NO. 100613-6
COURT OF APPEALS NO. 80576-2-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN EDWARD SHANNON, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Keto Shaw, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Steven Edward Shannon Jr., the appellant below, seeks review of the Court of Appeals decision, State v. Shannon, noted at ___ Wn. App. 2d ___, 2022 WL 18738, No. 80576-2-I (Jan. 3, 2022).[1]

B. ISSUES PRESENTED FOR REVIEW

At trial, Mr. Shannon presented a self-defense theory to the jury that relied in part on racial dynamics between him (Black) and the complainant (white). Mr. Shannon testified he thought the complainant was an undercover police officer and feared for his life, counsel's cross examination of the state's witnesses and the defense case-in-chief highlighted that the complainant and his friends seemed to harbor prejudice against Mr. Shannon and his friends, and his counsel argued in summation that, based on the way a young Black man

[1] Pursuant to RAP 13.4(c)(9), the Court of Appeals slip opinion is appended to this petition and cited accordingly.

experiences the world, Mr. Shannon's perception of a deadly threat and his reaction were objectively reasonable.

Mr. Shannon attempted to elicit testimony from the complainant that he and his friends talked after the incident and said that the whole thing started because someone said, "get out of here white boy" to the complainant or called him "white boy." The trial court excluded this evidence based on the state's hearsay objections and, puzzlingly, because it involved a postincident conversation rather than conversation contemporaneous with the shooting incident.

The Court of Appeals did not meaningfully address the trial court's bases for exclusion. Instead, despite Mr. Shannon's reliance on race in his defense, the Court of Appeals held the excluded evidence was irrelevant and therefore Mr. Shannon had failed to show a manifest constitutional error.

1. Because the excluded evidence was highly corroborative of and therefore relevant to Mr. Shannon's self-defense theory that relied on racial dynamics—confirming that

those racial dynamics were at play on both ends of the equation—did excluding the testimony violate Mr. Shannon's constitutional rights to present evidence in his defense and should the Court of Appeals decision be reviewed as both an important constitutional issue (RAP 13.4(b)(3)) and a matter of public importance (RAP 13(b)(4)), as the decision erroneously diminishes the presentation of race evidence in the courts?

2. Given that the defense objected to the excluded evidence and race was obviously at issue in Mr. Shannon's trial, does the Court of Appeals decision conflict with Washington Supreme Court precedent on the manifestness of a constitutional error, such that review should be granted pursuant to RAP 13.4(b)(1)?

C. STATEMENT OF THE CASE

1. The February 4, 2018 incident

In the early morning hours of February 4, 2018, Mr. Shannon, Tiffani Dejohnette, and their other friends were hanging out and playing darts in the back of a bar in downtown

Renton. RP[2] 858, 919-20. Mr. Shannon is a young Black man. Mr. McKnight, who is white, was in the same bar with a group of his white friends and was in the same back area playing a punching arcade game. RP 434-35, 542-43, 686.

At some point, Mr. McKnight started "just looking at" Mr. Shannon's group, and then approached the group and said something to the effect that they looked like a "sinister" group. RP 870, 929. Mr. Shannon was taken aback, Mr. McKnight continued speaking to them, and when Mr. Shannon implied Ms. Dejohnette was not listening to him, Mr. McKnight took offense and got aggressive. RP 930-31. Ms. Dejohnette described Mr. McKnight as trying to start a fight. RP 871. Mr. McKnight acknowledged he remembered saying Mr. Shannon's group being sinister. RP 545-46.

Mr. McKnight stated to Mr. Shannon that they should go outside and Mr. Shannon said, "Let's go," and they left the bar.

[2] Mr. Shannon refers to the consecutively paginated 1150-page trial transcript as "RP." No other transcripts are referenced in this petition.

RP 931, 933. Ms. Dejohnette said Mr. McKnight said, "if they wanted to talk like men, then they should go outside." RP 872. Mr. Shannon said he intended to talk this man down because he did not understand what was wrong. RP 937-38.

When Mr. McKnight was behind Mr. Shannon outside the bar, Mr. Knight told him to "freeze motherfucker." RP 940. Mr. McKnight took the posture as though he were reaching for a weapon on his hip and, based on his words and behavior, Mr. Shannon thought that Mr. McKnight might be an undercover cop. RP 939-41. Mr. McKnight said, "Don't fucking move" and threatened to blow his head off. RP 941. Mr. Shannon explained that he feared for his life and that any movement or gesture he made would result in his death. RP 941

Ms. Dejohnette followed them out shortly after. RP 872. She said Mr. McKnight was screaming he would "shoot him in his fucking face" repeatedly at Mr. Shannon. RP 876. Ms. Dejohnette went back inside and told Mr. McKnight's friend

Richard Durant that the conflict outside was growing "heated." RP 439-40.

Mr. Durant headed outside and heard loud voices. RP 442. He said he saw Mr. Shannon and Mr. McKnight three or four feet apart, it sounded like Mr. McKnight was asking Mr. Shannon a question, and then saw Mr. Shannon fire on Mr. McKnight. RP 443-44. Mr. Durant described Mr. Shannon as acting, "without any thought process. Like, it was second nature." RP 444.

Mr. Shannon testified that when Mr. Durant approached, he saw an opportunity to escape Mr. McKnight because Mr. McKnight looked away toward Mr. Durant. RP 943. Mr. Shannon at that point took his gun out from his waist and fired multiple times on Mr. McKnight. RP 877, 943-44.

Mr. McKnight said he remembered being outside the bar, turning around, and seeing Mr. Shannon close behind him. RP 549. Mr. Shannon was "messing around" with his belt and thought Mr. Shannon had a knife. RP 459. Mr. McKnight froze,

said "whoa" multiple times and then Mr. Shannon started shooting; it all happened quickly. RP 449-50.

Mr. McKnight stumbled back toward the bar, was bleeding, and people started administering aid. RP 445, 504. He sustained gunshot wounds to his thumb, arm, face, torso, buttocks, and spine. RP 560-66.

Mr. Shannon left the scene, telling witnesses to call 911 and believing that they would fairly express what happened to police. RP 944, 976-77. He described feeling a flurry of emotions over believing that he was going to be killed and having shot someone. RP 945, 973. He walked away approached a random vehicle, and told the driver that someone had just tried to kill him, he had to shoot him, and he needed a ride to his cousin's; the driver took Mr. Shannon to his cousin's. RP 946.

2. The excluded "white boy" evidence

During the cross examination of Mack McClinton, one of Mr. McKnight's friends who was there that evening, defense counsel tried to elicit that someone had told him that the whole

dispute between Mr. McKnight and Mr. Shannon started over someone telling Mr. McKnight, "Get out of here white boy" or calling him a "white boy." RP 708-09. The state objected based on hearsay, speculation, and facts not in evidence, and the trial court sustained the objections based on hearsay, thereby excluding the evidence. RP 708-09. When defense counsel later addressed the evidence, the court also stated it was not admissible because the evidence pertained to postincident conversation rather than something that happened at the time of the incident. RP 712-13. The trial court gave no legal basis for this exclusion.

3. The racial dynamics self-defense theory presented by Mr. Shannon

During voir dire, the issue of race was discussed several times, including the impact that having a Black defendant and a white complainant might have on ensuring a fair trial; jurors expressed varying views on race, prejudice, and bias and whether it would, could, or should have an impact on a criminal prosecution generally or on this prosecution in particular. RP

216-20, 234-47, 270-72, 282-88. In summation, the defense reminded jurors of these discussions and argued, "there are racial dynamics at work in this situation, and you can see them on the video. You can seem them in this case." RP 1071, 1076-77. Defense counsel argued that a "young black man experiences the world differently than a young white man. It's a very straightforward proposition." RP 1077. Counsel emphasized the need to view the situation from Mr. Shannon's perspective:

> But you also have to ask yourself whether or not that perspective is reasonable in light of everything that he knew. And everything that he knew includes a lifetime of growing up black in America. And maybe that puts him a little more on guard. Maybe if -- if somebody came up to you and pulled out keys and said they were going to blow your head off, maybe you might not be worried. Maybe you'd laugh and say, "Those are keys, dude."
>
> But Steven Shannon didn't have that luxury in that dark parking lot that night.

RP 1078. Defense counsel also argued, "when the person doing it is a white man and you are a young black man, it might make the threat more realistic to you. It might mean that you're less

likely to laugh it off, and you need to take that into consideration." RP 1079.

Racial tension was also implied through the testimony. Mr. McKnight's and Mr. Shannon's interaction started because Mr. McKnight kept staring them down and then approached them to tell them they looked sinister. RP 870, 929. Mr. McKnight's friend Mr. Durant said he would not associate with the "type of people" in the back of the bar where Mr. McKnight encountered Mr. Shannon's group of (Black) friends. RP 474. Mr. Durant also described the shooting in an interesting way, as Mr. Shannon acting "without any thought process. Like, it was second nature." RP 444.

Mr. Shannon's testimony was central to this theory as well, describing that he thought he was being threatened by white undercover police officer telling him to "freeze motherfucker" and assuming a law enforcement type arming posture; Mr. Shannon testified he needed to hold perfectly still or would be

shot and killed based on Mr. McKnight's words and conduct. RP 939-41.

4. Appeal

The jury returned a guilty verdict on first degree assault, including a firearm special verdict. RP 1112-14; CP 63-64. The trial court imposed a standard range sentence of 108 months, a 60-month firearm sentence enhancement, and 36 months of community custody. CP 42-43; RP 1146-47.

Mr. Shannon appealed. CP 63. He argued, among other things, that the trial court erred by excluding the "white boy evidence," and that the exclusion violated his Sixth Amendment and article I, section 22 rights to cross-examine witnesses and his right to present relevant evidence in his defense. Br. of Appellant at 13-25.

The Court of Appeals rejected Mr. Shannon's arguments by concluding that only Mr. Shannon's state of mind was at issue in the self-defense case. Shannon, slip op. at 7. It concluded that the state of mind of Mr. McKnight or his associates were not

relevant to Mr. Shannon's self-defense claim. Id. at 7-8. And, because Mr. Shannon did not present evidence that he heard or made the "white boy" statement, the evidence was not probative to Mr. Shannon's state of mind. Id. at 8. The Court of Appeals concluded that Mr. Shannon failed to raise a constitutional issue and that even if he had, he has not shown prejudice. Id. It reasoned that because Mr. Shannon was permitted to present and argue other race-related evidence, the error in excluding the "white boy" evidence was not manifest. Id.

D. ARGUMENT IN SUPPORT OF REVIEW

The "white boy" evidence was highly relevant to Mr. Shannon's self-defense theory because it confirmed his perception that racial dynamics were at play, whether he personally heard the statement or whether the statement was even ever spoken

The Sixth Amendment to the United States Constitution and article I, section 22 of the state constitution guarantee accused persons the right to a complete defense and to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v.

Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Orn, 197 Wn.2d 343, 347, 352, 482 P.3d 913 (2021). "Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 315. The more essential the witness is for the prosecution, the more latitude the defense should be given to explore motive, bias, credibility, or foundational matters. State v. Orn, 197 Wn.2d 343, 354, 482 P.3d 913 (2021); State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Cross-examination to confront a witness's bias is particularly important. Davis, 415 U.S. at 31.

The question whether the trial court's evidentiary ruling violated Sixth Amendment rights is reviewed de novo. Orn, 197 Wn.2d at 350. If a claim is raised under evidence rules, it is reviewed for abuse of discretion. Id. at 351. However, if the trial court misapplies the legal standard or misunderstands the law, it necessarily abuses its discretion by denying a criminal defendant's constitutional rights. Id.

The three-part framework developed in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), is the controlling framework. Orn, 197 Wn.2d at 353. That framework asks (1) if the excluded evidence was minimally relevant, (2) whether the evidence was '"so prejudicial as to disrupt the fairness of the factfinding process at trial,"' and, "if so, (3) whether the State's interest in excluding the prejudicial evidence outweighs the defendant's need to present it." Id. (quoting Hudlow, 99 Wn.2d at 15). If the evidence is of at least minimal relevancy, the state must demonstrate a compelling interest in excluding it. Hudlow, 99 Wn.2d at 16. There is no compelling interest the state can show in excluding highly probative evidence that deprives the defense from presenting its version of the incident. Id. at 16-18; State v. Jones, 168 Wn.2d 713, 721, 230 P.3d 576 (2010).

The Court of Appeals stopped at the first step of the analysis.[3] It concluded the evidence was not relevant. Shannon,

[3] The Court of Appeals did not meaningfully address the trial court's bases for excluding the evidence, hearsay and based on

slip op. at 7-8. It reasoned that only a defendant's state of mind was relevant in a self-defense case. Id. at 7. Because Mr. Shannon had not heard the "white boy" statement, the court held the statement was not probative of Mr. Shannon's state of mind. Id. at 8.

The Court of Appeals is mistaken. Any evidence that corroborated Mr. Shannon's state of mind that racial dynamics were at play during the incident allowed him to fully present his version of events and a coherent defense theory. Although there was no evidence the statement influenced his state of mind at the time of the incident (or that the statement was even made), the defense argued race was a reasonable component of his state of mind at the time of the incident, and the "white boy" testimony

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when the conversation about the "white boy" comment occurred. RP 708-09, 712-13. The Court of Appeals seemed to accept the proposition that there was no basis to exclude the "white boy" statement based on hearsay because it went to Mr. McKnight's (and other's) state of mind under ER 803(a)(2). Shannon, slip op. at 7-8 & n.4. And if the prosecution can't demonstrate even a basic evidentiary error, it certainly cannot show that the excluded evidence would disrupt a fair factfinding process. See Br. of Appellant at 19-23.

shows that Mr. Shannon wasn't wrong or unreasonable in thinking so. It also corroborates some of the bias against Mr. Shannon Mr. McKnight and his friends exhibited, which in turn explains why Mr. Shannon might have reasonably felt, in a racial way, more on edge that evening. The excluded evidence would allow Mr. Shannon to rely on something beyond his own feelings and perceptions that race was a factor in the episode; Mr. McKnight felt it also and confirmed as much after the fact. This was highly probative defense evidence because it lends credibility to Mr. Shannon's overall self-defense theory, which depended not only on the racial dynamics of the situation but also on convincing jurors that racial dynamics were a reasonable part of the situation and should be taken into account to acquit Mr. Shannon.

Race was indeed an issue at trial, discussed a lot during voir dire, and focused on by the defense in eliciting evidence and arguing the self-defense standard to the jury. Mr. McKnight and his friends treated Mr. Shannon's group poorly, staring at them,

calling them sinister, and one of them saying he would not associate with "that type" of person. Mr. Shannon described being fearful for his life based on the language and the conduct of Mr. McKnight, believing he was perhaps an undercover police officer. Counsel urged the jury to consider the racial dynamics of the case, discussing Mr. Shannon's state of mind and how his perception of being confronted with a white man, perhaps a police officer, put him on edge differently because of his race, and reasonably made threats seem surer. Counsel asked the jury to consider what was reasonable in terms of the self-defense standard from the perspective of "growing up black in America." RP 1078.

Because race was a central component of Mr. Shannon's defense, all evidence that supported this theory or Mr. Shannon's credibility in presenting this theory was relevant. The right of Black defendants to fully present relevant race evidence in their defense presents an important constitutional question that the

Court of Appeals decided incorrectly, meriting RAP 13.4(b)(3) review.

As a broader policy matter, the defense should be given leeway to present evidence that helps frame the issue of race and place the facts of a case into a racial context or narrative. This is especially true in a time of increased focus on issues of racial justice and reform of some aspects of the criminal legal system. Mr. Shannon was denied an opportunity to present evidence that supported his racial perspective of the events to the jury in a self-defense case where his racial perspective was a large part of his defense. In addition to violating his constitutional rights, this matter is one of public interest because the Court of Appeals decision diminishes the value of race evidence presented in the courts. The decision should be reviewed per RAP 13.4(b)(4).

In addition, the Court of Appeals decision should be reviewed for another reason—its misapplication of RAP 2.5(a) and the Hudlow review standard that was recently reaffirmed in Orn. According to the Court of Appeals, even if Mr. Shannon is

correct that the exclusion was constitutional error, it was not prejudicial and therefore not manifest. Shannon, slip op. at 8. This is supposedly so because Mr. Shannon got to present other race evidence and arguments to the jury. Id. The Court of Appeals is saying that the "white boy" evidence coming from a state's witness would essentially just be cumulative.

The constitution demands more under Mr. Shannon's reading of Hudlow. Even if evidence is of just minimal relevancy, it still cannot constitutionally be excluded unless the state's interest in excluding it is compelling in nature. Hudlow, 99 Wn.2d at 16. The Court of Appeals identifies no compelling state interest or even any evidentiary bar to the "white boy" evidence. The Court of Appeals does not even address the evidentiary bases the trial court gave for the exclusion of the evidence in concluding its error was not manifest, but implies that hearsay is not a barrier. Shannon, slip op. at 7-8 & n.4. Once the relevancy is established and the state shows no compelling interest, the question of whether the error is harmless might

remain but this analysis occurs "*after* the court determines the error is a manifest constitutional error and is a separate inquiry." State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). In sum, the Court of Appeals fails to apply the correct analysis under Hudlow and conflates what should be addressed as constitutional harmlessness analysis with RAP 2.5(a) analysis. This merits RAP 13.4(b)(1) review in light of the conflict.

In addition, the Court of Appeals' manifestness analysis is in conflict with Kalebaugh. The error in excluding the "white boy" evidence was manifest because it was important in light of all the other race evidence presented and discussed at trial, particularly because it was only such evidence to come from a state's witness. The question of "prejudice" under RAP 2.5(a) boils down to practical and identifiable consequences: "'the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.'" Kalebaugh, 183 Wn.2d at 584 (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217

P.3d 756 (2009)). Given what the trial court knew—that racial dynamics and perceptions had already been discussed and would likely be discussed by the defense in arguing self-defense—the trial court knew enough to allow Mr. Shannon a full opportunity to explore the racial dynamics not only in his own case but through cross-examining the state's witnesses as well. Because the trial court should have perceived the importance of the evidence to Mr. Shannon's defense, the constitutional error is manifest in the record. The Court of Appeals' incorrect manifestness analysis in conflict with Kalebaugh also supports review. RAP 13.4(b)(1).

E. CONCLUSION

Because he satisfies RAP 13.4(b)(1), (3), and (4) review criteria, Mr. Shannon asks that this petition for review be granted.

DATED this 2nd day of February, 2022.

Per RAP 18.17(b), I certify this document contains 3,668 words.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN EDWARD SHANNON, JR, Appellant.	No. 80576-2-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — A jury found Steven Edward Shannon, Jr. guilty of assault in the first degree while armed with a firearm. Shannon contends for the first time on appeal that the trial court violated his state and federal constitutional rights to cross-examine and present a defense and that it violated his right against self-incrimination. He also claims he received ineffective assistance of counsel, the State engaged in prosecutorial misconduct, and the cumulative effect of the claimed errors denied him a fair trial. For the reasons discussed below, we affirm.

I. BACKGROUND

Around 12:30 a.m. on Sunday, February 4, 2018, Ian McKnight, a white male, and his friends Mack McClinton, Richard Durant, Scott Howell, and Loren[1] went to J.P.'s Barroom in Renton, Washington. McKnight went to the back of J.P.'s to play a video game. Durant accompanied McKnight because it was late

[1] The record lacks Loren's last name. He left J.P.'s before the incident and did not testify at trial.

and he felt the people in the back of the bar were "not the type of people I'd want to hang around."

Also around 12:30 a.m., Shannon, a black male, his friend Tiffany Dejohnette, and four other friends[2] met at J.P.'s to "relax a little bit," "play darts," and "have a few drinks." Shannon and Dejohnette sat at a table in the back.

Around 1:00 a.m., McKnight sat down at Shannon and Dejohnette's table. McKnight told them that they looked "sinister." Dejohnette thought McKnight was trying to "start trouble." She said she told McKnight "we were, like, good people. We were just coming together to play darts."

According to Shannon, McKnight kept talking to him and Dejohnette. He testified that he said to McKnight "something along the lines of, 'She's, like, not listening.'" McKnight responded, "Who the fuck is you talking to?" and "Do you want to go outside?" Shannon responded, "Let's go." Shannon later testified, "I wasn't really for sure what he was trying to go outside to do. . . . I was thinking maybe I could, like, calm him down because he seemed angry." McKnight got up from the table and Shannon followed him outside.

Dejohnette went outside too. On her way, she told Durant, "You might want to check on your friend. He seems kind of heated."

McKnight and Shannon were standing "[f]ace to face" around the corner from J.P.'s entrance. Dejohnette said she heard McKnight say he was going to shoot Shannon "in his fucking face." Dejohnette tried to call to Shannon but he

[2] The four other friends were Xavier, Boyon, Ben, and Travis. The record is unclear on their last names, and they did not testify at trial.

appeared to ignore her; McKnight also did not acknowledge her presence. She asked Durant if he was friends with McKnight and Durant said that "he was going to handle it." So Dejohnette went back inside. Durant also tried to get McKnight's attention by calling his name repeatedly. He testified that it "sounded like [McKnight] was asking [Shannon] a question."

Shannon testified as follows: He saw McKnight reach "towards his side in, like—kind of like in a police manner to where they, like, get ready to pull their firearm and tell you to freeze." He thought McKnight was an "undercover" or "off-duty police officer." He also thought McKnight had a gun. McKnight said, "Freeze, motherfucker." Shannon put his hands up. He said McKnight "threaten[ed] me and let me know he'd blow my head off and he'd kill me if I moved wrong" and said, "Don't fucking—don't move. I'll shoot you right now." When Durant called McKnight's name, McKnight "finally took his focus off me and I was able to do something about the situation I was in." Shannon then pulled his gun from his waistband and shot McKnight five times.

McKnight testified as follows: While outside, he saw Shannon "motioning" towards or "messing around with. . . his belt." McKnight said that he thought Shannon had a knife. He said, "I froze." He put his "hand out and said, 'Whoa, whoa, whoa. Stop.' Or something like that." Then Shannon started shooting. But McKnight never saw the gun.

McKnight also testified that he had nothing in his hands and he did not reach for anything during the incident. He did not have a firearm, but he did have

a folding knife clipped in his right pocket. He said the "metal clip would be exposed."

Durant testified that he saw nothing in McKnight's hands. He said that at first Shannon's hands "were in his pockets." He said that he then saw Shannon "pull out a gun and shoot [McKnight]" and it looked like Shannon shot McKnight "without any thought process. Like, it was second nature."

Shannon also testified as follows: After he shot McKnight, "I proceeded to walk across the street. And as I'm walking across the street, there was people standing in the smoking area. And I pointed at them and said, 'Somebody call the police. This guy just shot to kill me.'" Shannon approached "a stranger" in a parked SUV and said, "He just tried to kill me. I ended up shooting him, and I have to get to my cousin's house. I'll give you some money, but I need to get out of here." The driver responded, "Hop in."

Multiple witnesses saw Shannon walk across the street and get into the SUV. The driver took Shannon to his cousin's house in Federal Way, Washington, and the next day Shannon went to another cousin's house in Portland, Oregon.

Shannon learned there was a warrant for his arrest and that he was mentioned as a fugitive on a television show. He said he tried to save money for adequate legal counsel. He also said that he talked with a few lawyers who advised him not to talk to law enforcement, so he did not make a statement.

The State charged Shannon with assault in the first degree in April, and added a firearm enhancement by amended information in September. Law

enforcement did not locate and take Shannon into custody until December, about 10 months after the incident.

At trial, Shannon claimed self-defense. A jury found him guilty of assault in the first degree while armed with a firearm. He appeals.[3]

II. ANALYSIS

A. Exclusion of "White Boy" Evidence

For the first time on appeal, Shannon says the trial court violated his rights under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington State Constitution to cross-examination and to present a defense when it precluded defense counsel from asking McClinton if McKnight or Durant told him the incident started because someone said to McKnight, "Get out of here white boy." Shannon contends the "white boy" evidence reflects racial dynamics, which support his self-defense theory. But the exclusion of that evidence was not prejudicial to Shannon.

1. The Questioning at Issue & the Trial Court's Ruling

On cross-examination, defense counsel asked McClinton, "And you also remember that somebody told you that the whole thing started because somebody said something to the effect of, 'Get out of here white boy[]?'" The State objected on hearsay grounds, which objection the trial court sustained. Defense counsel responded, "Your Honor, [this] doesn't go to the truth of the matter asserted. It goes to the mindset of the group of people discussing the issue." The State then objected that the question raised "facts not in evidence."

[3] This opinion discusses additional facts below as necessary.

The trial court sustained that objection. Defense counsel asked McClinton if he talked about the incident with McKnight and Durant, and McClinton said, "[O]bviously it came up once, but no one really wanted to talk about it a whole lot." Defense counsel then asked McClinton, "[Y]ou think that either [Durant] or [McKnight] told you that the whole thing started because someone called [McKnight] a white boy; right?" The State objected that the question called for speculation, but the trial court sustained on hearsay grounds.

Later, outside the presence of the jury, defense counsel said,

> The purpose of that question is not to elicit hearsay because I don't—I'm not offering it for the truth of the matter asserted. I don't believe that statement was made. But I believe it goes to the state of mind of Mr. McClinton, Mr. Durant, and Mr. McKnight that they discussed that as the reason.

The trial court responded, "Thank you. Your record is complete. I am sustaining the objection." At no time did Shannon object on constitutional grounds.

2. RAP 2.5

Generally, we will not consider issues raised for the first time on appeal. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019). RAP 2.5(a)(3) provides an exception to that rule when the appellant raises a "manifest error affecting a constitutional right." To raise such an error, Shannon must identify a constitutional error and show how the error actually prejudiced his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007). "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Shannon contends the trial court violated his Sixth Amendment and article I, section 22 rights to cross-examine and to present a defense.[4] He contends the "white boy" statement was relevant to McKnight, McClinton, and Durant's states of mind, which was relevant to his self-defense theory that he acted because he thought those individuals held "racial animus or discomfort."

"In considering a claim of self-defense, the jury must take into account all of the facts and circumstances known to the *defendant*. . . . such evidence is admissible to show the defendant's reason for fear and the basis for acting in self-defense." State v. Burnam, 4 Wn. App. 2d 368, 361, 421 P.3d 977 (2018) (emphasis added) (citations omitted) (internal quotation marks omitted). While a defendant has a right to cross-examine and present a defense, that right is not absolute: "[A] defendant has no right to present irrelevant evidence." State v. Orn, 197 Wn.2d 343, 352, 482 P.3d 913 (2021). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401.

Shannon does not show how McKnight, McClinton, and Durant's states of mind were relevant to his self-defense claim. By claiming self-defense, Shannon

[4] The State contends the invited error doctrine precludes review of this claim. The doctrine precludes review when the "'defendant affirmatively assented to the error, materially contributed to it, or benefited from it,'" even if that error raises a constitutional issue. In re Pers. Restraint of Salinas, 189 Wn.2d 747, 755, 408 P.3d 344 (2018) (emphasis omitted) (quoting In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014)). The State says that the doctrine applies because defense counsel told the trial court that he was not eliciting McClinton's testimony for the truth of the matter asserted and is now arguing that the testimony was admissible for the truth of the matter asserted. To the contrary, consistent with his argument at trial, on appeal, Shannon argues the testimony is admissible under ER 803(a)(2) as evidence of a then existing state of mind. So the invited error doctrine does not apply.

put his own state of mind at issue. And the evidence at issue was not probative as to Shannon's state of mind because no evidence shows that he heard the "white boy" statement. Thus, Shannon does not raise a constitutional error.

Even if Shannon did raise such an error, he does not establish that excluding the "white boy" evidence actually prejudiced his rights at trial. First, the evidence was irrelevant and thus not probative as to his self-defense. And second, the trial court's ruling did not prevent Shannon from eliciting other evidence that could relate to racial dynamics or using evidence of racial dynamics in closing argument. For example, Shannon contends that McKnight's "sinister" comment suggests "potential racial animosity." And during closing argument, defense counsel discussed racial dynamics: "[T]he reality is there are racial dynamics at work in this situation." He said, "A young black man experiences the world differently than a young white man. . . . This case really is about different perspectives. . . . We've got different perspectives from different groups of people, different friend groups, different races, [and] different ages." He said that "when a person [threatening to blow your fucking head off] is a white man and you are a young black man, it might make the threat more realistic to you." Because the evidence was not probative to Shannon's state of mind and the court did not prevent Shannon from eliciting other evidence that could relate to racial dynamics, the alleged constitutional error was not manifest and Shannon cannot raise it for the first time on appeal.

B. Evidence of Prearrest Silence

Also for the first time on appeal, Shannon says the State commented on his prearrest silence in violation of his right against self-incrimination under the Fifth Amendment to the U.S. Constitution and article I, section 9 of the Washington State Constitution.[5] The State responds that it used Detective Chris Edwards's testimony to explain why the incident occurred in February but law enforcement did not arrest Shannon until December. As discussed below, the State did not comment on Shannon's silence in violation of his right against self-incrimination.

[5] As for the Fifth Amendment, Shannon acknowledges that in State v. Magana, 197 Wn. App. 189, 194–95, 389 P.3d 654 (2016), abrogated on other grounds by State v. Johnson, 4 Wn. App. 2d 352, 421 P.3d 969 (2018), Division Three of this court recognized that under Salinas v. Texas, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), absent an express invocation of the right to silence, prearrest silence is admissible as evidence of guilt. He says that, to the extent that Division Three is correct, we should conclude that article I, section 9 is more protective with respect to prearrest silence than the Fifth Amendment by applying State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (providing six nonexclusive factors to determine whether the Washington State Constitution and the United States Constitution provide different protections for rights protected under both constitutions). Because we conclude that the State did not comment on Shannon's prearrest silence, we need not conduct a Gunwall analysis. State v. Parks, No. 78036-1-I, slip op. at 9 (Wash. Ct. App. Jul. 20, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/780361.pdf ("Because we conclude that the State did not improperly comment on Parks' prearrest silence, we need not conduct a Gunwall analysis."); see GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions."). Notably, in Magana, without conducting a Gunwall analysis, Division Three wrote, "Legally, this is not an area where our State's constitution affords greater protection that the federal constitution." 197 Wn. App. at 194–95; see also State v. Alvarez, No. 35567-5-III, slip op. at 3 (Wash. Ct. App. Jan. 23, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/355675_ord.pdf, review denied, 195 Wn.2d 1021, 464 P.3d 200 (2020) ("In balancing the Gunwall factors, we conclude that Washington Constitution article I, section 9 does not provide greater protections in this area than the Fifth Amendment to the United States Constitution."); GR 14.1(c).

1. The Testimony at Issue

Edwards investigated this case. He testified as follows: The day after the incident, he identified Shannon as a suspect. On February 8, Edwards tried to contact Shannon. He said, "I wanted to be able to talk to Mr. Shannon to get his side of the story so that I could paint a clear picture for the prosecutor's office." He tried to contact Shannon through his family, his friends, and his landlord. Edwards left Shannon many voice messages and Facebook messages. Shannon did not respond. On February 11, Edwards learned that Shannon might be in Portland and contacted law enforcement there for help finding him. On February 14, Edwards obtained another phone number for Shannon and tried to contact him again. Shannon did not return Edwards's call. At trial, Shannon did not object to any of this testimony on constitutional grounds.

In addition to evidence about Edward's investigation, the State introduced evidence that Shannon fled the scene. Durant, McClinton, and a bartender at J.P.'s testified that they saw Shannon walk across the street and get into an SUV. After the State rested, Shannon testified that after he shot McKnight, he left the scene because he was "[s]till terrified." He later learned there was a warrant for his arrest and he did not turn himself in. Law enforcement eventually located Shannon and took him into custody.

During closing argument, defense counsel said:

> I think it's been more and more clear that the biggest mistake Steven Shannon made that night was leaving the scene. You've heard that he regrets shooting Ian McKnight, and he agrees that he wishes he hadn't done it.

> I think you can also understand why, if he had stayed at the scene and explained what happened to the police that night, that we might not be here now.

2. RAP 2.5

Shannon says the State violated his right against self-incrimination when it elicited testimony that Edwards: (1) left many messages for Shannon that went unanswered and (2) wanted Shannon's statement before forwarding the case to the prosecuting attorney. For Shannon to raise this issue for the first time on appeal, he must establish a manifest constitutional error under RAP 2.5(a)(3). He does not do so.

Shannon contends the trial court violated his Fifth Amendment and article I, section 9 right against self-incrimination. But Shannon does not raise a constitutional error.

The Fifth Amendment and article I, section 9 protect criminal defendants' right to silence. State v. Pinson, 183 Wn. App. 411, 417, 333 P.3d 528 (2014). A defendant has a pre- and post-arrest right to remain silent. Id. But to rely on that privilege, the defendant must invoke the right to silence. Id. at 418. The two exceptions to this requirement—that a defendant need not take the witness stand to invoke the right and that a defendant subject to custodial interrogation or government coercion need not invoke the right—do not apply here. See id. "[T]he State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). No evidence suggests that Shannon received any of Edwards's messages or that Shannon knew that

Edwards tried to reach him. Because Edwards did not testify that Shannon was silent in response to a law enforcement inquiry, Shannon's nonresponse is not the type that the Fifth Amendment and article I, section 9 protect.

Given the foregoing, Shannon does not raise a constitutional issue reviewable for the first time on appeal.[6]

3. Ineffective Assistance of Counsel

Shannon says that his defense counsel was ineffective for failing to object to Edwards's testimony on his unresponsiveness.[7] The Sixth Amendment and article I, section 22 guarantee the right to effective assistance of counsel. We review ineffective assistance of counsel claims de novo. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To establish ineffective assistance of counsel,

> [A] defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 334–35. "There is a strong presumption that counsel's performance was reasonable." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177

[6] Shannon also says the State violated his right against self-incrimination during opening statements when it stated he fled for 10 months. The prosecutor said, "Now, after the shooting, Steven Shannon fled. And he wasn't located until months later in December of 2018 when he was arrested." The prosecutor did not, however, comment on Shannon's nonresponse to law enforcement. Thus, Shannon does not raise a constitutional issue.

[7] Shannon does not appear to claim that defense counsel was ineffective for failing to object to the State's comments in its opening statement.

(2009). Because Edwards's testimony was not a comment on Shannon's silence, Shannon's counsel was not deficient by failing to object.

C. Prosecutorial Misconduct

Shannon says a prosecutor engaged in misconduct by communicating with the jury while Shannon was testifying and during defense counsel's closing argument, and that this denied him a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 22 of the Washington State Constitution. But Shannon does not show a substantial likelihood that any such misconduct affected the jury verdict.

Prosecutorial misconduct may deprive a defendant of their constitutional right to a fair trial under the Sixth and Fourteenth Amendments and article I, section 22. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012). 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." Id. at 704. To show prejudice, the defendant must show "a substantial likelihood that the misconduct affected the jury verdict." Id. We review allegations of prosecutorial misconduct for abuse of discretion. State v. Wang, 5 Wn. App. 2d 12, 30, 424 P.3d 1251 (2018).

A court reporter transcribed the trial testimony from an audio recording. While this appeal was pending, Shannon's appellate counsel discovered that the transcript included multiple statements that one of the prosecutors made during

Shannon's testimony and defense counsel's closing argument.[8] The court held a fact-finding hearing on the matter.

During the hearing, the prosecutor testified, "It's my understanding that some comments that I made while at counsel table got picked up by the FTR and were transcribed into the actual transcript." The trial court said, "[I]f there were side conversations while argument was being made to the jury, no comment was objected to, or there was no indication that such comment or the substance of the comments were heard by anybody in the courtroom." Apparently, the microphone at the prosecutor's table recorded but did not amplify his statements.

[8] The prosecutor's first comment listed below occurred during the defense's direct examination of Shannon and his next six comments occurred during defense counsel's closing argument. The comments include the following:

(1) Defense counsel asked Shannon, "Why didn't you just stay and talk to the police?" While Shannon was responding, the prosecutor said, "I am going to ask him that."

(2) Defense counsel said, "The State of Washington has charged Steven Shannon with assault in the first degree for shooting [McKnight]. And now they stand here and tell you that they've proven to you beyond any reasonable doubt that Steven Shannon was acting in self-defense." The prosecutor said, "Wasn't."

(3) Defense counsel said, "Nobody remembers getting to the bar. Well, there's Ian in his good old boy sweatshirt holding the door," and the prosecutor said, "Good old boy sweatshirt. Wow."

(4) Defense counsel said, "You know that Mr. McKnight had something black and silver in his hands as he was threatening to shoot Mr. Shannon," and the prosecutor said, "What?"

(5) Defense counsel said that when Durant and Dejohnette were watching McKnight and Shannon's interaction, "[Dejohnette] said to [Durant], you need to break this up. That's what he remembers. He remembers her saying something to the effect of, 'Your friend's getting heated,' or, 'Is that your friend?'" The prosecutor said, "He needs to shut up."

(6) Defense counsel said that the "State said [Shannon] shot first and asked questions later," and the prosecutor said, "I did not say that."

(7) When defense counsel concluded his closing argument, the prosecutor said, "That's it?"

After the hearing, the court made four findings of fact:

1. The whispered comments by Mr. Soukup[, the prosecutor,] captured on the FTR recording during defense counsel's direct examination of the defendant and defense counsel's closing were not audible to the Court at the time.
2. Mr. Carter-Eldred, [defense counsel,] as noted in his declaration, perceived that Mr. Soukup was saying something at times during Mr. Carter-Eldred's closing argument but could not hear what he was saying.
3. The Court did not see anyone react or otherwise indicate that they heard the comments.
4. The Court finds that Mr. Soukup's testimony and Mr. Shannon's testimony were credible and made to the best of their respective recollections.

Because no indication exists that the jury heard the comments, Shannon cannot show "a substantial likelihood that the misconduct affected the jury verdict" and thus cannot show how any misconduct prejudiced him.

Shannon relies on Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954), to say the prosecutor's statements were presumptively prejudicial and the State cannot show the prejudicial misconduct was harmless. In Remmer, the U.S. Supreme Court wrote,

> In a criminal case, *any private communication, contact, or tampering directly or indirectly, with a juror* during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229 (emphasis added). Here, because Shannon does not show that any juror heard the prosecutor's statements, he fails to show that those statements prejudiced him.

D. Cumulative Error

Shannon says the cumulative effect of the alleged errors denied him a fair trial. The cumulative error doctrine applies in limited "instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). As discussed above, certain of the claimed errors—violation of Shannon's rights to cross-examination, to present a defense, and to silence—are not reviewable for the first time on appeal. Also, because Edwards's testimony did not violate Shannon's right against self-incrimination, defense counsel was not ineffective for failing to object to the testimony. And any prosecutorial misconduct was not prejudicial. Given the foregoing, the cumulative error doctrine does not apply.

We affirm.

Chun, J.

WE CONCUR:

Verellen, J.

Appelwick, J.

NIELSEN, BROMAN & KOCH, PLLC

February 02, 2022 - 4:24 PM

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