NO. 101810-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRY DAQUAN SMALLEY,

Petitioner.

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

No. 18-1-04289-7

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Darry Smalley was tried together with co-defendant Dominique Avington. This Court has accepted review in *State v. Avington,* No. 101398-1 on a single issue regarding a lesser included offense. Although there are differences between the cases, the co-defendants' defenses were aligned. Therefore, it is appropriate to stay consideration on this issue until the co-defendant's case is resolved.

As to the remaining claims, Smalley does not demonstrate a conflict with any Washington case, a significant constitutional question, or a matter of substantial public interest. The Court should decline review on the remaining issues.

II. RESTATEMENT OF THE ISSUES

A. Whether this petition for review should be stayed pending a decision in *State v. Avington,* No. 101398-1?

B. Whether Smalley has demonstrated a RAP 13.4(b) consideration which would justify discretionary review on any of his remaining claims?

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III. STATEMENT OF THE CASE

Petitioner/Defendant Darry Smalley and nine other male companions were out drinking together in Lakewood in October of 2018. 15RP 2311-15, 2317; 16RP 2426, 2457-59. Events were captured from various angles both inside the New World VIP Lounge on security video and outside the club in the surveillance videos of businesses which shared the parking lot. CP 264; Exh.s 280, 283, 284.

The Lounge was unusually busy with "well over 100 people in and out that night." 9RP 1361; 15RP 2318-19. One of the men in Smalley's group initiated a brawl with Perry Walls. 11RP 1726-27, 1738-39; 16RP 2463, 2479, 2482-83, 2489; 17RP 2546-48; Exh. 280, channel 6, subd 1259 @ 1:21:20-.51. Walls was knocked unconscious momentarily by Thomas Cooper, and when he stood up, Walls found himself "in the middle of a fight" "getting hit all over the place" by Smalley and his codefendants. 8RP 1261; 11RP 1727-28, 1739-40; 15RP

2346, 2349-52; 16RP 2413-14; 17RP 2549; Exh. 280, channel 6, subd 1259 @ 1:21:53; Exh. 282.

The fight cleared out the club. Smalley's group either left the lounge of their own accord or were pushed out the door by bouncers. 8RP 1214-15; 11RP 1729-30; 16RP 2490; Exh. 280, channel 6, subd 1259 @ 1:22:15-1:23:35. Walls exited the club a little later. 16RP 2494-95; Exh. 280, channel 15, subd 927 @ 1:23:47-1:24:09. Behind him, night club patrons were streaming out to the parking lot to go home. 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.

Terrance King had been waiting in the parking lot to pick up his wife who had been working as a bartender. 8RP 1208; 9RP 1357-59, 1369. Recognizing Walls, King approached him with his friend Denzel McIntyre in tow. 8RP 1237-38, 1247; Exh. 280, channel 15, subd 927 @ 1:24:09; Exh. 283.

At this point, Smalley and two others fired multiple rounds into the crowd gathered outside the entrance to the club. Exh.

283, ch02_20181021012000, @5:14-5:42; Exh. 284 @4:37 (Smalley and Dominique Avington are visible standing flat-footed, close to each other, and with arms raised shooting). Avington was 20-30 feet away from Walls. 8RP 1214-15; 11RP 1729-30; 15RP 2346, ll. 15-19, 2349-51; 16RP 2490, 2494-95; 17RP 2627-28 (Walls was equidistant from Avington and Walls' escape via the club door); Exh. 280, channel 6, subd 1259 @ 1:22:15-1:23:35.

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. Walls, King, and McIntyre 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 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 co-defendant Kenneth Davis appeared to have run. 11RP 1640-43, 1651-61; 18RP 2694-95, 2844.

Charges and arrest: Smalley was charged with extreme indifference murder and three counts of first-degree assault. CP 44-46. He eluded arrest for four months. 13RP 1959-61, 1971-72. Smalley was captured in Oahu, carrying identification and travel documents in the name of Jahaud Washington. 13RP 1967-68, 1974-76. Parts of his dismantled gun were discovered on Redondo Beach, Des Moines. 9RP 1323-25.

Jury selection: The three shooters were tried in a single trial. When co-defendant Avington made a GR 37 challenge regarding Juror No. 32, the court and prosecutor[1] expressed consternation. 6RP 932-33. The judge asked, "To my observation, Juror No. 32 is not a person of color, not a minority. Why is there an objection to this peremptory?" 6RP 932. Avington claimed the juror appeared to him to have a "tan or natural melanin." 6RP 933. The prosecutor disagreed but noted,

[1] *State v. Orozco*, 19 Wn. App. 2d 367, 376, 496 P.3d 1215 (2021) (recommending that a party who believes a challenged venire member is not a person of color should "say[] so during the GR 37 discussion").

"You know, I'm half Puerto Rican. People wouldn't know that looking at me." *Id.*

The court ruled against the challenge, disagreeing with Avington's factual premise, i.e., that the juror belonged to some racial or ethnic minority. 6RP 934.

The self-defense testimony: Smalley testified that he ran to his car, armed himself with a gun, and crept back to the club while ducking behind parked cars. 15RP 2359-61, 2368. He saw Avington facing Walls. 15RP 2362. Smalley claimed he shot in defense of Avington after Walls displayed a gun. 15RP 2370, 2372, 2373 ("There's no doubt in my mind if Avington would have turned his back, he would have got shot"), 2375. Smalley admitted to shooting 16-17 times, aiming at Walls, King, and McIntyre. 16RP 2404, 2429, 2431. He continued shooting "until [the victims were] far enough to where … I felt safe enough to run." 15RP 2376-77.

Avington testified, Walls had called out to Avington's group in the parking lot, asking, "why you all running?" and

calling them "bitch-ass" N-words and cowards. 16RP 2494-95. Avington claimed that Walls then threatened to kill them, lifted his shirt, and "appeared to be reaching" for a gun. 16RP 2499-50. Avington said he shot six times "to scare [Walls] and prevent him from shooting or killing me like he said he would." 16RP 2499. He claimed he "aimed away from" Walls. 16RP 2501.

The defense was contradicted both by other testimony and video. The video shows that Walls, King, and McIntyre did not display any weapons; Walls only continued to pull at his sagging pants which were under his over-sized shirt. 8RP 1216, 1249; 11RP 1728, 1732; Exh. 280, channel 15, subd 927 @ 1:24:05-.09. Both Walls and Avington testified that all parties, themselves included, pulled at their loose-fitting pants in the club to posture that they were ready to brawl. 11RP 1727; 16RP 2477, 2482. This posturing is apparent in surveillance video prior to parties engaging in fist fights. Exh. 280, channel 6, subd 1259 @ 1:21:20-.45.

Walls, like all the other patrons, had been frisked by security before entering the club. 11RP 1722. He testified that he never had a gun or other object in his hands before the shooting started. 11RP 1732. No one testified that Walls removed a gun as Avington and his accomplices continuously fired 31 shots at him. Police officers tended to Walls' wound and did not report the presence of any weapon. 11RP 1754-55.

Smalley was convicted of extreme indifference murder and three counts of assault. 19RP 2928-32. He has not challenged his sentence on appeal.

IV. ARGUMENT

A. It is appropriate to stay review of the petition where this Court is currently reviewing a shared issue in the co-defendant's case.

Smalley challenges the trial court's refusal to instruct the jury on manslaughter. This Court has accepted review of this issue in the co-defendant's case (*State v. Avington,* No. 101398-1). Oral argument is scheduled for May 25, 2023. The decision in that case should inform Smalley's claim. Smalley and

Avington were tried together. Their defenses were similar but not identical. Avington claimed he shot wide six times to scare Walls and in defense of self. Smalley claimed he shot directly at the victims 16-17 times in defense of Avington. It is appropriate to stay review of Smalley's petition until the co-defendant's case is resolved.

B. Smalley's challenges to the sufficiency of the evidence do not demonstrate a conflict with any Washington case or a significant constitutional question.

Smalley seeks review of the court of appeals' decision holding there was sufficient evidence for the jury's verdict on extreme indifference murder and assault. Pet. at 17, 19. As to the murder, Smalley contends that his testimony that he intended to shoot three specific people precludes a jury finding that he acted with extreme indifference to the lives of more than 20 people. *Id.* It does not. The standard of review does not require the jury to believe the Defendant. *See State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014) (admits the truth of the *state's* evidence drawing inferences most strongly for the state

and against the defendant). He was charged with extreme indifference murder. And on the evidence, a rational jury could find beyond a reasonable doubt that Smalley manifested extreme indifference to the human lives that were put at grave risk by his actions. RCW 9A.32.030(1)(b).

As to the assault, he claims that it is possible that all of the four bullets which struck Ms. Hendricks came from two men who were inside the bar and not aligned with Smalley. Pet. at 19 (citing *State v. Jameison*, 4 Wn. App. 2d 184, 421 P.3d 463 (2018)). Again, that is not the standard. Also, the video evidence makes clear than neither of these two men could have injured Hendricks. *See* Ex. 280, ch. 11 at 1:24:10 (Hendricks is shot); Ex. 280, ch. 11 at 1:24:29 (first man stands in foyer with the fallen Hendricks and shoots out the door away from her); Ex. 280, ch. 9 at 1:24:40-42 (second man crosses barroom toward entrance 20 seconds after Hendricks is shot).

Smalley does not demonstrate a conflict with any case or raise a constitutional question. This issue does not present a basis for review under RAP 13.4(b).

C. The court of appeals' compliance with this Court's precedent in *Walden* and *Kyllo* does not present a RAP 13.4(b) consideration.

Smalley claims that a person may use disproportionate force in defense. Pet. at 21. This is not the law. "Deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injury.'" *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (quoting RCW 9A.16.050(1)); *accord State v. Kyllo*, 166 Wn.2d 856, 866-67, 215 P.3d 177 (2009). Defensive force cannot be greater than necessary.

The court of appeals' unpublished opinion in this regard does not conflict with any other Washington case or present a significant constitutional question.

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D. Smalley's demand that jurors be required to identify their race and ethnicity is not a matter of substantial public interest.

Smalley argues that GR 37 "does not just apply to challenges of members of cognizable racial or ethnic groups which have been the historic victims of discrimination." Pet. at 24. This ignores the challenger's complaint. Avington complained the prosecutor was excluding Juror 32, because she was not white but "mixed with something." 6RP 932. The judge, who is the finder of fact and whose factfinding has not been challenged, found that the juror was white. She was not of a minority race or ethnicity. Therefore, Avington's claim failed in its factual premise, and there was no prima facie claim of unfair exclusion based on race or ethnicity. The court did not proceed to GR 37(d) or (e), because GR 37(a) and (b) were not met.

Smalley urges that the court should require jurors to identify their race and ethnicity. Pet. at 26. Not only does this invite offense and disrespect for the courts, but it misses the point. The concern is not the juror's identity, but whether

exclusion was based on the striking party's *perception* of the juror's identity.

> We emphasize that GR 37 has to do with appearances, not with whether a juror actually identifies with a racial or ethnic minority group. In many cases, a trial judge will need to make a record about the apparent racial and ethnic makeup of a jury panel in order to facilitate review on appeal.

State v. Lahman, 17 Wn. App. 2d 925, 935, 488 P.3d 881 (2021). Smalley's proposal to amend the court rule to demand that jurors self-identify is not a matter of substantial public interest.

E. No significant constitutional issue is raised by the court's refusal to allow Smalley to recall a witness to offer cumulative and collateral testimony based on information Smalley independently obtained after she testified but could have obtained earlier.

Smalley claims the court's denial of his request to recall an excused witness raises a significant constitutional issue because he obtained "newly disclosed evidence" after her testimony. Pet. at 28. This misrepresents the record.

Erica Johnson had been the straw purchaser for Smalley's guns and had been prosecuted for it in the federal court. 12RP 1869-71, 1874, 1877-78, 1884. Prior to trial, the State had

provided the defendants with Johnson's redacted statement, which the State had received from the U.S. Attorney's office. RP14 2283. The State did not disclose anything further after Johnson testified. *Id.*

Johnson had been informed that she would be "greenlighted" if she testified. 12RP 1925-26. But she dispelled any notion that the defendants were behind the threat, explaining the defense had been eager for her to testify and that the only pressure had come from the prosecution. 12RP 1936-38.

The prosecutor asked Johnson if she remembered telling federal authorities that Smalley had been "bragging" about the shooting. 12RP 1896-97. Johnson claimed she had misspoken and that Smalley had only been "amped up." *Id*.

Smalley cross-examined Johnson twice. 12RP 1765, 1906-16, 1935-37. When he asked for a third opportunity based on the questions of his co-defendants, the request was denied. 12RP 1939-40.

The next day, Smalley contacted the U.S. Attorney. 14RP 2283. "And what it looks like is that Ms. Johnson said that he seemed like he was kind of bragging, and that's different from what she said on the stand." *Id*. In other words, he wanted to recall her so that she could clarify that she misspoke when she told federal authorities that Smalley was only "kind of" bragging. 14RP 2284 ("the specific thing that the State said, 'you said he was bragging,' well, she actually said kind of bragging."). It is a small distinction on a collateral matter in which the witness had already explained that Smalley had not been bragging at all.

Smalley misrepresents that this minor detail was "newly disclosed evidence." Pet. at 28. In fact, it is information which he obtained *independent* of the prosecutor in a phone call with the U.S. Attorney. Nothing prevented him from making that phone call before trial.

Smalley's challenge to the trial court's discretion under ER 403 does not raise a significant constitutional question.

F. Where the court of appeals found *no* prosecutorial error, Smalley's claim of *cumulative* error does not raise a consideration under RAP 13.4(b).

Smalley argues that cumulative prosecutorial error permits review. Pet. at 32. In fact, the court of appeals found no error. Unpub. Op. at 43. Smalley does not identify any conflict with a Washington case. He only disagrees with the court of appeals' decision. That disagreement alone does not raise a significant constitutional question or involve a matter of substantial public interest. There is no basis for review.

Smalley devoted the greater part of his opening brief to this claim. Op. Br. of Ap. at 51-75. The prosecutor's response was even longer. Br. of Resp. at 44-87. It urged the court "to consider the record carefully and each allegation separately, as this brief attempts to do," because "[e]ach allegation of prosecutorial error is either refuted in the factual record or in controlling law." Br. of Resp. at 86-87.

Smalley's claim of pervasive and egregious prosecutor error was belied by the absence of objections[2] from the three defendants and the failure of Avington's appellate counsel to identify any prosecutor error in the identical record. *State v. Avington*, 23 Wn. App. 2d 847, 849, 517 P.3d 527 (2022), *review granted in part,* 200 Wn.2d 1026, 523 P.3d 1177 (2023). The claim has also been rejected by two courts.

In a motion for mistrial, Smalley accused the prosecutor of being dismissive and demeaning, of opining on the

[2] Smalley misrepresents that his failure to object at various times throughout the trial is justified because, toward the very end of trial, the court instructed him to sit down. Pet. at 31-32; 16RP 2450 ("Overruled. Please be seated.") Smalley claims on appeal that, as a result of this instruction, his attorney expected the judge would hold him in contempt and send him to jail if he made any further objections. Pet. at 32. This is not the record. There was no threat of contempt. Counsel never claimed that he was afraid he would be held in contempt. And counsel continued to object both during the State's examination of the remaining witness and during closing argument and even repeated his objections in writing. CP 224-26; 17RP 2572, 2573, 2576, 2645; 18RP 2882, 2883. Despite this apparent willingness to object, for the most part, none of the three defense attorneys preserved objection to claims of prosecutorial error.

Defendant's credibility and guilt, of exploiting the office's prestige, of inflaming the jury's passions, and of employing "legal sleight of hand" to produce "a guttural response" from the jury. CP 223-26. The trial judge was not impressed with the Smalley's slurs, stating: "I am not finding any misconduct by the prosecutor during this cross-examination, none whatsoever." 17RP 2532-35. Smalley did not assign error to this finding. Unpub. Op. at 41.

Smalley asked the court of appeals to import into the prosecutor's innocuous words a sarcastic or mocking tone or to interpret them in the most offensive way possible. *See* Op. Br. of Ap. at 69-74. The court of appeals was not impressed. "Smalley's recharacterization of the facts does not establish that the prosecutors acted improperly." Unpub. Op. at 42.

Smalley does not show that his disagreement with the court of appeals' decision meets a RAP 13.4(b) consideration.

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V. CONCLUSION

The State requests this Court stay consideration of the first lesser included offense claim until resolution of *State v. Avington,* No. 101398-1. The State submits the other issues do not merit consideration under RAP 13.4(b).

This document contains 3,257 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of April, 2023.

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4/17/2023	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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