez***, 75 Wn. App. 648, 651-52, 880 P.2d 65 (1994).

The Court impliedly balanced the probative value of the challenged evidence against its potential prejudice when it adopted the State's theory of admissibility over defendant's arguments for exclusion. 1RP 101, 104-07, 109-12; 4RP 397-400; 5RP 511, 525-27; 6RP 688, 691, 699, 707, 716-17; 10RP 1294-98. Any failure to adequately articulate the balancing is harmless since the trial court's decision is supported by the record. The trial court's ER 404(b) ruling should be affirmed with defendant's convictions.[4]

[4] Even error in admitting the entirety of the challenged evidence would not warrant the reversal defendant requests due to the overwhelming evidence of his guilt. *See* ***State v. Read***, 147 Wn.2d 238, 53 P.3d 26 (2002); ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (citation omitted; *see also* ***State v. Tharp***, 96 Wn.2d 591, 599, 637 P.2d 961 (1981);***State v. Cunningham***, 93 Wn.2d 823, 613 P.2d 1139 (1980).

2. DEFENDANT FAILED TO PROVE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE REFRAINED FROM REQUESTING AN ER 404(b) LIMITING INSTRUCTION FOR THE CHALLENGED EVIDENCE BECAUSE IT WAS A LEGITIMATE TRIAL TACTIC TO AVOID EMPHASIZING NEGATIVE INFORMATION CONSISTENT WITH COUNSEL'S EXPRESSED LACK OF CONFIDENCE IN THE EFFICACY OF SUCH INSTRUCTIONS.

To prevail on an ineffective assistance of counsel claim a defendant must prove his counsel's performance was deficient and the deficiency prejudiced the defense. ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994)(citing ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(citing U.S. Const. Amend. 6); *see also* Wash. Const. Art. I § 22). ***State v. Medlock***, 86 Wn. App. 89, 99, 935 P.2d 693 (1997) (Wash. Const. Art. I § 22 is co-extensive U.S. Const. Amend. 6). "In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight." ***State v. Brown***, 159 Wn. App. 336, 371, 245 P.3d 776 (2011) (citing ***State v. Nichols***, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007)).

Counsel is only constitutionally deficient when the challenged representation is demonstrated to fall below an objective standard of reasonableness. ***State v. McFarland***, 127 Wn.2d 322, 335, 880 P.2d 1251

(1995). "***Strickland*** begins with a strong presumption ... counsel's performance was reasonable." ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (emphasis added)). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (citing ***State v. Richenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also* ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968). Even proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

a. Defendant cannot show the absence of a legitimate trial tactic at work in omitting a limiting instruction which might have emphasized unfavorable evidence.

A valid trial tactic is not deficient performance. ***Yarbrough***, 151 Wn. App. at 91; ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) *overruled on other grounds by*, ***Carey v. Misladin***, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). And the decision to refrain from requesting an instruction to limit evidence admitted under ER 404(b) is presumed to be a valid trial tactic to avoid emphasizing damaging

evidence. ***Yarbrough***, 151 Wn. App. at 90 (citing ***State v. Price***, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn. 2d 1018, 124 P.3d 659 (2005); ***State v. Barragan***, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); ***State v. Donald***, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993)).

The State introduced the option of limiting the ER 404(b) evidence with an instruction on the record before the first trial. 1RP 110. Counsel later expressed a lack of confidence in the capacity of such instructions to do anything more than bring unwanted attention to unfavorable evidence when he argued against giving an instruction instead of declaring a mistrial to neutralize a witness's spontaneous revelation about defendant's incarceration:

> "Everybody has already heard it, and giving a curative instruction only brings attention to that particular statement by the witness...." 9RP 1149.
>
> "The other option is I would ask the Court to give an instruction along the lines of the statement of this particular witness that the Defendant would have going back to prison was improper. You may not consider it in your deliberations. Again, is all fine, well and good, but it just brings attention to it. That's the problem with it. 9RP 1152.

Those statements reveal counsel's professional opinion such instructions unduly emphasize unfavorable evidence. When coupled with the fact that giving an ER 404(b) limiting instruction was specifically addressed on the

record, counsel's comments undermine defendant's claim the instruction was inadvertently omitted. *See* App.Br. 19. Counsel's strongly expressed aversion to using instructions to neutralize unfavorable information makes it nearly inconceivable he would have thought it prudent to give a variant of the following instruction:

> I have admitted evidence defendant is a white supremacist who harbors animus toward African Americans, but you may consider the evidence only for the purpose of deciding his motive and intent in committing the first degree assaults charged in Counts V-VIII. You must not consider the evidence for any other purpose.

See e.g., WPIC 4.64.01 (modified). Not surprisingly, counsel similarly refrained from directly mentioning defendant's racism in summation, electing instead to attack the perceived weaknesses in the State's case. 20RP 2603-2633.

This is not an instance where counsel inexplicably failed to request an instruction reasonably necessary to effectively argue a plainly developed defense. *See* e.g., ***State v. Cienfuegos***, 144 Wn.2d 222, 228, 25 P.3d 1011 (2001)(citing ***State v. Thomas***, 109 Wn.2d 225-27, 743 P.2d 816 (1987)(ineffective failure to propose diminished capacity instruction in *mens rea* defense predicated on intoxication). Deficient performance has not been proven.

b. Defendant failed to show a limiting instruction would have changed the outcome of the trial.

Prejudice only exists if there is a reasonable probability the result of the proceeding would have been different but for counsel's deficient performance. *See* ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert denied*, 497 U.S. 922 (1986); ***State v. Neff***, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

Defendant claims the absence of a limiting instruction resulted in the jury misusing the ER 404(b) evidence to convict him for being a bad person. App.Br.19. The law does not presume an otherwise properly instructed jury automatically defaults to deciding a case on superficial assessments of a defendant's character in the absence of a ER 404(b) limiting instruction; otherwise, a special instruction would be mandatory whenever ER 404(b) evidence is admitted; it would not be a discretionary matter of professional preference. *See* e.g., ***Yarbrough***, 151 Wn. App. at 90-91.

Each juror was instructed to "apply the law from [the court's] instructions to the facts that [it] decide[d] ha[d] been proved, and in th[at] way decide the case." CP 166 (Instr. No. 1). And admonished:

> "[Y]ou are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict."

CP 168 (Instr.1). Accurate instructions on each offense, the presumption of innocence and the burden of proof followed. *See* e.g. CP 169 (Instr.2), 171-72(Instr. 4-5), 176 (Instr.8), 180 (Instr.12). The jury is presumed to have followed those instructions. ***Brown***, 132 Wn.2d at 618.

The instructions then guided the jury's assessment of the challenged evidence, which was only adduced, and very briefly argued, as proof of defendant's racist motive for committing Counts V-VIII. *See* 12RP 1589-90, 1593-98, 1613-14; 14RP 1857-58, 1869-70, 1881. 20RP 2588, 2591. In the context of this case the instruction defendant claims was negligently omitted would have done little more than emphasize persuasive evidence of his guilt. 20RP 2568-2645.

No less strained is defendant's claim a limiting instruction would have resulted in acquittal. His culpability for the offenses resulting in conviction was firmly established through his admissions, eye witnesses, cell phone evidence, handwriting analysis, and ballistic-tool marks linking the gun he was well known to brandish to both shootings. 11RP 1351-55, 1357-58, 1397-98, 1400-01, 1407, 1430, 1442; 12RP 1509-11,1540-44,

1590, 1613; 13RP 1669, 1676-77. 1680, 1731, 1746; 14RP 1845-46, 1869-81, 15RP 1974-79, 2010-12, 2049; 17RP 2151, 2156, 2166-70, 2220-26, 2228-29; 18RP 2305, 2318-20, 2379-83; 2385-86, 2390; 19 RP 2484-89, 2497-99; Ex. 313 at 5, 10-11. Prejudice has not been proven.

c. Defendant failed to prove his counsel's overall performance was ineffective.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***Cronic***, 466 U.S. at 656; ***Garrett***, 124 Wn.2d at 520. For "[t]he essence of an ineffective assistance claim is ... counsel's unprofessional errors so upset the adversarial balance between defense and prosecution ... the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

Counsel subjected the State's case to able adversarial testing from pretrial motions to sentencing over the course of nearly two trials after successfully arguing for a mistrial in the first. *See* e.g. 1RP 10-11, 26-7, 107-08; 9RP 1149, 1152, 1200; 20RP 2603, 2665. He conducted *voir dire*, actively objected during direct examinations, extensively cross-examined critical witnesses, argued instructions, and attacked the State's case in summation. *See* e.g. RP (voir dire Vol.1) 24; RP (voir dire Vol.2) 227;

3RP 242, 287, 311, 335; 11RP 1351-55, 1365, 1436, 1471; 20RP 2563, 2603-05. Defendant received constitutionally effective assistance of counsel.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE OF DEFENDANT'S PREMEDITATED ATTEMPT TO MURDER BRYAN BRANCH BECAUSE IT PROVED DEFENDANT BECAME CONVINCED BRANCH BETRAYED HIM, DIRECTED BRANCH TO DRIVE AWAY FROM A MAIN ROAD AMIDST ACCUSATIONS OF BETRAYAL, THEN FIRED TWO HOLLOW POINT BULLETS INTO BRANCH'S HEAD WITH A .45 CALIBER PISTOL THAT WAS LETHALLY REPOSITIONED BETWEEN SHOTS.

A person is guilty of murder in the first degree when with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). The element of premeditation necessary to support a first degree murder conviction requires the State to show the defendant decided to cause the victim's death after some period of reflection, however short. ***State v. Monaghan***, 166 Wn. App. 521, 535-36, 270 P.3d 616 (2012)(citing RCW 9A.32.020(a); ***State v. Gregory***, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006)). Premeditation may be proved by circumstantial evidence where the supporting inferences are reasonable and the evidence is substantial. *Id.* "An inference of premeditation can be established by a range of proven facts, including procuring a weapon to facilitate the killing, striking the

victim from behind, and inflicting multiple wounds or shots." ***State v. Notaro***, 161 Wn. App. 654, 672, 255 P.3d 774 (2011)(premeditation where defendant lured victim into basement before shooting him twice in the back of the head) (citing ***State v. Ra***, 144 Wn. App. 688, 703, 175 P.3d 609 (2008)(premeditation where defendant brought loaded firearm to the scene, provoked confrontation with the victim, then fired multiple shots)).[5]

Evidence is sufficient to support a premeditated murder conviction if it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt when viewed in a light most favorable to the State. *See* ***Notaro***, 161 Wn. App. at 670-71. Circumstantial and direct evidence are considered equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency admits the truth of the State's evidence with all reasonable inferences capable of being drawn therefrom. *Id.* Whereas "[c]redibility determinations ... cannot be

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[5] *See also* ***State v. Thompson***, 169 Wn. App. 436, 491, 290 P.3d 996 (2012) (citing ***Gregory***, 158 Wn.2d at 817); ***State v. Townsend***, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (premeditated murder where two pistol shots fired); ***State v. Ollens***, 107 Wn.2d 848, 733 P.2d 984 (1987);***State v. Ortiz***, 119 Wn.2d 294, 312, 853, 831 P.2d 1060 (1992); ***State v. Cross***, 156 Wn.2d 580, 627, 132 P.3d 80 (2006); ***State v. Allen***, 159 Wn.2d 1, 8, 147 P.3d 581 (2006); ***State v. Clark***, 143 Wn.2d 731, 769, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001); ***State v. Pirtle***, 127 Wn.2d 628, 644–45, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996); ***State v. Hoffman***, 116 Wn.2d 51, 83, 804 P.2d 577 (1991)), *review denied*, 164 Wn.2d 1016, 195 P.3d 88 (2008).

reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Several hours before defendant attempted to murder Branch, he threatened the woman who drove him to the first shooting she would end up like the four victims if she betrayed him by talking about the shooting. 12RP 1544. Later that day he became convinced Branch betrayed him by actively plotting with one of the shooting victims to retaliate against him. 14RP 1859-61; 17RP 2220-25; 18RP 2379-83. Defendant interrogated Branch about the perceived set up for approximately 10 minutes as he sat behind Branch pulling a .45 caliber pistol in and out its holster while the accusations of betrayal intensified. 17RP 2224-28; 18RP 2384-85.

Dissatisfied with Branch's responses, defendant unexpectedly directed him to drive away from a direct route to their destination under the guise it was a short cut through the area. *Id.* At the moment the car became apparently incapable of taking them farther, defendant reached around Branch's headrest and successively fired two .45 caliber hollow point bullets[6] into Branch's head, taking the time to reposition the gun from his right cheek to the base of his skull between shots. 13 RP 1799; 14RP 1845-46; 15RP 2002-04, 2008, 2049; 17RP 2156, 2169-70, 2228-29; 18RP 2385-86, 2390. (Ex. 165-175);18RP 2385-86, 2390; CP 225-26. Ex. 146-49, 165-175, 197, 208, 212-213, 216-17, 233, 238-39. Defendant

[6] Hollow point ammunition is designed to open like a mushroom so it stays within the body. 17RP 2156.

later alleged he shot Branch because he saw him flash the car's lights, which defendant claimed he perceived to be a signal related to the anticipated retaliation. 14RP 1857-62.

The jury was free to infer defendant's act of pulling the gun in and out of its holster while interrogating Branch about betraying him to be a physical manifestation of defendant's deliberation about whether to kill Branch. Considered in this context, defendant's act of directing Branch away from the direct route to their destination marked the moment defendant decided to kill Branch, which is why defendant attempted to relocate him to a more suitable location for the murder. The absence of any punctuated escalation in their protracted confrontation in the instant defendant shot Branch evinces a predetermined decision to kill Branch. For it was the absence of a foreseeable benefit in further postponing the murder due to the vehicle's perceived inability to transport them to a better location, instead of a spontaneous reaction to escalated conflict, which best explains defendant's timing.

Even under defendant's version of events he decided to murder Branch after reflecting upon his purported signal to the man defendant believed was planning a retaliatory attack against him for the shooting defendant committed earlier that day. 14RP 1857-62. Killing Branch before turning the gun on Crowe in this scenario was consistent with a calculated preemptive strike intended to improve defendant's odds of

surviving the retaliation by reducing his imagined enemies' numerical superiority.

Under either scenario defendant brought a loaded firearm into his unilateral confrontation with Branch motivated to murder him for a perceived betrayal before relocating Branch to a place where defendant reached up from behind to shoot him multiple times in the head with a repositioned firearm loaded with lethal ammunition. Although far less likely under the circumstances, a jury could have even rationally determined the attempted premeditated murder took place when defendant fired the second shot after reflecting on how to reposition the gun to ensure Branch would not survive. 15RP 2000, 2003; 17RP 2229. Premeditation was amply proved as the evidence easily supports a variety of reasonable inferences of defendant's premeditated decision to murder Branch in response to a perceived betrayal. The attempted first degree murder conviction should be affirmed.

D. CONCLUSION.

Evidence of defendant's white supremacist beliefs was properly admitted under ER 404(b) to prove his motive and specific intent in committing the first degree assaults charged in Counts V-VIII. His counsel was not constitutionally ineffective when he refrained from requesting a limiting instruction likely to have unprofitably emphasized evidence of

defendant's guilt. And defendant's attempted murder conviction was well supported by evidence he fired two hollow point bullets into Bryan Branch's head with premeditated intent to kill him for the perceived act of betraying defendant to one of his other victims. The convictions should be affirmed.

DATED: October 1, 2014.

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Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/2/14 Theresa Kail
Date Signature

PIERCE COUNTY PROSECUTOR

October 02, 2014 - 10:03 AM

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