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NO. 101398-1

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DOMINIQUE JAMES AVINGTON,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Judge Jerry Costello

No. 18-1-04290-1

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The trial court denied Dominique Avington's request for a lesser included instruction on manslaughter. The court of appeals only considered one on Avington's claims related to that issue. It held that the trial judge did not improperly weigh evidence and make credibility determinations. Op. at 13, 15. Avington does not seek review of this decision.

Instead, Avington claims that, in determining a different issue related to the manslaughter instruction, the court issued a decision in conflict with case law. Pet. at 18, 26-27, 30 (citing RAP 13.4(b)(1), (2)). In fact, the court did not determine any other issue related to the lesser included offense. It refused to consider Avington's claim that a jury could find he reasonably believed that he needed to act in self-defense but recklessly used more force than was warranted. It found this claim was unpreserved and declined review under RAP 2.5(a). Op. at 13, n. 6.

Because this issue was not reviewed at all, it is not possible that the court's non-determination is in conflict with any case law. Discretionary review must be denied.

II. RESTATEMENT OF THE ISSUE

Where the court of appeals did not accept review of the Petitioner's particular claim and did not decide it, is there any credibility to the Petitioner's assertion that the way the court decided the claim conflicts with any case law?

III. STATEMENT OF THE CASE

Dominique Avington appeals from his convictions for murder by extreme indifference and three counts of assault in the first degree. CP 1-3, 19, 295-97.

A. Avington and his co-defendants were charged with extreme indifference murder for shooting 31 times at close range at a crowd gathered outside the entrance of a club, killing Terrance King and injuring three other people.

On October 20, 2018, Avington, Darry Smalley, Kenneth Davis and seven other men had been out drinking together at the New World VIP Lounge in Lakewood. 15RP 2311-15, 2317; 16RP 2426, 2457-59. After a short brawl inside the night club,

patrons streamed out to the parking lot. CP 16-17; 8RP 1214-15; 11RP 1729-30; 15RP 2346, ll. 15-19, 2349-51; 16RP 2490; Exh. 280, channel 6, subd 1259 @ 1:22:15-1:23:35. What happened outside the club was captured on the security videos of the businesses which shared the parking lot.

Davis was one of the first to race out. CP 17; Exh. 284 @ 3:20-4:10. He returned to an area just out of camera view. *Id.* Avington and Smalley exited shortly afterward and were captured on video flat-footed, close to each other, raising their arms, and firing multiple rounds into the crowd gathered outside the entrance to the club. CP 17; Exh. 283; Exh. 284 @4:35-5:06. Suddenly people were running in every direction from sustained gunfire. 8RP 1214-17 (20-30 shots), 1240, 1247-48, 1257; 9RP 1372; 11RP 1730; Exh. 280, channel 6, subd 1259 @ 1:24:10; Exh. 280, channel 15, subd 927 @ 1:24:05-21; Exh.s 282, 287.

Perry Walls, Terrance King, and Denzel McIntyre had been in the parking lot; they took cover inside the bar. Exh. 280, channel 11, subd 2124 @ 1:24:10-40. Walls was shot in the foot.

11RP 1732-33, 1754. McIntyre was shot through the leg and buttocks resulting in nerve damage. 8RP 1217-22. King was dead from a gunshot wound to the chest. 8RP 1218; 11RP 1599, 1605 (bullet entered from the back). Every bullet hit them from behind. 7RP 975-76.

Pearl Hendricks was leaving the bar at the time of the gunshots. 13RP 1981, 1983. She was shot four times and passed out in the club's doorway beside Walls. 11RP 1735, 1753; 13RP 1984-86 (shot in the ankle, hip, and twice in the back). The gunshots to her thoracic vertebrae permanently paralyzed her. 13RP 1987-88.

Police recovered fired bullets or fragmented bullets, the majority of which had impacted near the club door. 13RP 1997. They recovered 31 fired cartridge casings, which would have ejected in the vicinity of the three shooters. CP 259-61; 11RP 1638. Where Avington and Smalley had stood, police collected 24 casings, six from .40 Smith & Wesson and 17 from a 9mm Ruger. 11RP 1661-99. The remaining 7 casings (9mm Ruger)

were located at a location where Davis appeared to have run.

11RP 1640-43, 1651-61; 18RP 2694-95, 2844.

B. Avington's claim that he aimed away from everybody by shooting high and to the right was inconsistent with the video and ballistic evidence.

Unlike his co-defendants, Davis had not been captured on camera actually firing his weapon. CP 17. His defense was general denial, and the jury would acquit him. 1RP 32; 19RP 2930-31. Avington and Smalley testified that they were the shooters, but claimed they had acted in self-defense. 1RP 37-38, 53-54. They would be convicted as charged. 19RP 2928-32.

Smalley testified that he shot in defense of Avington admitting that he aimed at Walls, King, and McIntyre. 15RP 2373, 2375, 2404, 2429, 2431. He continued to shoot even as people fled with their backs to him or lay huddled inside the club doors. 16RP 2433-35.

Avington testified that he shot to "scare" Walls and to "prevent him from shooting or killing me like he said he would." 16RP 2499. He claimed he "aimed away from" everybody,

shooting high and to the right. 16RP 2501; 17RP 2580. Neither the ballistic evidence nor the video supported Avington's claim that he shot away from people. 17RP 2628.

C. The trial court declined to instruct the jury on manslaughter.

Avington and Smalley asked that the jury be instructed on manslaughter as a lesser included offense of extreme indifference murder. 17RP 2613.

The judge focused on the factual prong of the *Workman* test. 17RP 2620-21 (quoting *State v. Henderson*, 182 Wn.2d 734, 744, 33 P.3d 1207 (2015)). He observed the evidence of the shooting was "on video." 17RP 2623. The shooters were very close – only 20-35 feet away. 16RP 2494; 17RP 2627. From the video, it was apparent that Avington held the gun level, aiming at the people gathered at the front of the club. 17RP 2627-28. There were no barriers for the people to hide behind. 16RP 2525. There were "well over 20 people at extreme risk of being killed" with "a clear unobstructed line of fire" to at least 15 potential

homicide victims. 17RP 2624-25. Four people were hit by eight bullets. 17RP 2625-26.

The physical evidence in this case that I've been referring to demonstrates that all of the shots -- well, nearly all of the shots -- were directed towards that crowd. So the physical evidence undermines greatly the credibility of Mr. Avington's assertion that he did not aim at anybody in particular because the gunfire landed very close to or directly into the crowd.

....

...I have tried to view this evidence in a light most favorable to the defendants, but based on all these facts, I do not believe the jury in this case could rationally conclude that any of these defendants committed Manslaughter in the First Degree to the exclusion of extreme indifference murder, and, again, this presupposes that the shooting was not justified.

17RP 2628-29. The court declined to instruct the jury on manslaughter. 17RP 2622.

D. The court of appeals declined to review Avington's unreserved claim that the court should have instructed the jury on manslaughter under the theory that he recklessly used more force than necessary in defending himself.

With regard to the lesser included instruction, Avington made two claims on appeal. First, he argued that he was entitled

to the manslaughter instruction under the theory that he recklessly used more force than necessary in defending himself and that the trial court's failed to consider *State v. Coryell*.¹ Op. Br. of Ap. at 26-27, 30. And, second, he argued that the trial court had improperly determined Avington's credibility. *Id.* at 30.

The court of appeals only considered the second of these claims, i.e., whether the trial court improperly weighed evidence by making credibility determinations. Op. at 13. It held that it was proper for the court to consider the evidence which directly contradicted Avington's testimony that he had aimed high and to the right, and not at any human beings. Op. at 15. Avington does not seek review of this decision.

We hold that in light of the video evidence showing Avington standing square and shooting straight towards the direction of the bar entrance, where the victim and others were gathered, and Avington's stipulation that a photo admitted into evidence shows him standing square and firing multiple rounds from a semi-automatic handgun straight

¹ *State v. Coryell*, 197 Wn.2d 397, 483 P.3d 98 (2021).

towards the direction of the bar entrance where the victims and others were gathered, no reasonable jury would have been able to rationally find that Avington was acting recklessly as required for first degree manslaughter rather than with extreme indifference as required for first degree murder. Thus, the trial court did not err in failing to give the lesser included jury instruction on first degree manslaughter.

Op. at 1-2.

The court of appeals declined to review whether Avington was entitled to the jury instruction on manslaughter under the theory that he reasonably believed that he needed to act in self-defense but recklessly used more force than was warranted. Op. at 13, n.6.

...This specific argument is raised for the first time on appeal.

Under RAP 2.5(a), we may refuse to consider arguments raised for the first time on appeal. Although Avington objected to the trial court's decision to decline the first degree manslaughter instruction, he did not argue that he was entitled to the instruction because he recklessly used more force than necessary to defend himself. And the trial court's ruling was not based, in any way, on the theory that a first degree manslaughter instruction was appropriate because the use of force was recklessly more than necessary. Further, Avington does not address RAP 2.5(a)(3) or any exception to

waiver in his briefing. *See State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (when an appellant fails to provide argument or authority, this court is not “required to construct an argument on behalf of appellants”). Therefore, we decline to consider Avington’s argument raised for the first time on appeal that the trial court should have given the lesser included offense instructions because he recklessly used more force than necessary in self-defense.

Op. at 13, n.6.

Avington’s convictions were affirmed on appeal. Op. at 37. Avington claims that the court of appeals’ opinion is in conflict with *Coryell*.

IV. ARGUMENT

A. There is no conflict with *State v. Coryell* where, under RAP 2.5(a), the court of appeals declined to consider this claim which raised for the first time on appeal.

Avington asserts that the trial court’s decision (and the court of appeals affirmance of that decision) is in conflict with *State v. Coryell*, 197 Wn.2d 397, 414-15, 483 P.3d 98 (2021). Pet. at 1, 18-19, 23; Op. Br. of Ap. at 25-26, 30-31. Specifically, he claims that it was error for the trial court to query whether the lesser offense could have been committed “to the exclusion” of

the charged offense and should have found that a jury could find Avington recklessly used more force than necessary in self-defense.² Pet. at 1, 23 (citing 17RP 2622, 2629). However, it is impossible that the court of appeals opinion could be in conflict with any published opinion on an issue which it *declined to review*. Op. at 13, n.6.

Because this claim was not decided, the Petitioner can have no credibility when he claims the decision of the claim conflicts with any case law.

V. CONCLUSION

The State requests this Court decline review of this petition.

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² *Coryell* clarified that the proponent of a lesser included instruction is not required to disprove the greater charge or show that the greater charge was not committed. *Coryell*, 197 Wn.2d at 414-15.

This document contains 1,975 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of
November, 2022.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Gig Harbor, Washington on the date below.

11/15/2022
Date

s/ Kimberly Hale
Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 15, 2022 - 11:16 AM

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