NO. 101810-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRY DAQUAN SMALLEY,

Appellant.

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

No. 18-1-04289-7

SUPPLEMENTAL ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517

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I. INTRODUCTION

Petitioner Smalley's petition for review was stayed pending resolution of *State v. Avington*, --Wn.2d --, 536 P.3d 161 (2023) in which this Court reviewed the same trial record on the issue of whether it was an abuse of discretion to deny the request for instruction on manslaughter. The Court's opinion approving of the trial court action also resolves Smalley's claim.

The trial court correctly applied the law and denied the instruction after resolving the preserved claim. And this Court declined to review a claim which it alone identified was not properly preserved.

II. RESTATEMENT OF THE ISSUE

> Whether the lesser included offense claim is foreclosed by this Court's decision in *State v. Avington*, the co-defendant's case regarding the same trial?

III. STATEMENT OF THE CASE

Petitioner Darry Smalley and his co-defendant Dominique Avington were captured on video standing flat-footed, close to each other, and with arms raised shooting multiple rounds into

the crowd gathered outside the entrance of a club. CP 17; Exh. 283, ch02_20181021012000, 5:14-5:42; Exh. 284 @4:37. They were tried together in a single trial.

Both defendants were charged with and convicted of extreme indifference murder inter alia. CP 44, 167, 286, 288, 367; 19RP 2928, 2931; Unpub. Op. at 23; *State v. Avington*, -- Wn.2d --, 536 P.3d 161, 167 (2023). Both argued that they acted in self-defense. CP 176; Unpub. Op. at 4; *Avington*, 536 P.3d at 166. Both appealed the trial court's refusal to instruct the jury on manslaughter as a lesser included offense. Unpub. Op. at 19; *Avington*, 536 P.3d at 168.

Smalley's petition for review maintains this claim and therefore was stayed pending *State v. Avington*, No. 101398-1 where the issue was "Whether the trial court abused its discretion by declining to instruct the jury on first degree manslaughter as a lesser included offense of first degree murder by extreme indifference in light of the evidence presented at trial." *Avington*, 536 P.3d at 168 (2023).

The decision has issued, affirming the trial court and court of appeals. *Avington*, 536 P.3d at 163-64, 172.

IV. ARGUMENT

A. *Avington* forecloses Smalley's lesser included claim.

Smalley's petition for review challenges the court of appeals' decision affirming the trial court's refusal to instruct the jury on manslaughter. Pet. at 7-15. With the issuance of this Court's opinion in the co-defendant's case, those issues are now foreclosed against Smalley.

1. The trial court correctly applied the "exclusion" language in a manner consistent with *Coryell.*

Smalley argues that the trial court used the wrong legal standard when it found that a jury could not rationally conclude that manslaughter was committed "to the exclusion" of extreme indifference murder. Pet. at 7-8. This reprises a claim that *State v. Coryell*, 197 Wn.2d 397, 483 P.3d 98 (2021) changed the legal standard. Op. Br. of Ap. at 17. Avington made the same claim. *Avington*, 536 P.3d at 169.

In fact, the legal standard has not changed. "*Coryell* did not disavow *Fernandez-Medina* nor did we suggest that a trial court's use of the word 'exclusion,' without more, necessarily indicates that the court applied an incorrect legal standard." *Id.*

The *Avington* opinion examined the identical record and held that the trial court applied the correct legal standard. *Avington*, 536 P.3d at 169-70.

> [T]he trial court properly engaged in a detailed analysis of the evidence in this case as compared to *Henderson*. *Coryell* did not abrogate *Henderson*, and we explicitly reaffirm that *Henderson* remains good law. Therefore, the trial court applied the correct legal standard when assessing *Workman*'s factual prong in this case.

Id. at 170. The decision in *Avington* resolves Smalley's claim. The claim is without merit.

2. An appellate court is entitled to decline review of claims that are not properly before it.

Smalley argues that a court's procedural rules only apply if invoked by a party and not when invoked by the court itself. Pet. at 11. This is not the law.

Both Avington and Smalley argued for the first time on appeal that they were entitled to manslaughter instructions because they needed to act in self-defense, but recklessly or negligently used more force than was necessary to repel the attack. *Avington*, 536 P.3d at 170 n.2; *State v. Avington*, 23 Wn. App. 2d 847, 859 n.6, 517 P.3d 527 (2022), *review granted in part*, 200 Wn.2d 1026, 523 P.3d 1177 (2023), *and aff'd*, 536 P.3d 161 (Wash. 2023); Unpub. Op. at 19 n.4. However, appellate review is of a lower court's decision. Where the defendants had not presented this question to the trial court, there was no decision to review. Accordingly, the court of appeals declined to consider it, noting:

> 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.

Avington, 23 Wn. App. 2d at 859 n. 6; *accord* Unpub. Op. at 19 n.4.

Smalley argues that, under RAP 12.1, only a party may challenge the scope of review under RAP 2.5(a). He is wrong. "The general rule is that appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). For a criminal defendant to obtain an exception to the general rule, the defendant "must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." *Kirkman*, 159 Wn.2d at 926–27. The onus is on the appellant, not the respondent or the court, to show why an exception should be permitted.

RAP 12.1 recommends (but does not mandate) that a court decide a case on the *issues* that the parties have discussed. But declining to consider an issue is not deciding an issue. And a court's consideration of issue preservation is not a separate "issue." The court of appeals did not raise a different issue. It *declined to consider* Smalley's and Avington's identified issue under the authority of RAP 2.5(a). Similarly, the supreme court

declined to consider the issue in the co-defendant's case because it was "not properly before us." *Avington*, 536 P.3d at 170 n.2 (citing RAP 13.7(b)).

Smalley cites several cases for the proposition that deciding a case on issues that the parties did not raise or discuss violates due process. Pet. at 10. But that is not what occurred here. Smalley raised an issue premised on a single per curiam decision resolved by a party's concession: *State v. Schaffer*, 135 Wn.2d 355, 358, 957 P.2d 214 (1998). Op. Br. of Ap. at 18-19. The State noted that Smalley was reading far more into the decision than was reasonable or fair. Br. of Resp. at 25 (noting the dearth of facts made the case impossible to compare with others). And the court of appeals declined to decide a claim that was neither preserved below and nor well supported above.

A court's observation that an issue has not been preserved for review is not deciding the case on a separate "issue." And the court has full authority to decline review under RAP 2.5(a) where the appellant fails to request and/or justify an exception to

the general rule. The court of appeals' decision to decline review does not present a consideration under RAP 13.4(b).

3. No affirmative evidence supports a manslaughter instruction.

Smalley argues that the factual prong of the *Workman* test was met. Pet. at 13. A party is only entitled to an instruction on a lesser included offense if "evidence in the case supports an inference that the lesser crime was committed." *Avington*, 536 P.3d at 168. There must be some affirmative evidence actually admitted; it is not enough that the jury might disbelieve or ignore some evidence. *Coryell*, 197 Wn.2d at 406–07, 415.

This Court found in *Avington* that there was no affirmative evidence which supported the giving of a manslaughter instruction. *Avington*, 536 P.3d at 170. Avington had argued that there was affirmative evidence in his testimony that he had not aimed at any person. *Id.* at 171. However, this was "irrelevant to the actual charges and the undisputed facts." *Id.* at 164, 171. Smalley's bullet killed Terrance King, an act in which Avington was complicit. *Id.* at 164, 171.

> Smalley further testified that **he fired over a dozen shots while aiming at three specific people, including King**. This evidence cannot support a lesser included offense instruction for manslaughter. Instead, **Smalley's testimony can be construed only as evidence that King was killed " '[u]nder circumstances manifesting an extreme indifference to human life ... [where the shooter] engages in conduct which *creates a grave risk of death*,' " as required for first degree murder**. *Henderson*, 182 Wash.2d at 743, 344 P.3d 1207 (first and second alteration in original) (quoting RCW 9A.32.030(1)(b)).

Id. at 171 (bolding added).

This Court's decision in *Avington* resolves Smalley's petition as to the lesser included claim.

V. CONCLUSION

The petition for review must be denied.

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RESPECTFULLY SUBMITTED this 20th day of November, 2023.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517
teresa.chen@piercecountywa.gov

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11-20-23	*s/Therese Nicholson*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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