No. 97625-2
Court of Appeals No. 35751-1-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PETER J. ARENDAS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Peter J. Arendas, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Arendas requests this Court grant review of the decision of the Court of Appeals, No. 35751-1-III (August 15, 2019). A copy of the decision is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

The Court of Appeals ruled Mr. Arendas committed trespass because he had been told to leave by a person in authority. Opinion at 7. The court also ruled, *sua sponte*, that an employee authorized to evict persons who did not have legitimate business on a premise also had authority to evict non-disruptive persons who did have legitimate business on the premise, even though the employee did not assert such unfettered authority. Where a premise is open to the public, it is a defense to a charge of criminal trespass that an actor complied with all lawful conditions imposed on access to or remaining in the premise. RCW 9A.52.090(2). In *State v. R.H.*, 86 Wn. App. 807, 939 P.2d 217 (1997), a commissioner entered a disposition of guilt of criminal

trespass when R.H. was in compliance with all conditions imposed on entering or remaining on a property but an employee ordered him to leave. On appeal, the court reversed the disposition and noted, "[u]nder this analysis, one would be guilty of trespass by returning to property after being unjustly ordered to vacate it. That, the law does not condone." 86 Wn. App. at 812. The reasoning in *R.H*. was adopted by the court in *State v. Green*, 157 Wn. App. 833, 852, 239 P.3d 1130 (2010). Does the court's ruling in the present case conflict with RCW 9A.52.020(9), *R.H.*, and *Green*, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

An Amtrak[1] train stops in Wishram twice daily. RP 272. An unmanned Amtrak waiting room is located inside a depot owned by Burlington Northern Santa Fe Railroad (BNSF). Ex. 11-14; RP 272. The waiting room is approximately eight feet by 15 feet, with a small bench, several chairs, and two vending machines. Ex. 18-21; RP 368. The room is open to the public 24 hours a day and is regularly used all

[1] The National Railroad Passenger Service Corporation does business under the name "Amtrak." www.amtrak.com.

night. RP 314, 369. A sign on the waiting room door reads, "No Loitering on This Property." Ex. 15, 16; RP 278, 367.

Peter J. Arendas purchased an Amtrak ticket departing on the next train at 7:30 the following morning. Ex. 29; RP 435, 437. Around 7:00 that evening, he went to the Amtrak waiting room and eventually fell asleep on the floor. RP 438-39.

Eric Young, a BNSF locomotive engineer characterized the waiting room as "a facility that's designed for people to be waiting to either depart or embark on Amtrak." RP 271, 288. He was authorized to take "further actions" if persons did not have legitimate business in the BNSF depot, including the Amtrak waiting room. RP 289, 292. Mr. Young explained his authority to have persons removed from the property stemmed from his status as a BNSF employee. RP 309. "[S]o when [BNSF employees] observe situations that cause concern – trespassers, kids spray painting, whatever – we are asked to call [a regional dispatcher].[2] That is the protocol." RP 311. He did not testify that he was authorized to have removed non-disruptive ticketed passengers waiting for a train.

[2] The regional dispatcher may contact local authorities to respond to the depot, as happened in the present case. RP 274.

Around 10:00 p.m., Mr. Young conducted a "courtesy walk around" of the Amtrak waiting room where he found Mr. Arendas alone and asleep on the floor of the otherwise empty room. RP 276-77, 292. Although no one had complained about Mr. Arendas, Mr. Young assumed Mr. Arendas was a non-ticketed transient person. RP 293. He testified, "[I]t wasn't like he was causing any kind of disruption, he was just trespassing." RP 297

Mr. Young never asked whether Mr. Arendas had a ticket. Rather, he immediately and loudly ordered Mr. Arendas to leave. RP 278 293.

> A I told him he needed to go.
> Q And why was that?
> A [W]e get a lot of transient activity, riders. For us, it's a safety issue. ... So, any time there's someone that's not there for railroad business or is employed by one of the companies, it causes concern on our part.
> Q And is that why it's marked no loitering?
> A That's correct.

RP 278. Mr. Arendas did not respond. RP 278.

Police were summoned and the responding officers found Mr. Arendas still asleep on the waiting room floor. RP 346, 361. Based on Mr. Young's complaint, the officers told Mr. Arendas to leave. RP 346, 372. According to the officers, Mr. Arendas was belligerent and hostile. RP 346-47, 372-73. Within five minutes of the officers' arrival, Mr.

Arendas was placed under arrest for criminal trespass. RP 372. As with Mr. Young, the officers never asked Mr. Arendas whether he had a train ticket or other legitimate business in the public waiting room.

Based on the above facts, Mr. Arendas was convicted of criminal trespass in the first degree. On appeal, Mr. Arendas argued the evidence was insufficient to prove beyond a reasonable doubt to a rational juror that he remained unlawfully in the waiting room. Br. of App. at 11-18. The Court of Appeals disagreed and affirmed the conviction. Opinion at 5-8. The court ruled, *sua sponte*, Mr. Young's authority to evict persons who did not have legitimate business in the waiting room additionally extended to all persons, regardless of their ticketed status and non-disruptive presence. Opinion at 7. Based on this assumption, the Court ruled Mr. Young's orders were sufficient to revoke Mr. Arendas's privilege to remain on the premises. *Id.*at 7-8. It may be noted, the court did not dispute Mr. Arendas's status as a ticketed passenger or that he was non-disruptive in the otherwise empty waiting room.

E. ARGUMENT

The Court of Appeals erroneously ruled that Mr. Arendas, a non-disruptive ticketed passenger, was required to promptly leave the train station simply because he was told to do so by a person authorized to evict persons who did not have legitimate business on the premises, contrary to RCW 9A.52.020(2), *R.H.*, and *Green*.

A person commits the crime of criminal trespass in the first degree when he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(2).

RCW 9A.52.090(2) provides a statutory defense:

> In any prosecution under RCW 9A.52.070 it is a defense that:
> ...
> (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; ....

When a defendant presents some evidence that his or her presence was permissible pursuant to RCW 9A.52.090(2), the State bears the burden of proving the absence of the defense beyond a reasonable doubt. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002), (citing *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983)).

In *R.H.*, a juvenile was charged with trespass when he returned to a restaurant after police officers told him to leave. 86 Wn. App. at 808. The restaurant owner allowed patrons to skateboard to and from his business, but he did not allow recreational skateboarding in the parking lot or loitering. *Id*. at 809. A restaurant manager who had "the authority to evict individuals" asked a group of young people who were loitering and skateboarding in the parking lot to leave but they did not, and the manager called police to disperse the group. *Id*. In the meantime, R.H. arrived by skateboard. *Id*. He planned to eat at the restaurant with a friend and he waited in the parking lot to meet his friend. *Id*. When police arrived, at the manager's request, the police ordered all the young people, including R.H., to leave. *Id*. R.H. did not believe the order applied to him because he had legitimate business on the premises so he returned to wait for his friend and he was arrested for trespass. *Id*. at 810. At the adjudication hearing, the commissioner ruled R.H.'s return to the property was unlawful because he had been ordered to leave, even though he was engaged in neither recreational skateboarding nor loitering, the two lawful conditions on access to the restaurant. *Id*. at 812. On appeal, the court reversed the adjudication and specifically disagreed with the commissioner's conclusion that the

juvenile was trespassing simply because he had been ordered to leave, and wrote, "[u]nder this analysis, one would be guilty of trespass by returning to property after being unjustly ordered to vacate it. That, the law does not condone." *Id*.

The reasoning in *R.H*. was adopted in *Green*, in which a public school excluded a parent from the premises of her son's school. 157 Wn. App. at 845. In reversing her conviction for criminal trespass in the first degree, the court ruled:

> We respect the right and obligation of the school district to exclude vexatious parents who disrupt the school or pose a risk of harm. ... But, we cannot sanction a criminal conviction for violations of restrictions contained in a letter constituting a notice of trespass absent a determination based on competent evidence that the restrictions were lawfully imposed and absent minimal notice of due process rights.

Id. at 852 (citing *R.H.*, 86 Wn. App. at 813).

Contrary to *R.H*. and *Green*, the Court of Appeals here ruled, "A reasonable trier of fact can conclude beyond a reasonable doubt that an individual knowingly remains unlawfully on premises when he has been told by someone in authority that he needs to leave and refuses." Opinion at 7. The court relied exclusively on *State v. Finley*, 97 Wn. App. 129, 982 P.2d 681 (1999), in which a bartender told a disruptive patron to leave, the patron left but returned within five minutes, the

patron was again told to leave, he refused, and police were summoned. 97 Wn. App. at 130-31. In the officers' presence, the patron was yet again told to leave the bar and never return. *Id*. at 131. The patron was escorted from the bar but again returned within minutes. *Id*. at 132. At trial, the bartender explained her authority to evict the patron. "My authority is that if anybody who is in there and I don't want them in there they have to leave, you know." *Id*. The court accepted the bartender's assertion of unfettered authority because it was unrefuted. *Id*. at 139.

In stark contrast, Mr. Young never asserted such unfettered authority to evict people from the waiting room. Rather, he testified, "so when [BNSF employees] observe situations that cause concern – trespassers, kids spray painting, whatever – we are asked to call [a regional dispatcher]. That is the protocol." RP 311.

No case interpreting RCW 9A.52.090(2) endows employees with unfettered authority to evict persons from public premises when that authority is not asserted by the employee. Accordingly, the decision in the present case conflicts with RCW 9A.52.020(9), *R.H.*, and *Green*, and involves an issue of substantial public interest that

should be determined by this Court. Pursuant to RAP 13.4(b)(2) and (4), this Court should accept review.

F. CONCLUSION

Contrary to RCW 9A.52.090(2), *R.H.*, and *Green*, the Court of Appeals affirmed Mr. Arendas's conviction for trespass simply because an employee with authority to evict trespassers mistakenly assumed he was a trespasser and ordered him to leave the premises. For the foregoing reasons, and pursuant to RAP 13.4(b)(2), (3), and (4), this Court should accept review.

DATED this 5th day of September, 2019.

Respectfully submitted,

s/ Sarah M. Hrobsky

_____

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APPENDIX

FILED
AUGUST 15, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 35751-1-III
Respondent,	)	
	)	
v.	)	
	)	
PETER JOHN ARENDAS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Peter Arendas was belligerent and defiant when ordered to leave a train depot in Wishram, a small town in Klickitat County, which led to charges and convictions for first degree criminal trespass and third degree assault. We affirm his convictions but remand with directions to correct his judgment and sentence to provide that a prohibition on contact with the Burlington Northern Santa Fe (BNSF) Railroad and its properties is a condition to his suspended sentence, not a condition of community custody.

FACTS AND PROCEDURAL BACKGROUND

Following a one-day jury trial, Peter Arendas was found guilty by a Klickitat County jury of first degree trespass and third degree assault. The evidence at trial included the testimony of Eric Young, a locomotive engineer for BNSF, that he

encountered Mr. Arendas sleeping on the floor of a small waiting room at the BNSF depot in Wishram late on an August night and told him twice, loudly, that he needed to leave. When Mr. Arendas did not respond to his first demand to leave, Mr. Young contacted BNSF's railroad police, who in turn contacted the Klickitat County sheriff. A sheriff's sergeant and deputy responded, allegedly with the intention to do no more than tell Mr. Arendas he had to leave and escort him from the property.

According to Mr. Young and Sergeant Fred Kilian, one of the responding officers, Mr. Arendas was alert, hostile, and belligerent immediately upon the arrival of the officers. Rather than heed their directives that he comply with Mr. Young's request that he leave, Mr. Arendas hurled profanities. After what Mr. Young estimated was five minutes of arguing with the officers, Mr. Arendas was arrested and placed in the back of a patrol car, where he continued to rant. At one point, when Sergeant Kilian reached into the driver's side of the front seat of the patrol car, Mr. Arendas spat in the sergeant's face, leading to the charge of third degree assault.

Mr. Arendas chose to represent himself at trial, with standby counsel. He defended against the trespass charge on the basis that he was a ticketed passenger for an Amtrak train scheduled to leave the following morning and was therefore not a trespasser. He denied that Mr. Young ever told him to leave the waiting room before two police officers and two others came "busting in through the door" to tell him he was

under arrest for trespassing. Report of Proceedings (RP) at 439. He denied ever spitting in Sergeant Kilian's face.

Before the trial, Mr. Arendas made several discovery-related motions. According to Mr. Arendas, he had traveled to Skamania County to see the "Great American Eclipse" on August 21, 2017, after which he planned to take a train to Salt Lake City but was delayed in leaving the area by medical problems. Because of difficulty accessing funds, he had arrived in Wishram on August 26 without money to pay for housing and had slept outside. He claimed that during his short time in Klickitat County, he was harassed by the sheriff's department and specifically by Sergeant Kilian. He moved the court to require the State to produce police records of his prior contacts with officers from the county sheriff's office, claiming they would help him establish a pattern of harassment and bias. The trial court denied the requests, finding that Mr. Arendas had not demonstrated the relevance of information about prior contacts.

Mr. Arendas also moved for the opportunity to view Sergeant Kilian's patrol car after he learned that one of the State's witnesses—a BNSF conductor who had been standing behind Sergeant Kilian's patrol car after Mr. Arendas was placed inside—claimed to have seen Mr. Arendas spit in Sergeant Kilian's face. Mr. Arendas said he wanted to view the patrol car's tinted windows, because he doubted the conductor could have seen into the interior of the patrol car late at night. The trial court denied the

motion, telling Mr. Arendas that he could cross-examine the conductor about his ability to see.

During the State's case, its witnesses included Mr. Young and the BNSF conductor. Mr. Arendas had served his own subpoenas on the BNSF witnesses. At the conclusion of the witnesses' testimony in the State's case, the prosecutor asked the trial court to quash Mr. Arendas's subpoenas so that the two witnesses could leave. When questioning by the trial court led it to conclude that Mr. Arendas had no further areas of questioning for the two witnesses, it quashed the subpoenas, citing its authority to control the mode of presenting evidence and to exclude cumulative evidence.

During a jury instruction conference following the conclusion of testimony, the State informed the court that it was no longer offering its originally-proposed instruction 13, which was based on a Washington pattern jury instruction that identifies statutory defenses to first degree criminal trespass, including a public premises defense. The trial court asked Mr. Arendas if he was asking the court to offer that instruction, and Mr. Arendas responded, twice, that he did not care if the instruction was given. The court excluded it. Mr. Arendas took no exception to the final jury instructions.

The jury returned its verdicts finding Mr. Arendas guilty as charged on the afternoon of the one-day trial.

At the time of his sentencing hearing, Mr. Arendas had been in custody for 84 days. Given an offender score of 0, he faced a standard range of 1 to 3 months for the

third degree assault, a class C felony, and 0 to 364 days for the criminal trespass, a gross misdemeanor. The trial court imposed 3 months for the assault and ordered 12 months' community custody. On the trespass charge, the court stated it would "post" 364 days but suspend 274 of the days "upon the condition that you do not have any contact with the Train Depot Station—Burlington Northern Santa Fe Depot Station down there." RP at 530. The court later clarified that the condition would extend to BNSF and all of its properties. In completing the judgment and sentence, the court included a handwritten notation of the prohibition of contact with BNSF in the section dealing with community custody.

The trial court imposed $800 in legal financial obligations that included the $200 criminal filing fee.

Mr. Arendas appeals.

ANALYSIS

Represented by counsel on appeal, Mr. Arendas raises seven assignments of error. We address them in the order presented, combining two challenges that are based on Mr. Arendas's right to present a defense and two challenges to the prohibition of contact with BNSF and its properties.

I. THE EVIDENCE OF CRIMINAL TRESPASS WAS SUFFICIENT

A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). "A person 'enters or

remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(2). A person remains unlawfully in a building by remaining after a license previously extended is specifically revoked, by someone with authority over the premises. *State v. Davis*, 90 Wn. App. 776, 781, 954 P.2d 325 (1998).

Mr. Arendas challenges the sufficiency of the State's evidence on the trespass count, relying on the fact that it is a statutory defense to trespass that "[t]he premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises." RCW 9A.52.090(2). Mr. Arendas contends that because he had a train ticket for the next departing train and the waiting room is open 24 hours a day, this "public premises" defense applied.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact on matters of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A conviction will be reversed only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Mr. Arendas's argument depends on his position that a "no loitering" sign posted on the door to the waiting room identified BNSF's only lawful condition to presence on its premises. But conditions to entering and remaining on premises can also be imposed by authorized agents of the proprietor, as this court recognized in *State v. Finley*, in which a bartender ordered a patron to leave a bar. 97 Wn. App. 129, 138, 982 P.2d 681 (1999). As this court also held in *Finley*, what an individual "understood" or "believed" about the lawfulness of his presence is not relevant to the public premises defense; the pertinent viewpoint is that of a rational trier of fact. *Id.* A reasonable trier of fact can conclude beyond a reasonable doubt that an individual knowingly remains unlawfully on premises when he has been told by someone in authority that he needs to leave and refuses. *Id.* at 139.

Mr. Arendas argues that to commit first degree criminal trespass one must "knowingly" enter or remain unlawfully in a building, and there was no evidence that he heard Mr. Young's two orders. But Mr. Young, a former gunnery sergeant, testified that he spoke loudly to Mr. Arendas, using his "command" voice, and he and the responding officers testified that Mr. Arendas was immediately alert once the officers appeared. The jury was not required to believe Mr. Arendas's claim that he never heard Mr. Young tell him to leave. Additionally, the testimony of Mr. Young and the officers was that Mr. Arendas was given additional opportunities to comply with Mr. Young's demand that he leave before the decision was made to arrest him. There was sufficient evidence from

which the jury could find that Mr. Arendas knowingly remained unlawfully in the waiting room.

II. GIVEN THE THEORY OF THE STATE'S CASE, WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 19.06 DID NOT APPLY

Mr. Arendas makes a related argument that it was error for the trial court to fail to give a Washington pattern jury instruction originally proposed by the State as its instruction 13, which it later withdrew. The pattern instruction identifies statutory defenses to first degree criminal trespass and the State's burden to disprove a statutory defense that arguably applies. Mr. Arendas argues for the first time on appeal that the public premises defense applied and required giving the pattern instruction in the following form:

> It is a defense to a charge of criminal trespass in the first degree that the premises were at the time open to members of the public and the defendant complied with all lawful conditions imposed on access to or remaining in the premises.
>
> The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

See 11 WPIC § 19.06, at 337 (4th ed. 2016). He argues that the failure to give the instruction was manifest constitutional error "in that it concerns the burden of proof, an issue of due process," and had practical and identifiable consequences in the trial. Br. of Appellant at 16-17.

As the instruction makes clear, if evidence is offered that might support the public premises defense, then the State bears the burden to prove the absence of the defense. This is because the defense negates the unlawful presence element. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002); *State v. Olson*, 182 Wn. App. 362, 375-76, 329 P.3d 121 (2014).

At no point in proceedings below did the State base its general charge of first degree criminal trespass on a contention that Mr. Arendas committed the trespass when he entered the waiting room. Its consistent position was that he committed trespass when he remained after being told by Mr. Young to leave, and after having his obligation to leave affirmed by Sergeant Kilian and the deputy. Sergeant Kilian's declaration in support of probable cause stated that he and the deputy responded to the Wishram depot after being told "that a BNSF employee (Eric Young) told the subject to leave twice but got no response." Clerk's Papers (CP) at 5. The declaration in support of probable cause described the events following the officers' arrival that led to the arrest:

> I told Arendas he was trespassed from the property and had to go. He began tying one of his shoes, but then continued to yell at all of us. I told him to get his stuff and leave now. He did not comply. I told him at least four, if not five times he had to go now. He continued to yell and would not comply. . . .

Id.

At trial, Mr. Arendas cross-examined the deputy sheriff who accompanied Sergeant Kilian about what constituted his trespass, and he received the following response:

> BY MR. ARENDAS:
>
> Q How did I trespass?
> A You were unwanted on the property of someone else.
> Q What was the basis of your reasonable investigation to determine that?
> A An employee from the railroad said that you had—or said that he had asked you to leave several times and you didn't respond to him.

RP at 350.

In finalizing the jury instructions, the trial court was aware that the only trespass alleged by the State was that Mr. Arendas defied Mr. Young's orders, even after Sergeant Kilian and the deputy affirmed that he was required to leave. That theory of trespass inherently negated the possibility that Mr. Arendas complied with lawful conditions imposed by BNSF. Because the public premises defense could not apply given the State's theory, the trial court did not commit error by accepting Mr. Arendas's position that WPIC 19.06 need not be given.

III. THE TRIAL COURT DID NOT DEPRIVE MR. ARENDAS OF HIS RIGHTS TO PRESENT A DEFENSE OR TO COMPULSORY PROCESS

A. Discovery

CrR 4.7 governs criminal discovery, including a prosecutor's affirmative disclosure obligations and certain additional disclosures that a defendant is entitled to

obtain from the prosecutor upon request and specification. CrR 4.7(a), (c). Otherwise, "[u]pon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of [other] relevant material and information." CrR 4.7(e)(1). Both threshold requirements—materiality and reasonableness—must be met before the court may exercise discretion in granting the request. *State v. Norby*, 122 Wn.2d 258, 266, 858 P.2d 210 (1993). A decision as to the scope of criminal discovery is within the trial court's discretion and will not be disturbed absent a manifest abuse of that discretion. *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993) (citing *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)).

A criminal defendant's *constitutional* right to disclosure of evidence is limited to evidence favorable to the defendant and material to guilt or punishment. *Id.* at 828 (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). If a defendant requests a disclosure beyond what the State is obligated to disclose, the defendant "must show that the requested information is material to the preparation of his or her defense." *Id.* "The mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial . . . does not establish 'materiality' in the constitutional sense." *State v. Mak*, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986) (alterations in original).

Mr. Arendas's briefing reveals his inability even now, and represented by counsel, to demonstrate that evidence of his prior contacts with sheriff's personnel were material to preparing his defense. His brief states that even "[t]he *relevance* of the reports could not be determined without a review of the reports," and that he requested the reports "*to investigate* whether the sheriff's office . . . engaged in a pattern of harassment and bias against him." Br. of Appellant at 21 (emphasis added). Mr. Arendas was a party to the prior contacts and was able to testify to his version of what occurred. He fails to demonstrate that the trial court manifestly abused its discretion by refusing to order disclosure of the State's records of those contacts.

As for Mr. Arendas's request to view Sergeant Kilian's patrol car, the State had already provided Mr. Arendas with photographs of the interior of the patrol car, and, in response to his motion, the trial court ordered the State to provide Mr. Arendas with a photo of the vehicle from the outside. As the court explained, the conductor's ability to see through tinted windows could be explored through cross-examination.

Mr. Arendas did challenge the conductor's alleged observations through cross-examination. The conductor repeatedly agreed that the rear window of the patrol car was tinted. Asked by Mr. Arendas how he could see through the tinted window in the dark and whether he had "flashlight eyes," the conductor responded, "There's lights in the parking lot." RP at 329. Mr. Arendas fails to demonstrate any respect in which his defense was hampered by denial of his motion to view the patrol car.

B. Compulsory process

Mr. Arendas contends that the trial court improperly quashed his subpoenas and released the BNSF witnesses after they testified and had been cross-examined in the State's case.

Both the federal and Washington State Constitutions guarantee criminal defendants a right of compulsory process. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. But a "defendant's right to present witnesses has limits." *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015). In exercising the right to present witnesses, a defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

We review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court. *State v. Clark*, 187 Wn.2d 641, 648, 389 P.3d 462 (2017). If the court excludes relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense. *Id.* at 648-49 (citing *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010)).

The trial court quashed the subpoenas and released the BNSF witnesses only after asking Mr. Arendas repeatedly whether he had areas of questioning beyond those already covered in his cross-examination. Mr. Arendas could identify none, but protested that he could not be sure without reviewing his notes. The trial court stated it would have the BNSF witnesses remain through the lunch recess, directing Mr. Arendas to review his notes and report back at 12:55 p.m. on any additional areas of questioning that remained.

When trial resumed following the recess, Mr. Arendas told the court he could not identify additional information needed "at this time," but stated, "I don't want to excuse the witnesses, that's just what I want to do. I don't want to excuse them." RP at 339-40. At that point, the trial court relied on its authority under ER 611 and ER 403 to quash the subpoenas.

Under ER 611(a), Washington courts have broad authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence," including to protect witnesses from harassment. Under ER 403, the court may exclude relevant evidence based on considerations of the needless presentation of cumulative evidence. The trial court did not abuse its discretion in applying the two rules. Because Mr. Arendas can identify no relevant evidence that was excluded, no Sixth Amendment issue is presented.

IV. THE LIMITATION ON CONTACT WITH BNSF OR ITS PROPERTIES IS PROPER AS A CONDITION TO MR. ARENDAS'S SUSPENDED SENTENCE ON THE TRESPASS CHARGE, BUT NOT AS A CONDITION OF COMMUNITY CUSTODY

Mr. Arendas argues that the condition that he have no contact with BNSF or its properties is unconstitutionally vague and is not crime related. He proceeds on the premise that the condition was intended as a discretionary crime-related prohibition under RCW 9.94A.703(3)(f). Under that provision, a court sentencing a person to a term of community custody shall impose conditions, which can include discretionary crime-related prohibitions. We review the "imposition of crime-related prohibitions for abuse of discretion." *State v. Cordero*, 170 Wn. App. 351, 373, 284 P.3d 773 (2012).

The trial court was authorized by the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), to order community custody in connection with Mr. Arendas's sentence on the assault count, since third degree assault is a crime against a person under RCW 9.94A.411. RCW 9.94A.702(1)(c). But the trial court was not authorized to order community custody in connection with the criminal trespass count because criminal trespass is a gross misdemeanor. RCW 9A.52.070(2). The SRA applies only to felony sentencing. *State v. Besio*, 80 Wn. App. 426, 431, 907 P.2d 1220 (1995). Because a prohibition on contact with BNSF or its properties is not reasonably related to Mr. Arendas's commission of assault, which was the sole basis for imposing community custody, it was error to identify it as a condition of community custody in section 4.2 of

the judgment and sentence. We remand the case with directions to strike the order that Mr. Arendas have no contact with BNSF or its properties from section 4.2.

A sentencing court has the authority to suspend all or any portion of the sentence for a gross misdemeanor and may do so on conditions that tend to prevent the future commission of crimes. RCW 9.95.200; RCW 9.92.060; *State v. Morgan*, 8 Wn. App. 189, 190, 504 P.2d 1195 (1973) (citing *Spokane County v. Farmer*, 5 Wn. App. 25, 486 P.2d 296 (1971)); *State v. Summers*, 60 Wn.2d 702, 707, 375 P.2d 143 (1962). In announcing its sentence, the trial court stated that it was suspending 274 days of Mr. Arendas's sentence for the trespass charge "upon the condition that you not have any contact with the Train Depot Station—Burlington Northern Santa Fe Depot Station down there." RP at 530.

The prohibition of contact with BNSF or its properties is valid as a condition of his suspended sentence on the trespass charge. The crime-relatedness required by the SRA does not apply to conditions imposed on misdemeanant offenders. *State v. Williams*, 97 Wn. App. 257, 263, 983 P.2d 687 (1999). Determining which conditions are appropriate is within the court's discretion. *State v. LaRoque*, 16 Wn. App. 808, 810, 560 P.2d 1149 (1977).

Turning to Mr. Arendas's vagueness challenge, we assume the vagueness doctrine would apply if the condition to the suspended sentence did not sufficiently define the proscribed conduct so that an ordinary person could understand the prohibition or did not

provide sufficiently ascertainable standards to protect against arbitrary enforcement. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).[1] Mr. Arendas argues on appeal that BNSF's extensive property holdings make compliance with the condition burdensome, but burdensomeness is not the test. A condition requiring that Mr. Arendas "have no contact with . . . Burlington Northern Santa Fe Railroad or its properties" is understandable and presents a standard that is ascertainable. It is not unconstitutionally vague.

On remand, the judgment and sentence may be corrected to provide that the prohibition on contact with BNSF or its properties is a condition to the suspended sentence.

V. MR. ARENDAS HAS NOT DEMONSTRATED A RIGHT TO RELIEF FROM THE CRIMINAL FILING FEE

In a supplemental brief, Mr. Arendas asks that we order the trial court to strike the $200 criminal filing fee imposed at sentencing, citing *State v. Ramirez*, 191 Wn.2d 732, 745-49, 426 P.3d 714 (2018). *Ramirez* held that a legislative overhaul of Washington's legal financial obligations provisions that became effective in June 2018 applies to cases then on direct review. *Id.* at 747. The 2018 changes provide in part that the criminal filing fee cannot be imposed against a defendant who is indigent as defined in RCW 10.101.010(3)(a)-(c) at the time of sentencing. RCW 10.01.160(3).

[1] We note, however, that the issue has not been briefed by the parties.

The record reveals that Mr. Arendas was found indigent for purposes of appointment of counsel at trial and on appeal, but it does not disclose whether he was indigent as defined by RCW 10.101.010(3)(a)-(c). If Mr. Arendas was found indigent based on the definition provided by RCW 10.101.010(d), then the criminal filing fee was properly imposed. RCW 36.18.020(2)(h). Mr. Arendas has not established that the fee should be struck.

STATEMENT OF ADDITIONAL GROUNDS

Mr. Arendas filed a pro se statement of additional grounds (SAG). A defendant may file an SAG to identify and discuss matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's appellate lawyer.

Prior reports. Mr. Arendas argues that he was wrongfully denied reports of his prior contact with the Klickitat County Sheriff's Office and Sergeant Kilian. This issue was adequately addressed by counsel and will not be reviewed further. *See* RAP 10.10(a); *State v. Thompson*, 169 Wn. App. 436, 492-93, 290 P.3d 996 (2012) (allegations of error that have been adequately addressed by counsel are not proper matters for an SAG).

Improper amendment of charges. Mr. Arendas contends that the State filed an amended information adding the criminal trespassing charge two days before trial because he refused to accept a plea offer. An information may "be amended at any time

before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d). Generally, the State is liberally allowed to amend the information provided that the defendant is aware of the charges. *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987); *State v. Ziegler*, 138 Wn. App. 804, 808, 158 P.3d 647 (2007). Mr. Arendas knew he was originally arrested for trespassing. The filing of additional charges after plea negotiations fail does not give rise to a presumption of improper prosecutorial vindictiveness. *State v. Korum*, 157 Wn.2d 614, 631, 141 P.3d 13 (2006).

Perjury. Mr. Arendas contends that Sergeant Kilian committed perjury. While Mr. Arendas suspects the sergeant of committing perjury, he does not point to anything in the record on appeal that proves it. If Mr. Arendas has evidence outside the record that would establish that the sergeant committed perjury and, if so, that the jury's verdict of guilt was likely to be influenced, his remedy is to file a personal restraint petition (PRP) with the supporting evidence. *State v. Turner*, 167 Wn. App. 871, 881, 275 P.3d 356 (2012).

No prior trespass warning. Mr. Arendas appears to argue that the State did not prove that he had been trespassed from the Wishram depot before the time of the charged offense. The State was not required to prove that he had been trespassed earlier. A verbal order of the sort testified to by Mr. Young can revoke a license or privilege to remain in a building. *See State v. Kutch*, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998).

No authority over the waiting room. Mr. Arendas contends that BNSF employees did not have authority over an Amtrak waiting room. Mr. Young testified that the Wishram railroad yard and depot is owned by BNSF, that the waiting room is "labeled" for Amtrak, and that his job responsibilities include reporting any trespass situation to BNSF's railroad police, who then coordinate with local law enforcement. The evidence was sufficient to establish BNSF's authority over the waiting room.

False photographs and DNA.[2] Mr. Arendas contends the State presented falsified photographs of Sergeant Kilian's patrol car. As with the alleged perjury, if Mr. Arendas has proof that the photographs were falsified and the jury's finding of guilt was likely influenced thereby, his remedy is to file a PRP with the supporting evidence. He also contends that the State failed to conduct DNA tests on the spit in the back of the patrol car. It was not required to. The State presented eyewitness testimony that Mr. Arendas spat in the sergeant's face.

Photograph not provided. Mr. Arendas contends he was never provided with the photograph from outside Sergeant Kilian's patrol car that the trial court ordered be provided. The time to have objected to that failure was at trial, when the court could have done something about it. We will not consider the argument for the first time on appeal. RAP 2.5(a).

[2] Deoxyribonucleic acid.

Objections. Mr. Arendas asserts that the trial court erred by allowing the prosecutor to object over 71 times during the one-day trial. Mr. Arendas identifies no authority suggesting that a party is limited in the number of objections it may make.

Utah conviction. Mr. Arendas was cross-examined about whether he had spit on people before, and, specifically, whether he had been convicted in Utah of spitting on someone. Mr. Arendas argues on appeal that the State's questions about the Utah conviction and a related exhibit misled the jury. Mr. Arendas did not object in the trial court, however. Objections to evidence need to be raised in the trial court; they will not be entertained for the first time on appeal. RAP 2.5(a).

Unlawful arrest. Mr. Arendas argues that he was unlawfully arrested. He does not inform the court of the nature of the problem with his arrest or why it would be a basis for relief from his judgment and sentence. We will not consider it. RAP 10.10(c).

We affirm the convictions but remand with directions to correct the judgment and sentence so that the prohibition of contact with BNSF and its properties is identified as a condition of the suspended sentence rather than as a condition of community custody. The court may also entertain any evidence that the criminal filing fee should be struck based on Mr. Arendas's indigence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PETER ARENDAS, Petitioner.	)))))))))	NO. _____ COA NO. 35751-1-III

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF SEPTEMBER, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] PETER ARENDAS ID# 36554 SHASTA COUNTY JAIL 1655 WEST ST REDDING, CA 98001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF SEPTEMBER, 2019.

X_____

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