

No. 92115-6

IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

STEPHEN ADAM YOUNG,

Petitioner.

**FILED**

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PETITION FOR REVIEW

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Court of Appeals No. 45582-0-II  
Appeal from the Superior Court of Pierce County  
Superior Court Cause Number 10-1-04933-1  
The Honorable Vicki Hogan, Judge

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**I. IDENTITY OF PETITIONER**

The Petitioner is STEPHEN ADAM YOUNG, Defendant and Appellant in the case below.

**II. COURT OF APPEALS DECISION**

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 45582-0, which was filed on July 28, 2015. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court. No motion for reconsideration has been filed in the Court of Appeals.

**III. ISSUES PRESENTED FOR REVIEW**

1. Was the improper admission of Stephen Young's white supremacist beliefs harmless error where the evidence was completely irrelevant, highly prejudicial, and never connected to the crime?
2. Pro Se issues: did the trial court erred by ruling that Stephen Young could not present other-suspect evidence; did the prosecutor commit prejudicial misconduct; and did Young receive ineffective assistance of trial and appellate counsel?

**IV. 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 9A.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 9A.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)<sup>1</sup> 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

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<sup>1</sup> 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.

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 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)

Young timely appealed. (CP 373) Young challenged the the trial court's decision to allow the State to present evidence that Young was a "skinhead" who hated African Americans and who had a tattoo of Adolph Hitler. The Court of Appeals agreed that the

trial court erred in admitting the evidence, but found that the error was harmless. (Opinion at 4-7) The Court of Appeals affirmed Young's conviction and sentence.

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 to 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)

#### **V. ARGUMENT & AUTHORITIES**

The issues raised by Young's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

##### **A. THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE OF YOUNG'S WHITE SUPREMACIST BELIEFS WAS NOT HARMLESS**

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.

In this case, 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. (RP 101-10, 1294-96)

The Court of Appeals agreed that the trial court erred in admitting this evidence, stating: "the State produced no evidence connecting skinhead affiliation or white supremacist tattoos to Young's motive for attempting to assault Green." (Opinion at 7) But the Court found that the error was harmless. (Opinion at 7-8)

The Court of Appeals was wrong. 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 527-28 (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)).

Unpopular affiliations 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." United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991). 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).

Without a connection of that status to the crimes, the only reasonable inference for the jury to draw from the testimony was that the defendant] was a bad person. One reason that ER 404(b) exists is to combat that type of reasoning." Scott, 151 Wn. App. at 529 (citing State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487

(1995)). Likewise, in this case the admission of the supremacist tainted the trial because, without any explanation or connection to the crime, the jury was likely to view Young as a bad person with anti-social or violent tendencies, and likely to feel compelled to punish him for holding such unpopular or offensive views.

**B. PRO SE ISSUES**

In his *pro se* Statement of Additional Grounds for Review, Young argued that: that the trial court erred by ruling that he could not cross- examine Green regarding an altercation in which Green participated just before the first shooting in order to show that someone other than Young had a motive to shoot Green; that the prosecutor committed prejudicial misconduct; and that he received ineffective assistance of trial and appellate counsel. The arguments and authorities pertaining to these issues are contained in Young's Statement of Additional Grounds, which is hereby incorporated by reference. The Court of Appeals rejected these arguments. (Opinion at 12-17) This Court should review the *pro se* issues as well.

**VI. CONCLUSION**

This Court should accept review for the reasons indicated in Part V above. Young respectfully requests that this Court grant

review of his appeal and reverse his convictions.

DATED: August 19, 2015



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

**CERTIFICATE OF MAILING**

I certify that on 08/19/2014, 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.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

**CUNNINGHAM LAW OFFICE**

**August 19, 2015 - 5:20 PM**

**Transmittal Letter**

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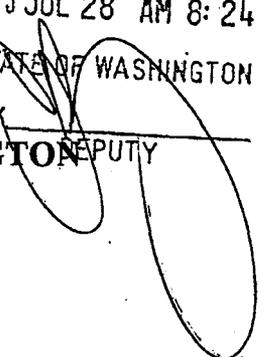
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STATE OF WASHINGTON

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN ADAM YOUNG,

Appellant.

No. 45582-0-II

UNPUBLISHED OPINION

MAXA, J. — Stephen Young appeals his convictions for attempted first degree murder, first and second degree assault, and witness tampering. The convictions related to an incident in which Young fired shots at a moving vehicle and a separate incident in which he shot a friend in the back of the head. We hold that (1) the trial court erred by admitting evidence that Young was a “skinhead” and had certain white supremacist tattoos, but the error was harmless; (2) Young’s counsel did not provide ineffective assistance of counsel by failing to request a limiting instruction on the white supremacist evidence because the decision not to request a limiting instruction may have been tactical; (3) sufficient evidence supported the premeditation element of attempted murder; and (4) none of the issues Young raises in his statement of additional grounds (SAG) have merit. Accordingly, we affirm Young’s convictions.

**FACTS**

In the fall of 2010, Young was in a romantic relationship with Deanna Treptow. On October 27, Treptow spent the day with an African-American man, Marlon Green. That

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evening, Treptow and Green met up with Green's friends, Heather Martin and David Moore. The four went to the house of another friend, Riki Perasso. While at the house, Perasso received a phone call from an unidentified caller asking whether Treptow and Green were sleeping together. Green took the phone from Perasso and engaged in a heated conversation with the caller.

That same evening, Carrie Taylor-Edwards picked up Young in her car. Young asked Taylor-Edwards to take him to Perasso's house. Young then told her to pull over and turn off her headlights. Young got out of the car and engaged in a heated conversation on his mobile phone.

Green, Treptow, Moore, and Martin eventually left Perasso's house in a white sport utility vehicle (SUV), with Martin driving. As Martin drove away, gunshots were fired at the SUV, hitting Martin and grazing Green. Taylor-Edwards heard gunshots coming from Young's location outside her car and saw an SUV drive by. Young got back into Taylor-Edwards' vehicle and told her to follow the SUV, but Taylor-Edwards refused and drove Young to a motel where some of his friends were staying. At the motel, Young told his friends he had just "shot at some girls," and Taylor-Edwards confirmed that Young had shot at some people. Report of Proceedings (RP) at 1676.

Young began acting paranoid and brandishing a handgun. Later that night, Young left the motel with two friends, Bryan Branch and Brandon Crowe, to go to another friend's house. They then left that house to drive to yet another friend's house. Branch was driving, Crowe was in the front passenger seat, and Young was in the backseat directly behind Branch.

Young began to interrogate Branch as to why Branch was taking him to the house. He began to insinuate that Branch somehow was involved with Green and was lying to cover up that involvement. At one point, Young told Branch to take an abrupt turn off the main road. Branch did so, but his car stalled as he approached a stop sign. Young then reached forward from the back seat, put his gun up to the back of Branch's head, and shot him. Young then shot him again, apparently after repositioning the gun at the base of Branch's skull. He pointed the gun at Crowe and threatened him, and Crowe ran from the vehicle into a nearby house. Branch was seriously injured, but survived.

Police apprehended Young and later found his handgun. Forensic evidence connected the handgun to both shootings.

The State charged Young with one count of attempted first degree murder for his attack on Branch; five counts of first degree assault for his attacks on Branch, Green, Martin, Moore, and Treptow; one count of second degree assault for his threat against Crowe; two counts of unlawful possession of a firearm; one count of witness intimidation for later threatening Taylor-Edwards; and one count of witness tampering for later sending a letter to a friend asking him to fabricate an alibi for the night of the shootings. The firearm possession charges were decided by bench trial, and the trial court found Young guilty of both counts<sup>1</sup>.

The remaining charges were tried to a jury in October 2012, but the trial ended in a mistrial. A second jury trial took place in September 2013.

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<sup>1</sup> There is no indication that Young is appealing these convictions.

A small part of the State's case at the second trial involved the production of evidence that Young was a "skinhead," was tattooed with a skinhead or white supremacist symbol, and had tattoos of a swastika, lightning bolts, and a portrait of Adolph Hitler. According to trial testimony, Young did not associate with African-Americans. The evidence also showed that Young was angry that his girlfriend might be sleeping with an African-American man.

The jury found Young guilty of all counts except witness intimidation. Young appeals his convictions.

#### ANALYSIS

##### A. ADMISSION OF "WHITE SUPREMACIST" EVIDENCE

Young argues that the trial court erred by admitting evidence that Young was a white supremacist and a member of a skinhead group because that evidence was inadmissible under ER 404(b). We agree, but hold that this error was harmless.

##### 1. Legal Principles

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, this evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b) must be read in conjunction with ER 403, which requires the trial court to exercise its discretion in weighing the probative value of the evidence against its prejudicial effect. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

We review the trial court's interpretation of ER 404(b) de novo as a matter of law. *Id.* at 922. If the trial court interprets the rule correctly, we review the decision to admit evidence

under ER 404(b) for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

2. Admissibility Under ER 404(b)

Young argues that the trial court erred in admitting evidence suggesting that Young was a white supremacist – specifically, evidence that Young was a skinhead and had tattoos of skinhead or white supremacist symbols and Hitler – because its probative value was low and the potential for undue prejudice was high. We agree.

The trial court stated that the white supremacist evidence was relevant to establish Young's motive for the first shooting. According to the State, the evidence was relevant because Young's white supremacist beliefs motivated him to shoot an African-American man who may have been sleeping with his girlfriend. Under ER 404(b), prior act evidence can be admissible to prove motive. *See, e.g., State v. Yarbrough*, 151 Wn. App. 66, 83-84, 210 P.3d 1029 (2009) (holding that gang affiliation is admissible under ER 404(b) to show motive for the murder of a rival gang member). Motive is an "impulse, desire, or any other moving power which causes an individual to act." *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Evidence of motive is admissible even when it is not an element of the charged crime. *Yarbrough*, 151 Wn. App. at 83.

Here, the State presented minimal evidence that being a skinhead or having certain white supremacist tattoos created a motive for Young's attempt to assault Green. The only evidence explaining what it meant to be a skinhead was an answer to a single question from one of Young's acquaintances:

Q: And did you, in fact, recall testifying previously that he is like a Skinhead, or something, and that he didn't kick it with black people?

A: They don't kick it with black people, and yeah, so that's, you know, what I know a Skinhead to be, I guess.

RP at 1594. The State presented no evidence about what it meant to have tattoos of white supremacist symbols, swastikas, or Hitler, although a jury could infer that those tattoos indicated that Young believed that white people were superior to African-American people. This evidence was sufficient to establish that Young did not associate with African-American people, and the State also produced some direct evidence of that fact.

However, choosing not to associate with African-American people or believing that white people are superior to African-American people is quite different than having a motive to assault an African-American person. To be relevant, evidence that Young was a skinhead or had certain tattoos had to show that Young had some animus toward African-American people in general. The State produced no such evidence.

The jury could infer from *other* evidence that Young had some animus toward African-American people. Young may have used the "n word" to describe Green.<sup>2</sup> And there was some evidence suggesting that Young was particularly angry that his girlfriend might be sleeping with an African-American. But there was no evidence connecting this animus with being a skinhead or having tattoos of white supremacist symbols, swastikas, or Hitler.

The State cites *State v. Monschke*, which discusses white supremacists as an identifiable group with a shared set of beliefs and customs that include standing up for the white race. 133

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<sup>2</sup> One witness said in a pretrial statement that Young used the "n word" to describe Green, but at trial did not remember making that statement.

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Wn. App. 313; 330, 135 P.3d 566 (2006). However, in that case the State presented expert testimony that explained what it meant to be a white supremacist. *Id.* at 326-27, 330. Here, the State presented no such testimony.

Although we review evidentiary decisions under ER 404(b) for an abuse of discretion, here the State produced no evidence connecting skinhead affiliation or white supremacist tattoos to Young's motive for attempting to assault Green. Accordingly, we hold that the trial court erred in admitting white supremacist evidence under ER 404(b).<sup>3</sup>

### 3. Harmless Error

A trial court's error in admitting evidence in violation of ER 404(b) may be harmless. *State v. Gower*, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). Such an evidentiary error is not of constitutional magnitude. *Id.*; *State v. Binh Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005). Under the nonconstitutional harmless error standard, an error is grounds for reversal only if it has prejudiced the defendant. *See Gower*, 179 Wn.2d at 854. The test is whether there is a reasonable probability that the outcome of the trial would have been materially affected absent the error. *Id.*

Here, there was extensive admissible evidence that demonstrated Young's guilt on the charges. Young had Taylor-Edwards drive him to a location where Green was present. Taylor-Edwards heard gunshots coming from where Young stood outside her car as an SUV passed. Taylor-Edwards and Young himself told friends that Young had fired shots at some people.

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<sup>3</sup> Young also argues that the trial court erred in not excluding the white supremacist evidence under ER 403. Because we hold that the trial court erred under ER 404(b), we do not address ER 403.

There also was strong evidence of motive – Young believed that Green was sleeping with his girlfriend. There also was eyewitness testimony that Young shot Branch in the back of the head. Given this evidence, there is no indication that admission of the white supremacist evidence materially affected the trial outcome.

Moreover, the prejudice of admitting the white supremacist evidence was minimal for the same reason that the evidence was inadmissible – there was no evidence regarding what it meant to be a skinhead or a white supremacist. The fact that Young was a skinhead and had various tattoos may have had vague negative connotations. But the State presented no evidence that would have caused a jury to believe that being a skinhead or having those tattoos made Young more likely to commit crimes. In addition, the State did not emphasize the white supremacist evidence. At closing argument, the State did not even mention Young's affiliations or tattoos. In the overall context of the extensive evidence presented that Young was responsible for the two crimes, the white supremacist evidence was insignificant.

The evidence shows that there is no reasonable probability that the outcome of the trial would have been materially affected if the trial court had not admitted the white supremacist evidence. Therefore, we hold that the trial court's error was harmless.

**B. INEFFECTIVE ASSISTANCE OF COUNSEL**

Young claims that he received ineffective assistance of counsel because once the white supremacist evidence was admitted, his trial counsel did not request a limiting instruction regarding the jury's consideration of that evidence. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to effective assistance of

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counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Where a criminal defendant has been denied effective assistance of counsel, we will reverse any resulting conviction and remand for a new trial. *See id.*

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on such a claim, the defendant must show that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. We presume counsel's performance was not deficient. *Id.* at 33. The defendant may rebut this presumption by showing that the performance was not a matter of legitimate trial strategy or tactics, and fell below an objective standard of reasonableness. *Id.*

When the trial court admits evidence under ER 404(b), the defendant generally is entitled to a limiting instruction stating that the evidence cannot be used to show the defendant's bad character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). A failure to request such an instruction may constitute deficient performance where the lack of the instruction presents the jury with an inaccurate or incomplete picture of the law. *See State v. Thomas*, 109 Wn.2d 222, 228, 743 P.2d 816 (1987); *see also State v. Cierfuegos*, 144 Wn.2d 222, 229-30, 25 P.3d 1011 (2001).

However, the "failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence." *Yarbrough*, 151 Wn. App. at 90. Young's attorney may have made a calculated tactical decision not to draw the jury's attention to the limited evidence of Young's white supremacist beliefs and affiliation. At the end of Young's first trial, his counsel made it clear that he was concerned

about highlighting unfavorable evidence with instructions. Because the State did not emphasize the white supremacist evidence at the second trial, it may have been sensible for Young's attorney to decide not to remind the jury of that evidence with a limiting instruction. Young claims that the failure to request a limiting instruction was inadvertent, but he points to nothing in the record that supports this claim.

We hold that Young has failed to rebut the presumption that his counsel's performance was not deficient. Therefore, we hold that Young has not shown that he received ineffective assistance of counsel.

C. SUFFICIENCY OF EVIDENCE

Young argues that his conviction for attempted first degree murder of Branch was based on insufficient evidence because the State did not offer evidence supporting the necessary element of premeditation. We disagree.

A criminal defendant challenging the sufficiency of the State's evidence on appeal admits the truth of that evidence, and we draw all reasonable inferences therefrom in the State's favor. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Evidence is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014).

To convict a defendant of attempted first degree murder, the State must prove beyond a reasonable doubt that the defendant acted with premeditated intent to kill another. RCW 9A.32.030(1)(a); *State v. Barajas*, 143 Wn. App. 24, 36, 177 P.3d 106 (2007). "[P]remeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves

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'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)). Premeditation may be inferred from circumstantial evidence as long as substantial evidence supports the inference. *Pirtle*, 127 Wn.2d at 643; *Barajas*, 143 Wn. App. at 36. Particularly probative evidence of premeditation includes evidence of a motive to kill and evidence of a manner of killing suggesting prior reflection or planning. *Pirtle*, 127 Wn.2d at 644.

Here, the State presented extensive circumstantial evidence indicating that Young acted with premeditated intent. Testimony showed that before and during the car ride, Young suspected that Branch was helping Green retaliate against him. This was strong motive evidence.

As to the manner of killing, the evidence showed that Young told Branch to turn off onto a side street shortly before shooting him. This evidence supports an inference that Young planned to shoot him in a less conspicuous place. Further, testimony and photographs showed that Young shot Branch in the head twice from behind, repositioning the gun after the first shot to aim more directly at the center of his head. Evidence that the defendant shot a defenseless victim from behind multiple times strongly suggests premeditation. *State v. Notaro*, 161 Wn. App. 654, 672, 255 P.3d 774 (2011).

Taken together and viewed in the light most favorable to the State, this circumstantial evidence shows that Young formed a deliberate intent to kill Branch and acted on that intent. We should hold that this evidence was sufficient to prove premeditation and support Young's conviction for attempted first degree murder.

D. SAG ISSUES

1. Other Suspect Evidence

Young argues that the trial court erred by ruling that he could not cross-examine Green regarding an altercation in which Green participated just before the first shooting in order to show that someone other than Young had a motive to shoot Green. We disagree.

Young intended to cross-examine Green about the altercation to support his theory that somebody other than Young may have been responsible for the shooting. Other suspect evidence is only admissible if the proponent can show some nexus “tending to connect such other person with the *actual commission* of the crime charged.”<sup>4</sup> *State v. Franklin*, 180 Wn.2d 371, 379, 325 P.3d 159 (2014) (emphasis added). Evidence that another person had a motive to commit the crime – or even had a motive and the opportunity to commit it – is insufficient to show such a nexus. *State v. Russell*, 125 Wn.2d 24, 77, 882 P.2d 747 (1994). We review a trial court’s exclusion of evidence for an abuse of discretion. *Franklin*, 180 Wn.2d at 377 n.2.

Here, Young sought to elicit evidence that another participant in the altercation had a motive, and perhaps an opportunity, to shoot at Green. But without some other evidence tending to show that another individual in fact shot at Green or was otherwise involved in the crime, the evidence Young sought was inadmissible to support an other suspect theory.

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<sup>4</sup> Young focuses on the relevance of the evidence, arguing that it was at least minimally probative of his guilt. But the problem with attenuated other suspect evidence is not that it is irrelevant, but that its potential to confuse the issues and increase the length and complexity of the trial greatly exceeds its probative value. See *Franklin*, 180 Wn.2d at 380; *State v. Mak*, 105 Wn.2d 692, 716, 718 P.2d 407 (1986).

Young seems also to argue that Green's lifestyle was such that many people wanted to harm him and might have been responsible for the shooting. But our Supreme Court in *State v. Mak* cautioned specifically against admission of such generalized motive evidence:

"[I]f evidence of motive alone upon the part of other persons were admissible . . . in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased; [and] a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion."

105 Wn.2d 692, 717, 718 P.2d 407 (1986) (quoting *People v. Mendez*, 193 Cal. 39, 52, 223 P. 65 (1924)) (emphasis in original). This potential for increasing the burdens on the trial court greatly outweighs the probative value of such evidence. See *State v. Maupin*, 128 Wn.2d 918, 927, 913 P.2d 808 (1996).

We hold that the trial court did not abuse its discretion by sustaining the State's objection and disallowing cross-examination regarding the altercation and production of generalized other suspect evidence.

## 2. Prosecutorial Misconduct

Young argues that the prosecutor committed prejudicial misconduct and thereby denied him a fair trial in two ways: by presenting a mobile phone to a witness, and by stating during closing argument that a defense argument was a "red herring." We disagree and hold that neither instance rose to the level of misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). We

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examine the prosecutor's conduct and whether prejudice resulted therefrom by considering the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

a. Mobile Phone

Young argues that the prosecutor committed misconduct by questioning a witness about the contents of the witness's mobile phone. We do not consider this issue because it depends on evidence not in the record.

Young claims that he was never allowed to examine the contents of the phone, and therefore its production and use during direct examination was improper. But Young does not cite to any part of the record showing that he was unable to examine the phone or that its contents were not made otherwise discoverable. Because this claim requires consideration of evidence not in the appellate record, we do not consider it.<sup>5</sup> *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). If Young wishes to raise this claim, the appropriate means is a personal restraint petition. *Id.*

b. Characterization of Defense Argument as a "Red Herring"

Young argues that the prosecutor also committed misconduct by referring to a defense argument as a "red herring" during closing argument. We disagree.

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<sup>5</sup> Young also claims on the same grounds that the trial court erred in admitting the evidence under CrR 4.7 and ER 404(b). These arguments, to the extent they are distinct, similarly depend on the discovery-related evidence not in our record. Young also fails to develop the arguments, making them too vague for review. *See* RAP 10.10.

During closing, the prosecutor discussed the defense argument that the State had failed to produce at trial a police investigator who conducted important interviews. The prosecutor referred to this argument as a red herring because another investigator who testified at trial had conducted the interviews. The prosecutor implored the jury not to “fall for it.” RP at 2635. Young did not object to this line of argument at the time.

It is improper for a prosecutor to impugn defense counsel’s integrity during closing argument. *Thorgerson*, 172 Wn.2d at 451. But where a defendant fails to object to the prosecutor’s conduct, he waives his right to later claim that it was misconduct unless that conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61.

Describing an argument as a red herring figuratively indicates that the argument is intended to mislead the jury by directing its attention to something unimportant. While such a description might impugn defense counsel’s integrity under certain circumstances, in the context of the argument in this case it did not. The prosecutor simply was arguing to the jury that the defense’s focus on the investigator who did not testify was misguided, and that the jury should not consider the investigator’s absence meaningful. In context, this was not so flagrant or ill-intentioned as to produce incurable prejudice. Therefore, we hold that Young waived his claim of misconduct.

### 3. Ineffective Assistance of Counsel

Young argues that both his trial and appellate counsels provided ineffective assistance. We disagree.

As noted above, we review claims of ineffective assistance of counsel de novo. *Sutherby*, 165 Wn.2d at 883. To prevail on such a claim, the defendant must show that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33.

a. Trial Counsel

Young argues that his trial counsel provided ineffective assistance because he did not impeach two witnesses with prior inconsistent statements offered as testimony in Young's first trial. As Young notes, a witness may be impeached on cross-examination with prior inconsistent testimony. *State v. Garland*, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012). But we presume that decisions regarding the extent of cross-examination are strategic. *See State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967). "[E]ven a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation." *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

Young's attorney cross-examined both witnesses robustly, and impeached them with other prior inconsistencies. Young may disagree with his counsel's decisions not to use certain prior testimony to impeach the witnesses' credibility, but this does not elevate those decisions to the level of deficient performance. We hold that Young's trial counsel provided effective assistance with regard to cross-examining these witnesses.

b. Appellate Counsel

Young argues that his appellate counsel provided ineffective assistance because he did not raise in the main appeal the "obviously appealable constitutional issues" Young raises in his SAG. SAG at 30. However, "the exercise of independent judgment in deciding which issues

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may be the basis of a successful appeal is at the heart of the attorney's role in our legal process." *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). Therefore, for a defendant to prevail on an ineffective assistance of counsel claim for failure to raise certain issues on appeal, he must show that the issues not raised had merit. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 777-78, 100 P.3d 279 (2004).

As discussed above, the issues Young raises in his SAG either lack merit or are not properly reviewable on direct appeal. Therefore, his appellate attorney's strategic decision not to raise them was neither deficient nor prejudicial performance. We hold that Young's appellate counsel provided effective assistance.

We affirm Young's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
MAXA, J.

We concur:

  
\_\_\_\_\_  
WORSWICK, P.J.

  
\_\_\_\_\_  
LEE, J.

**CUNNINGHAM LAW OFFICE**

**August 19, 2015 - 5:21 PM**

**Transmittal Letter**

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