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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

BRIEF OF APPELLANT

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12 Royce A. Ferguson, Jr., Wash. Prac., Criminal Practice & Procedure
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A. SUMMARY OF ARGUMENT

The Amtrak train waiting room in Wishram is located in a depot owned by Burlington Northern Santa Fe Railroad (BNSF). The waiting room is unmanned, open to the public twenty-four hours a day, and frequently used all night. A sign on the door to the waiting room reads, “No Loitering on This Property.”

Mr. Arendas purchased an Amtrak ticket and went to the public waiting room to wait for his train that was due approximately twelve hours later. A BNSF employee authorized to have trespassers removed from the property found Mr. Arendas alone and asleep on the waiting room floor. Without attempting to ascertain whether Mr. Arendas had legitimate business in the waiting room, the employee immediately ordered him to leave. Mr. Arendas did not respond. The employee contacted authorities and made a trespass complaint.

Mr. Arendas was arrested and placed in the back of a patrol car where he allegedly spat on one of the responding officers. His resulting convictions for criminal trespass in the first degree and assault in the third degree violated due process and were the product of a trial at which he was denied his right to present a defense.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence Mr. Arendas committed criminal trespass in the first degree, in violation of his constitutional right to due process.

2. Instructional error relieved the State of its burden of proving every essential element of criminal trespass in the first degree, in violation of Mr. Arendas's right to due process.

3. The trial court erroneously denied Mr. Arendas's motions for discovery of police reports and to view a patrol car, in violation of his constitutional right to present a defense.

4. The trial court erroneously quashed two subpoenas served by Mr. Arendas, in violation of his constitutional rights to present a defense and compulsory process.

5. The sentencing court erroneously entered a community custody condition that prohibited Mr. Arendas from contact with any BNSF property within the state, which was unconstitutionally vague as subject to capricious enforcement.

6. The sentencing court erroneously entered a community custody condition that prohibited Mr. Arendas from contact with any BNSF property within the state, which was not crime-related.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to due process prohibits a conviction based on insufficient evidence of proof beyond a reasonable doubt of every essential element of the offense. An essential element of criminal trespass in the first degree on premises that are open to the public is the person failed to comply with lawful conditions imposed on access to or remaining on the premises. As a ticketed passenger alone in the public waiting room, Mr. Arendas did not fail to comply with the “no loitering” condition. Did Mr. Arendas’s conviction for criminal trespass in the first degree violate his right to due process and require reversal.

2. Jury instructions must make the applicable law manifestly apparent to the average juror. By statute, it is a defense to criminal trespass in the first degree on premises that are open to the public that the person complied with all lawful conditions imposed on access to or remaining on the premises. Was Mr. Arendas denied due process when the trial court did not instruct the jury on the statutory defense and thereby relieved the State of its burden of prove the absence of the defense beyond a reasonable doubt?

3. A criminal defendant’s constitutional right to present a defense includes the right to independent pre-trial discovery and

investigation. Mr. Arendas moved for discovery of county sheriff's reports of prior contacts with him to demonstrate bias and a pattern of harassment. He also moved for an opportunity to view the arresting officer's patrol car under circumstances similar to those at the time of his arrest to challenge a witness's ability to see inside the back of the car. Did the trial court violate Mr. Arendas's right to present a defense when it denied these motions?

4. A criminal defendant's constitutional right to present a defense includes the right to compulsory process. Mr. Arendas subpoenaed two State witnesses so he could question them on direct for presentation of his defense. Did the trial court violate Mr. Arendas's right to present a defense when it quashed the subpoenas?

5. A condition of community custody is unconstitutionally vague when it is subject to capricious enforcement. As a condition of community custody, the sentencing court entered an order prohibiting Mr. Arendas from contact with any BNSF property within the state. Given the extensive network of railroad tracks owned by BNSF across the state, is the condition of community custody subject to capricious enforcement?

6. A sentencing court acts without authority when it imposes a condition of community custody that is not crime-related. As a condition of community custody, the sentencing court entered an order prohibiting Mr. Arendas from contact with any BNSF property within the state. Did the sentencing court act without authority when Mr. Arendas was convicted of trespass inside a BNSF depot only, and not of trespass involving any BNSF railroad tracks?

D. STATEMENT OF THE CASE

An Amtrak¹ train stops in Wishram twice daily, once going eastbound and once going westbound. 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 fifteen feet, with a small bench, several chairs, and two vending machines. Ex. 18-21; RP 368. The room is open to the public twenty-four hours a day and is regularly used all night. RP 314, 369. A sign on the waiting room door reads, “No Loitering on This Property.” Ex. 15, 16; RP 278, 367.

¹ The National Railroad Passenger Service Corporation does business under the name “Amtrak.” www.amtrak.com.

Peter J. Arendas arrived in Wishram on August, 26, 2017, with plans to catch an Amtrak train from Wishram to Salt Lake City, Utah, as soon as he received funds to purchase a ticket. RP 432. That evening, while he was sitting on a park bench, he was approached by Sergeant Frederick Kilian, who asked for his name and ran his name for warrants. RP 411, 423, 434.

Two days later, on August 28, 2018, Mr. Arendas received his funds and he purchased an Amtrak ticket to Salt Lake City, departing 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, was authorized to have trespassers removed from the BNSF depot, including the Amtrak waiting room inside the depot. RP 271, 284, 289. On August 28, 2017, sometime before 5:00 p.m., Mr. Young received a report of suspicious activity by unauthorized “individuals” in the area. RP 274-75, 293, 304. Hours later, around 10:00 p.m., Mr. Young conducted a “courtesy walk around” of the depot, including the Amtrak waiting room where he found Mr. Arendas alone and asleep on the floor. RP 276-77, 292. Although no one had complained about Mr. Arendas, Mr. Young

immediately and loudly ordered him to leave. RP 278. Mr. Arendas did not respond. RP 278. Mr. Young briefly left the room to report a trespasser, returned, again loudly ordered Mr. Arendas to leave, and again got no response. RP 278-79. Although Mr. Young characterized the waiting room as “a facility that’s designed for people to be waiting to either depart or embark on Amtrak,” he never asked whether Mr. Arendas had a ticket or other legitimate business for being in the waiting room. RP 288. Mr. Young testified, “We get a lot of problems with the route that we work. It goes down into southern California and we 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.” RP 278.

Sergeant Kilian and Deputy Eric Beasely responded to Mr. Young’s trespass complaint. RP 345, 359-61. Mr. Young met the officers and stated Mr. Arendas refused to leave. RP 372. The officers found Mr. Arendas still asleep on the waiting room floor. RP 346, 361. Sergeant Kilian announced their presence and Mr. Arendas woke up immediately. RP 346, 362. Based on Mr. Young’s report, Sergeant Kilian informed Mr. Arendas that he had to leave. RP 346, 372. Mr.

Arendas emphatically insisted no one told him to leave. RP 347, 372-73. 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, however, neither officer asked Mr. Arendas whether he had a train ticket or other legitimate business in the public waiting room.

Mr. Arendas was handcuffed, escorted outside, and placed in the back seat of Sergeant Kilian's patrol car on the driver's side. RP 379. His belligerence continued. RP 347, 400. According to Sergeant Kilian, when he leaned into the driver's side to get paperwork, Mr. Arendas spat on him from the back seat. RP 382.

Mr. Arendas was charged with assault in the third degree and criminal trespass in the first degree. CP 63-64. He represented himself and the matter proceeded to trial by a jury. CP 34.

Mr. Arendas moved for discovery of police reports of his prior contacts with officers from the Klickitat County Sheriff's Office, including Sergeant Kilian. RP 74-77. The motion was denied. RP 77. He also moved to view Sergeant Kilian's patrol car under circumstances similar to those at the time of his arrest. RP 165-69. This motion was denied also. RP 170.

At trial, Mr. Young and Sergeant Kilian testified as set forth. Benjamin Tibbets, a BNSF train conductor, testified he observed Mr. Arendas being escorted out of the depot and into the patrol car. RP 317, 320. Mr. Tibbets was approximately fifteen feet behind the patrol car when he saw Sergeant Kilian lean into the driver's side. RP 321, 325. At night and from that distance, Mr. Tibbets testified he could see Mr. Arendas through the tinted rear window of the patrol car. RP 325. According to Mr. Tibbets, Mr. Arendas made a motion as if spitting and Sergeant Kilian immediately backed away from car with spittle on his face. RP 320-21, 325. Mr. Tibbets took Sergeant Killian inside the depot for a few minutes to clean his face with a hand sanitizer wipe. RP 322. He testified, "[I]t's Wishram and we get a lot of riff-raff in there." RP 319.

Mr. Arendas served subpoenas on Sergeant Kilian, Mr. Tibbets, and Mr. Young, so he could question them on direct examination in the presentation of his defense. RP 201-02, 313, 315. After Mr. Young and Mr. Tibbets were cross-examined by Mr. Arendas, the State moved to quash all three subpoenas. RP 331-32. "That is simply being done to harass the witnesses, to inconvenience them and make them be here the rest of the afternoon." RP 332. The court asked Mr. Arendas's

purpose for the subpoenas. RP 332-39. Mr. Arendas objected, stating, “I’m entitled to my own strategy.” RP 335. He then explained he wanted to question Mr. Tibbets and Mr. Young to clarify their testimony from the State’s case in chief. RP 336-40. The court ruled such testimony would be cumulative and quashed the subpoenas. RP 340-41. The subpoena for Sergeant Kilian remained in effect. RP 340-41.

The State played an audio and video recording taken from Sergeant Kilian’s patrol car. Ex. 31; RP 373, 377-88. The camera recorded Mr. Arendas stating, interspersed with profanities, he had been asleep, he never saw Mr. Young, and he had a ticket. Ex. 31; RP 378-88. The camera also recorded a sound that Sergeant Kilian identified as Mr. Arendas spitting on his face when he leaned into the driver’s side to get paperwork. RP 382. Sergeant Kilian accused Mr. Arendas of spitting on him which Mr. Arendas emphatically denied. Ex. 31; RP 382-83. Sergeant Kilian then asked an unidentified person whether he had something to clean his face. RP 384, 398.

Mr. Arendas testified on his own behalf. He emphasized that he had a ticket for the next train to Salt Lake City. Ex. 29; RP 435, 437-38. He denied that Mr. Young ordered him to leave and denied that he

spat on Sergeant Kilian. RP 439, 440. Mr. Arendas called Sergeant Kilian who testified that he did not know when the Amtrak trains arrived or departed Wishram. RP 450.

Mr. Arendas was convicted as charged. CP 70, 71.

At sentencing, the court imposed the top end of the standard range, stating, “I can’t think of anything more outrageous or horrendous than having someone spit on another man’s face. ... I find that is probably one of the most outrageous and egregious types of assault that can occur.” RP 528. As a condition of community custody, the court prohibited Mr. Arendas from contact with BNSF or its properties within the state of Washington. CP 90.

E. ARGUMENT

1. The State presented insufficient evidence Mr. Arendas entered or remained unlawfully, an essential element of criminal trespass in the first degree, when he was a ticketed Amtrak passenger quietly sleeping in a public waiting room until the next train arrived.

- a. A person does not commit criminal trespass in the first degree where the premises are open to the public and the person complies with all lawful conditions imposed on access to or remaining on the premises.

A person commits the crime of criminal trespass in the first degree when he or she knowingly enters or remains unlawfully in a building. RCW9A.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).

By statute, a person does not “enter or remain unlawfully” where the premises are open to the public and the person complies with all lawful conditions on being on the property. RCW 9A.52.090(2) provides:

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;

The statutory defense negates the element of “enters or remains unlawfully” and, therefore, it is not an affirmative defense. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002). Thus, 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. *Id.* at 570 (citing *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983)); accord *State v. Finley*, 97 Wn. App. 129, 939 P.2d 217 (1997).

b. Mr. Arendas did not enter or remain unlawfully in the public waiting room, when he was a ticketed passenger, he was the only person in the waiting room, and he was quietly sleeping.

The Wishram Amtrak waiting room is open to the public twenty-four hours a day and is frequently used throughout the night. RP 314, 369. A sign posted on the door into the waiting room reads “No Loitering on This Property.” Ex. 15. The sign does not prohibit sleeping, restrict the length of time a ticketed passenger can wait in the room prior to departure, or otherwise prohibit specific conduct.

Mr. Arendas had a ticket for the next train leaving for Salt Lake City. Ex. 29. He was alone in the waiting room, quietly sleeping. RP 276-77. Although BNSF employee Mr. Young received a report of a group of suspicious persons in the area approximately five hours before he found Mr. Arendas asleep, nothing suggested Mr. Arendas was part of that group. RP 274-75, 293, 304.

The State may contend Mr. Arendas remained unlawfully when he failed to comply with Mr. Young’s order to do so. However, there was no evidence Mr. Arendas was aware of that order. As Mr. Young acknowledged, Mr. Arendas did not respond to his orders. RP 278-79. Moreover, there was no evidence Mr. Arendas failed to comply with all lawful conditions imposed on remaining in the public room.

c. Mr. Arendas was not “loitering” in the Amtrak waiting room.

“Loitering” is a nebulous term that includes both criminal and innocuous behavior. Black’s Law Dictionary defines as “loitering” as “[t]he criminal offense of remaining in a certain place (such as a public street) for no apparent reason.”² Merriam-Webster Dictionary defines “loiter” as “1: to delay an activity with idle stops and pauses: 2: to remain in an area for no obvious reason; 3: to lag behind.”³

The owner of private property that is open to the public may prohibit “loitering.” *See, e.g., State v. R.H.*, 86 Wn. App. 807, 812, 939 P.2d 217 (1997) (owner of a restaurant allowed skateboarding in the restaurant parking lot when traveling to and from the restaurant but prohibited recreational skateboarding and loitering). By contrast, a criminal ordinance is unconstitutionally vague if it prohibits all loitering on public property and fails to exempt innocuous loitering such as window shopping. *See, e.g., City of Seattle v. Pullman*, 82 Wn.2d 794, 799, 514 P.2d 1059 (1973) (ordinance that made it unlawful for juveniles to “loiter, idle, wander or play” during curfew hours unconstitutionally vague).

²10th ed. 2014.

³www.merriam-webster.com.

As a ticketed passenger waiting for his train, Mr. Arendas was not in the public waiting room “for no obvious reason.” Rather, he was in the waiting room for the most obvious reason, to catch a train. Mr. Young acknowledged the Amtrak waiting room was open to the public and was “designed for people to be waiting to either depart or embark on Amtrak.” RP 288. That was Mr. Arendas’s exact purpose. Under these circumstances, the State failed to prove the absence of the statutory defense beyond a reasonable doubt.

d. Instructional error relieved the State of proving the absence of the statutory defense beyond a reasonable doubt.

“It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Jury instructions must make the applicable law manifestly apparent to the average juror. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The adequacy of jury instructions is reviewed *de novo*. *State v. Pirtle*, 127 Wn.2d 628, 656 904 P.2d 245 (1995).

Where, as here, the defendant presents evidence that he or she complied with all conditions imposed on entering or remaining on

public premises, the defendant is entitled to an instruction regarding lawful presence. The pattern jury instruction provides in relevant part:

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].

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.06 (4th ed.). As the Note on Use provides, “Use this instruction with WPIC 60.16 (Criminal Trespass – First Degree – Elements), if the statutory defense is an issue supported by the evidence.” *Id.* In determining whether the evidence supports giving the instruction, the court views the evidence in the light most favorable to the defense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 445-46, 6 P.3d 1150 (2000).

Although Mr. Arendas did not request an instruction on the statutory defense, this issue is properly before the Court as a manifest constitutional error. RAP 2.5(a)(3). The error is clearly constitutional in that it concerns the burden of proof, an issue of due process. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). The error was also manifest, that is, “the record shows that there is a fairly strong

likelihood that serious constitutional error occurred.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Also, the error had practical and identifiable consequences. Without the instruction, the State was relieved of its burden to prove the absence of the defense beyond a reasonable doubt. Also, the instruction would have placed the evidence in a different light, focusing on Mr. Arendas’s evidence that he was a ticketed passenger, alone and quietly sleeping in the public waiting room.

e. Reversal is required.

A conviction based on insufficient evidence violates due process and must be reversed. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). When the sufficiency of the evidence to support a conviction is challenged, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

No rational trier of fact could have found beyond a reasonable doubt that Mr. Arendas entered or remained unlawfully in the public waiting room. Nor did the State prove the absence of the statutory

defense beyond a reasonable doubt. The only condition imposed on access to or remaining in the waiting room was “no loitering.” Ex. 15. The evidence established only that Mr. Arendas had a ticket for the next train, he was alone, quietly sleeping, and no one complained about his presence. Under these circumstances, the State failed to prove the absence of the statutory defense beyond a reasonable doubt.

The insufficiency of the evidence requires reversal of Mr. Arendas’s conviction for criminal trespass in the first degree. Moreover, the failure to instruct the jury on the statutory defense impermissibly relieved the State of its burden of proof, further requiring reversal of the charge and dismissal with prejudice. *See State v. Hardesty* 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (when a conviction is reversed for insufficient evidence, retrial is prohibited by the double jeopardy clause of the Fifth Amendment).

2. In violation of Mr. Arendas’s constitutional right to present a defense, the trial court denied his motion for discovery of records of his prior contacts with officers from the Klickitat sheriff’s officer, denied his motion to view the arresting office’s patrol car, and quashed two subpoenas of State witnesses who Mr. Arendas wanted to question on direct in the presentation of his defense.

a. A criminal defendant has the constitutional right to present a defense.

The federal and state constitutions guarantee a criminal defendant the right to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The Sixth Amendment to the United States Constitution provides in relevant part “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him, [and] to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel.” Article I, section 22 of the Washington Constitution provides in relevant part, “[i]n criminal prosecution the accused shall have the right to ... defend in person, or by counsel, ... to meet the witnesses against him fact to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf...”

The right to present a defense includes the right to discovery and to conduct independent pre-trial investigation. CrR 4.7; *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Equally important, the right

to present a defense also includes the right to compulsory process.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

A claimed denial of a defendant's right to present a defense is reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

b. Mr. Arendas's discovery requests were erroneously denied.

Liberal discovery is necessary for the parties to fully prepare for trial.

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, pretrial discovery should be as full and free as possible.

12 Royce A. Ferguson, Jr., Wash. Prac., Criminal Practice & Procedure § 1303 (3d ed.).

CrR 4.7 governs discovery in criminal cases and provides, in relevant part, the prosecutor "shall" disclose:

(a)(1)(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...

Discovery is not limited to admissible evidence. *Robinson v. Perez*, 123 Wn. App. 320, 337, 96 P.3d 420 (2004). For purposes of

discovery, the standard of relevance is much broader than the standard for admissibility at trial. *Id.* at 336-37; *State v. Mines*, 35 Wn. App. 932, 938, 671 P.2d 273 (1983).

- i. Mr. Arendas was entitled to discovery of reports of his prior contacts with officers from the Klickitat County Sheriff's Office, necessary to prepare his cross-examination of Sergeant Kilian regarding bias and a pattern of harassment.

Mr. Arendas requested discovery of police reports of his prior contacts with officers from the Klickitat County Sheriff's Office, including Sergeant Kilian, to investigate whether the sheriff's office, including Sergeant Kilian, engaged in a pattern of harassment and bias against him. RP 72-77. Specifically, Sergeant Kilian was on the prosecutor's witness list and, therefore, his written reports of contacts with Mr. Kilian were subject to discovery. CrR 4.7(a)(1)(i).

The court denied his request on relevance. RP 76-77. This was in error. The relevance of the reports could not be determined without a review of those reports. Moreover, bias is never irrelevant.

The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' We have recognized that the exposure of a witness' [sic] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. 308, 316–17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (internal citations omitted); *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 213 (2002). A police officer is not immune to bias or ill-will against a defendant. *See, e.g., State v. Jones*, 25 Wn. App. 746, 750-51, 610 P.2d 934 (1980) (reversible error to exclude extrinsic evidence of officer’s bias against defendant.).

The court’s denial of Mr. Arendas’s motion for discovery of the reports on relevance was prejudicial to his right to conduct a thorough pre-trial investigation.

ii. Mr. Arendas was entitled to view the sergeant’s patrol car under circumstances similar to those at the time of his arrest, necessary to prepare his cross-examination of Mr. Tibbets.

The right to conduct an independent pre-trial investigation is an integral aspect of the right to present a defense.

A defendant is denied his right to counsel if the actions of the prosecution deny the defendant’s attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.

Burri, 87 Wn.2d at 180. In *Burri*, the defendant was represented by counsel. However, there can be no meaningful distinction between a represented defendant and a defendant who is his or her own counsel.

Mr. Arendas requested to view Sergeant Kilian's patrol car under circumstances similar to those described by Mr. Tibbets to test the credibility of Mr. Tibbet's assertion that he could see into the back of Sergeant Kilian's patrol car. RP 165-69. The prosecutor objected and characterized the request to view the patrol car as "clearly harassing" RP 168. The request was denied. RP 170.

At trial, the State introduced photographs of the interior of Sergeant Kilian's patrol car taken by the sergeant the following day. Ex. 1-10; RP 390, 393. However, these photos do not address Mr. Arendas's concern that Mr. Tibbets could not have seen into the back of the patrol car at night while standing 15 feet behind the car and looking thorough tinted windows. Without viewing the patrol car under those circumstances, Mr. Arendas's right to prepare his cross-examination of Mr. Tibbets was prejudicially compromised.

iii. Mr. Arendas was entitled to subpoena witness to be examined in the presentation of his defense, even though the witnesses had testified on behalf of the State.

"The guaranty of compulsory process is a fundamental right and one which the courts should safeguard with meticulous care. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (internal citations omitted). The right to compulsory process "is in plain terms the right to

present a defense,” and is a fundamental element of due process of law. *Washington*, 388 U.S. at 19. Few rights are more fundamental than the right of a defendant to subpoena witnesses for his defense. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Mr. Arendas wanted to question Mr. Young and Mr. Tibbets on direct in the presentation of his defense case. Citing ER 403 and ER 611, the trial court quashed the subpoenas as cumulative. RP 340-41. This was in error.

Unlike direct examination, cross-examination is limited to issues raised by a witness’s testimony on direct examination and credibility. ER 611(b) provides, “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” When Mr. Arendas cross-examined these witnesses, his subpoenas were in effect and he reasonably believed he would have a later opportunity to develop their testimony without the restrictions of cross-examination. After he cross-examined Mr. Young, the court asked whether he had any additional questions. RP 315. Mr. Arendas responded, “Not for – not until direct.” RP 315. The State did not object. After the State conducted re-direct examination of Mr. Tibbets, the court failed to offer Mr. Arendas the opportunity to re-

cross him. RP 330. By quashing the subpoenas only after Mr. Arendas conducted his cross-examination with the understanding he would have a later opportunity to question the witnesses, the court prejudicially impaired Mr. Arendas's presentation of his defense.

c. The violations of Mr. Arendas's right to discovery and compulsory process requires reversal.

Violation of a constitutional right is presumed prejudicial and the State bears the burden of proving the denial was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Burri*, 87 Wn.2d at 181-82. Specifically, although the denial of a defendant's right to compulsory process is not a structural error, the denial of that right is rarely harmless. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 331, 125 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (reversible error to disallow defense witnesses who were to testify regarding third-party guilt). Where the denial of the right is prejudicial to the defense, reversal is required. *State v. Duarte Vela*, 200 Wn. App. 306, 328, 402 P.3d 281 (2017).

The State cannot overcome the presumption of prejudice here. Without Sergeant Kilian's report of their prior contact, Mr. Arendas was hampered in his ability to fully investigate the purpose and duration of that contact to demonstrate bias and harassment. Without

the opportunity to view the sergeant's patrol car under circumstances similar to those at the time of his arrest, Mr. Arendas was hampered in his ability to challenge Mr. Tibbet's ability to see into the back of the patrol car. By having the subpoenas quashed after his cross-examination, Mr. Arendas's was denied the opportunity to fully question Mr. Young and Mr. Tibbets. Individually and cumulatively, these rulings violated Mr. Arendas's constitutional right to present his defense.

3. Community custody condition 4.2(B)(7) prohibiting Mr. Arendas from contact with BNSF is unconstitutionally vague and not crime-related and must be stricken.

- a. The community custody condition prohibiting Mr. Arendas from contact with BNSF properties in Washington is too vague to protect against capricious enforcement

The right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, requires community custody conditions not be vague. *State v. Bahl*, 164 Wn.2d 739, 753-54, 193 P.3d 678 (2008). The community custody conditions must provide ordinary people fair warning of proscribed conduct and have standards that are definite enough to "protect against arbitrary enforcement." *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990); *State*

v. Irwin, 191 Wn. App. 644, 653, 364 P.3d 830, 835 (2015). A community custody condition is unconstitutionally vague if it fails to do either. *Bahl*, 164 Wn.2d at 753.

A vagueness claim is reviewed for abuse of discretion. *State v. Valencia*, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010).

Community custody condition 4.2(B)(7) provides, *inter alia*, “[D]uring the period of supervision the defendant shall ... have no contact with ... Burlington Northern Santa Fe Railroad or its properties.” CP 90. This condition is so vague as to be subject to capricious enforcement, especially for *de minimus* or unwitting violations.⁴

In Washington, BNSF owns a sprawling network of 1334 miles of railroad tracks across the state, including a large loop around the south-central region of the state, a second large loop across the middle of the state, and a long route along the water from Olympia to British Columbia. Appendix A. Common experience confirms that BNSF ownership is not marked at every railroad crossing or other points along

⁴ At sentencing, the court orally prohibited Mr. Arendas from contact with Amtrak but that condition was not memorialized in the Judgment and Sentence. *Compare* RP 531 *with* CP 90. However, Mr. Arendas was not convicted of a crime involving Amtrak. If that condition is extant, it is not crime-related and must be stricken. RCW 9.94A.703(3)(f); *State v. Munoz-Rivera*, 190 Wn. App. 870, 892-94, 361 P.3d 182 (2015) (conditions of community custody that are not crime-related must be stricken).

the tracks. Yet, if Mr. Arendas tried to leave the state from Wishram or even to travel outside south-central Washington, he would necessarily cross BNSF property and, therefore, he would be subject to arrest for violation of the above community custody condition. He would also be subject to arrest if he rode an Amtrak train anywhere in Washington because the train runs on tracks owned by BNSF in the state. *Compare* Appendix A (BNSF-owned railroad tracks in Washington) *with* Appendix B (Amtrak routes in Washington).

In *Valencia*, the defendants made a vagueness challenge to a community custody condition that prohibited possession of “any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances.” 169 Wn.2d at 785. The Court ruled “the breadth of potential violations under this condition” was unconstitutional vague because it subjected the defendants to capricious enforcement. *Id.* at 794.

The condition here is similarly unconstitutionally vague, as the breadth of potential violations, especially *de minimus* or unwitting, subjects Mr. Arendas to capricious enforcement

b. The court acted without authority when it imposed the community custody condition prohibiting Mr. Arendas from contact with BNSF properties in Washington because the condition is not crime-related.

A trial court may impose a sentence only as authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). By statute, a court may impose only conditions of community custody that are “crime-related.” RCW 9.94A.703(3)(f). A “crime-related” condition prohibits “conduct that directly relates to the circumstances of the crime for which the offender has been convicted...” RCW 9.94A.030(10).

The condition prohibiting Mr. Arendas from contact with any BNSF property, not only its buildings, is not related to the circumstances of the offense. Mr. Arendas was convicted of trespass inside a public waiting room within a BNSF depot. He was not convicted of an offense relating to the extensive network of BNSF railroad tracks across the state. Because the condition is overly broad in scope and does not relate directly to the circumstances of the offense, it is not crime-related.

c. The community custody condition must be stricken.

A condition of community custody that is unconstitutionally vague and subject to capricious enforcement must be stricken. *Valencia*, 169 Wn.2d at 795. In addition, a condition that is not crime-related must be stricken. *State v. Munoz-Rivera*, 190 Wn. App. 870, 892-94, 361 P.3d 182 (2015). The condition prohibiting Mr. Arendas from contact with any BNSF property within the state is both unconstitutionally vague and not crime-related. Therefore, the condition must be stricken.

F. CONCLUSION

This incident seemingly started with the unfounded assumption that Mr. Arendas was a “transient” and “riff-raff.” However, as a ticketed passenger in compliance with conditions of entering and remaining in the public Amtrak waiting room, Mr. Arendas did not commit criminal trespass in the first degree and his conviction must be reversed and the conviction dismissed with prejudice. The violations of Mr. Arendas’s right to pre-trial discovery, investigation, and compulsory process prejudicially violated his constitutional right to present his defense and require reversal of his convictions both for criminal trespass and for assault in the third degree. In the alternative,

the condition of community prohibiting all contact with BNSF property within the state is unconstitutionally vague and not crime-related and must be stricken.

DATED this 22nd day of June 2018.

Respectfully submitted,

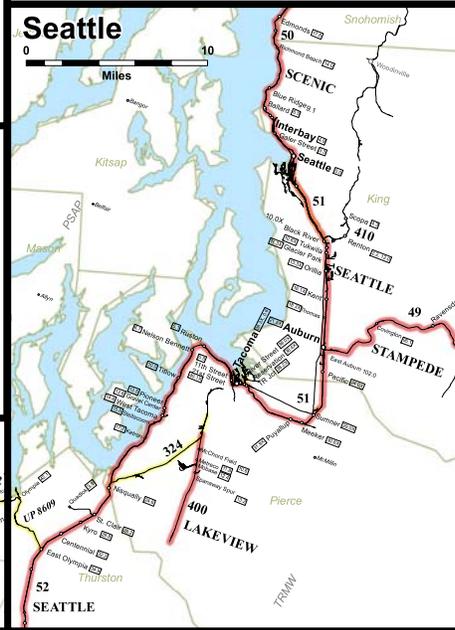
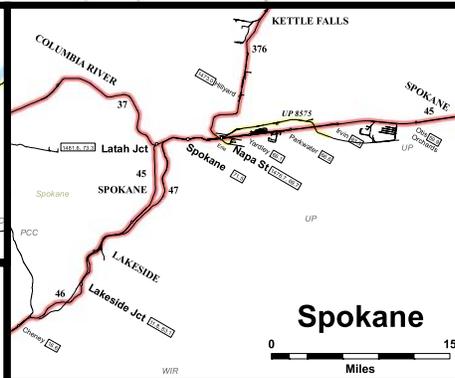
s/ Sarah M. Hrobsky

Sarah M. Hrobsky (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

Map of BNSF-owned railroad tracks in Washington

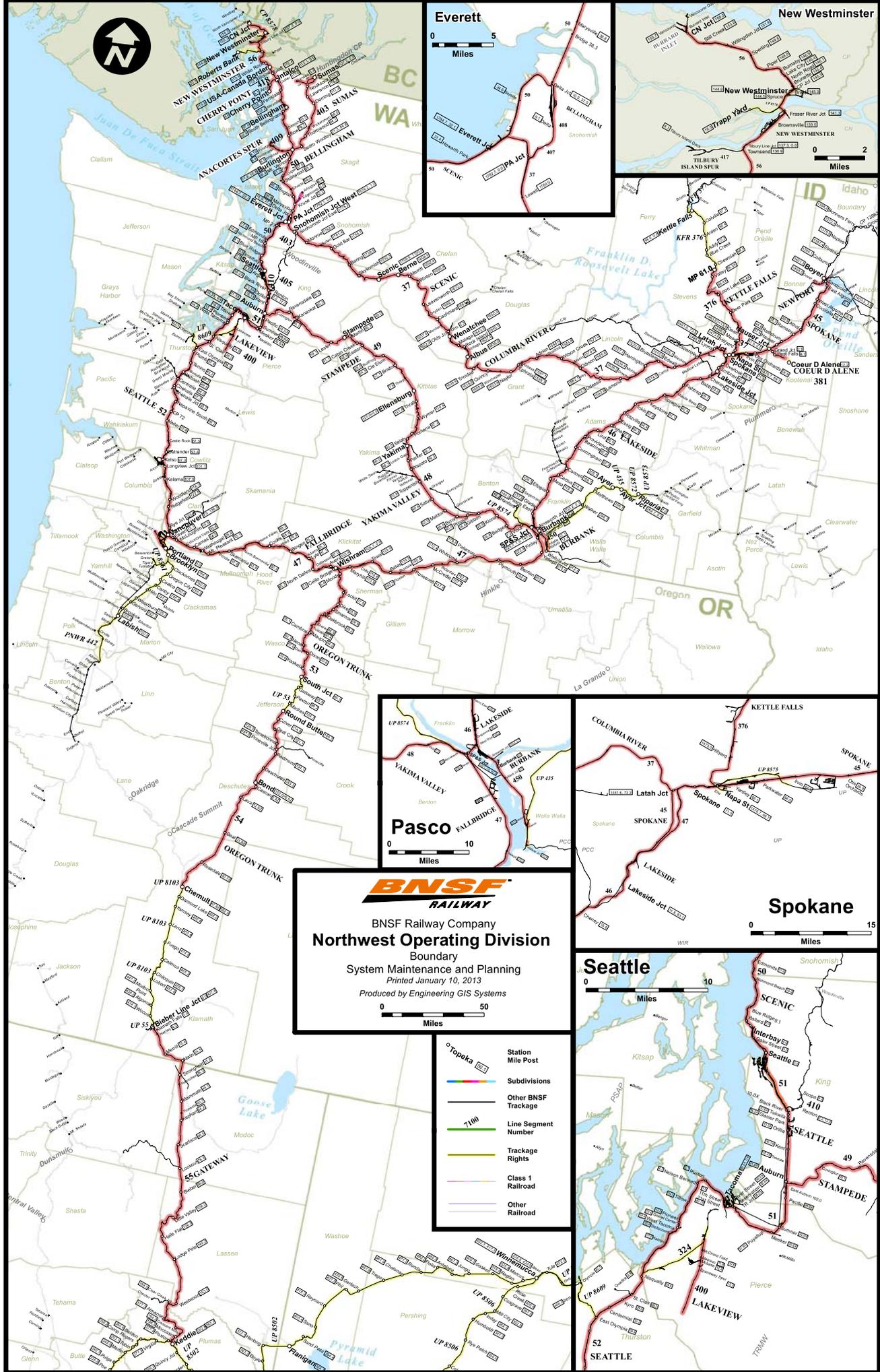
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RAILWAY

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Northwest Operating Division
Boundary
System Maintenance and Planning
Printed January 10, 2013
Produced by Engineering GIS Systems

- Station Mile Post
- Subdivisions
- Other BNSF Trackage
- Line Segment Number
- Trackage Rights
- Class 1 Railroad
- Other Railroad



APPENDIX B

Map of Amtrak routes in Washington

www.amtrak.com



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

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

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<input checked="" type="checkbox"/> PETER ARENDAS #70154 KLICKITAT COUNTY JAIL 205 S COLUMBUS AVE GOLDENDALE, WA 98620	(X) () ()	U.S. MAIL HAND DELIVERY _____

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WASHINGTON APPELLATE PROJECT

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