FILED
Court of Appeals
Division III
State of Washington
9/26/2018 4:10 PM

No. 35751-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PETER J. ARENDAS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The insufficiency of evidence and instructional error that relieved the State of its burden of proof require reversal of Mr. Arendas's conviction for criminal trespass in the first degree.

a. The State presented insufficient evidence Mr. Arendas failed to comply with the "no loitering" condition for entering and remaining in the public waiting room.

By statute, a person does not "enter or remain unlawfully" on privately owned premises that are open to the public when the person complies with all lawful conditions to being on the premises. RCW 9A.52.090(2). Mr. Arendas had a ticket for the next Amtrak train, due to depart approximately nine hours after he was arrested for trespassing in the public Amtrak waiting room. Ex. 29. He was alone sleeping on the floor in the unmanned room that is open to ticketed passengers twenty-four hours a day. RP 272, 276-77, 314, 369. A sign on the door into the waiting room reads, "No Loitering on This Property." Ex 15. The sign does not prohibit sleeping or lying on the floor, does not restrict the length of time a ticketed passenger can wait in the room prior to departure, or otherwise prohibit specific conduct. Accordingly, the State presented insufficient evidence that Mr. Arendas knowingly entered or remained unlawfully in the waiting room.

The State's repeated assertion that "it was never the theory of the case that the initial entry was unlawful" is simply untrue. Br. of Resp. at 7, 8. By amended information, the State alleged Mr. Arendas "did knowingly enter or remain unlawfully" in the Amtrak waiting room. CP 64. In addition, the jury was instructed, "A person commits the crime of criminal trespass in the first degree when he or she enters or remains unlawfully in a building," and "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privilege to so renter or remain CP 79, 81. The "to convict" instruction included as elements, "the defendant knowingly entered or remained in a building," and "the defendant knew that the entering or remaining was unlawful." CP 80.

The State argues Mr. Arendas never asserted his presence was authorized, "but rather accused everyone around him of lying." Br. of Resp. at 8. It is unclear whether this argument refers to the time of the incident or the time of trial. If the argument refers to the time of the incident, Mr. Arendas was never given an opportunity to explain his purpose. When BNSF employee Eric Young saw Mr. Arendas asleep on the waiting room floor, rather than attempting to ascertain whether he had railroad business, Mr. Young immediately announced, "You need to

get out of here." RP 276. When the officers responded shortly thereafter to investigate Mr. Young's trespass complaint, they too immediately told Mr. Arendas to leave, based entirely on Mr. Young's report.

If the argument refers to the time of trial, the State misstates the defense. Mr. Arendas introduced his train ticket to establish his presence in the waiting room was authorized. As Mr. Young acknowledged, the waiting room is "designed for people to be waiting to either depart or embark on Amtrak." In addition, this argument improperly shifts the burden to the defendant. The State bore the burden of proving beyond a reasonable doubt his presence was not authorized. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002). As a criminal defendant protected by the constitutional right to due process, Mr. Arendas had no burden whatsoever. U.S. Const. amend. XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (prosecution's burden of proof beyond a reasonable doubt is a due process protection of "surpassing importance").

The State contends Mr. Arendas was trespassing because he posed a safety issue. Br. of Resp. at 8, 9. At trial, Mr. Young variously testified Mr. Arendas posed a safety issue either by blocking access to the room or by blocking access to vending machines inside the waiting

room. RP 277, 291. On the other hand, Mr. Young acknowledged Mr. Arendas was not disruptive and the responding officers "simply opened the door [to the waiting room] and walked in." RP 294, 297. Thus, Mr. Young's testimony did not establish Mr. Arendas violated the "no loitering" condition imposed on entering or remaining in the public waiting room.

Mr. Arendas's conviction for criminal trespass in the first degree was unsupported by sufficient evidence and must be reversed.

2. Failure to instruction the jury on the statutory defense was a manifest constitutional error and prejudicial to the defense.

Failure to instruct the jury on every fact the State must prove beyond a reasonable doubt is an error of constitutional magnitude that may be raised for the first time on appeal and is presumed prejudicial. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 102, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985)). The statutory defense, RCW 9A.52.090(2), negates an essential element of criminal trespass and creates an additional fact that the State must prove, in addition to the statutory elements of the offense. *O'Hara*, 167 Wn.2d at 105. As with a

claim of self-defense, where there is some evidence of the defense, the burden shifts to the State to prove the absence of the defense beyond a reasonable doubt. *Widell*, 146 Wn.2d at 570 (citing *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983)). In determining whether the evidence supports giving an instruction, the evidence is viewed in the light most favorable to the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

Mr. Arendas repeatedly asserted he was authorized to be in the Amtrak room as a ticketed passenger waiting for the next train. RP 435, 437-40, 442, 484-85. He introduced his ticket to support his assertion. Ex.29. Viewed in the light most favorable to Mr. Arendas, this evidence shifted the burden to the State to establish beyond a reasonable doubt the absence of the statutory defense.

The State does not address the constitutional question, but, instead, notes Mr. Arendas did not request an instruction on the statutory defense. Br. of Resp. at 7-8. As stated, however, failure to instruct on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal and is presumed prejudicial. *O"Hara*, 167 Wn.2d at 102.

Instructional error that relieved the State of its burden to prove the absence of the statutory defense requires reversal of Mr. Arendas's conviction for criminal trespass in the first degree.

2. The denial of Mr. Arendas's discovery motions and the quashing of two warrants violated his right to present a defense and require reversal of his convictions.

The constitutional right to present a defense includes the right to discovery, to conduct an independent pre-trial investigation, and to compulsory process. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Mr. Arendas's requests for discovery, an opportunity to conduct pre-trial investigation, and to compulsory process were his attempt to exercise these rights, and not to create a "spectacle," as pejoratively characterized by the State.

a. Reports of contacts with Klickitat County sheriffs.

Mr. Arendas requested discovery of reports of his prior contacts with Klickitat County sheriffs to bolster his claim that he had been subjected to a pattern of harassment and bias against him. RP 72-76. Without reviewing the reports, the trial court denied the request on relevance. RP 76-77. However, bias is never irrelevant. *Davis v.*

Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Jones*, 25 Wn. App. 746, 750-51, 610 P.2d 213 (1980). Moreover, for purposes of discovery, the standard of relevance is much broader than the standard for admissibility at trial. *Robinson v. Perez*, 123 Wn. App. 320, 336-37, 96 P.3d 420 (2004); *State v. Mines*, 35 Wn. App 932, 938, 671 P.2d 273 (1983).

The State's contention that Mr. Arendas "made no showing whatsoever" that his discovery requests were material to his defense is unsupported by the record. Br. of Resp. at 9-10. Mr. Arendas's defense was denial and his arrest for trespass was the unwarranted culmination of several days of harassing contacts by Klickitat County sheriffs. RP 73-74, 76-77. The reports were germane to his pre-trial investigation to determine whether the reports bolstered his defense.

The State does not address the prosecutor's failure to comply with his mandatory discovery obligations.

> (1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney *shall* disclose to the defendant . . .
> (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, *together with any written or recorded statements and the substance of any oral statements of such witnesses* . . .

CrR 4.7(a)(1)(i) (emphasis added). By court rule, Mr. Arednas was entitled to Sergeant Kilian's reports regarding contacts shortly before the incident in question.

b. View of patrol car.

Mr. Arendas requested to view the rear window of Sergeant Kilian's patrol car under circumstances similar to those at the time of his arrest to investigate whether BNSF employee Benjamin Tibbets could see into the patrol car through the tinted rear window at night, as Mr. Tibbets claimed. RP 167-70. The trial court denied the request on the grounds his claim could be challenged on cross-examination. RP 170. However, without the opportunity to conduct an independent pre-trial investigation of the patrol car, Mr. Arendas was unable to fully prepare his cross-examination of Mr. Young to challenge that claim.

The State does not address this issue.

c. Quashed warrants.

Mr. Arendas subpoenaed state witnesses Mr. Young and Mr. Tibbets to testify during the presentation of his defense. RP 210-02, 313, 315. After Mr. Young testified for the State and was cross-examined by Mr. Arendas, the trial court asked whether Mr. Arendas had any additional questions. RP 315. He responded, "Not for – not until direct." RP 315. The

State did not object. After the State conducted re-direct examination of Mr. Tibbets, the trial court did not offer Mr. Arendas an opportunity for re-cross-examination. RP 330. The court then asked Mr. Arendas his purpose for the subpoenas, and he explained he wanted to clarify their testimony from the State's case in chief. RP 332-40. The court quashed the subpoenas as cumulative. RP 340-41.

The State's argument that Mr. Arendas did not establish the materiality of the subpoenas is unsupported by the record. Br. of Resp. at 10. When Mr. Arendas cross-examined the witnesses, the subpoenas were in effect and he reasonably anticipated an opportunity to conduct direct examination in the presentation of his defense.

The right to compulsory process is a fundamental to due process and should be safeguarded "with meticulous care." *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Here, the untimely quashing of the warrants after Mr. Arendas completed his cross-examination of the witnesses was prejudicial and violated his right to compulsory process.

Reversal is required.

3. The community custody condition prohibiting contact with BNSF is unconstitutionally vague and so broad as to be unrelated to the circumstances of criminal trespass, as charged.

Community custody condition 4.2(B)(7) prohibits Mr. Arendas from contact with BNSF or its properties. CP 90. Given the extensive network of BNSF railroad tracks across the state, Mr. Arendas cannot leave south-central Washington without crossing one or more of its railroad tracks. This condition is accordingly unconstitutionally vague as subject to capricious enforcement, especially for *de minimus* or unwitting violations. *See State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008) (community custody conditions that do not protect against arbitrary enforcement are unconstitutionally vague).

Contrary to the State's contention, Mr. Arendas does not argue the condition is vague because it is "unenforceable." Br. of Resp. at 11. Rather, as stated, he argues the condition is subject to arbitrary enforcement.

Further, the condition is not limited to BNSF buildings and therefore is not directly related to the circumstances of the offense, as required by RCW 9.94A.030(10); RCW 9.94A.703(3)(f). Mr. Arendas was not convicted of an offense directly related the network of BNSF railroad tracks that span the state. The State's contention to the contrary

is unsupported by the circumstances of the alleged offense and should be disregarded.

Condition 4.2(B)(7) must be stricken.

B. CONCLUSION

Mr. Arendas was not loitering in the Amtrak waiting room and his conviction for trespass based on insufficient evidence and instructional error that failed to include every fact necessary for conviction must be reversed. The denial of Mr. Arendas's requests for pre-trial discovery, investigation, and compulsory process violated his constitutional right to present a defense and require reversal of his convictions for trespass and assault. In the alternative, the condition of community custody prohibiting all contact with BNSF property, including railroad tracks, must be stricken as unconstitutionally vague and so broad as not directly related to the circumstances of the alleged offense. For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Arendas requests this Court reverse his

convictions for criminal trespass in the first degree and assault in the third degree.

Respectfully submitted,

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DIVISION THREE

STATE OF WASHINGTON, RESPONDENT, v. PETER ARENDAS, APPELLANT.	)))))))))	NO. 35751-1-III

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF SEPTEMBER, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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September 26, 2018 - 4:10 PM

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