NO. ___
(COA NO. 85334-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT ARVISO,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Federal Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Robert Arviso asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Arviso seeks review of the Court of Appeals's opinion in *State v. Arviso*, No. 85334-1-I (Wash. Ct. App. Sept. 3, 2024). The Court of Appeals denied Mr. Arviso's motion for reconsideration on October 1, 2024.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Arviso has a constitutional right to present evidence in his defense. A trial court violates that right by precluding the admission of relevant, admissible evidence. Here, Mr. Arviso offered evidence he did not know a protection order existed when he allegedly violated it. The trial court remarked it would not admit the evidence without granting the prosecution a continuance. By forcing Mr. Arviso to choose between an unwarranted delay and exclusion of key evidence, the court violated his right to present a defense. Yet

the Court of Appeals construed the trial court's refusal to admit the evidence without delaying the trial as no ruling at all, leaving Mr. Arviso without a remedy for the violation of his rights. RAP 13.4(b)(3).

2. The prosecution must prove all elements of a crime beyond a reasonable doubt. To convict Mr. Arviso of resisting arrest, it had to prove a lawful arrest. An arrest achieved through excessive force is unlawful. Below, Mr. Arviso explained that the prosecution failed to prove a lawful arrest because any reasonable juror would find the police used excessive force. Yet the Court of Appeals declined to decide this issue, instead reframing it as an affirmative challenge to the arrest. In avoiding the merits of this properly presented sufficiency issue, the Court of Appeals violated Mr. Arviso's due process right to have every element proved beyond a reasonable doubt. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

In April 2022, the prosecution charged Mr. Arviso with assault against his former partner, Erin Maestas. CP 205–06. The trial court entered a pretrial protection order. CP 501. In June 2022, Mr. Arviso pleaded guilty pursuant to an agreement that the prosecution would recommend the judgment include no post-conviction no-contact order. CP 243, 509–10, 518.

The following day, the trial court granted Mr. Arviso a temporary release so that he could secure his car and other belongings before beginning his sentence. RP 41, 49, 486. Mr. Arviso was to return to court for sentencing after a week, but he did not do so. RP 50.

One day in October, Mr. Arviso visited a trailer to ask his friend Patti Kristjanson if she knew where his car was. RP 369–70. Ms. Maestas also happened to be visiting Ms. Kristjanson that day. RP 329–30.

Shortly after Mr. Arviso arrived, ten or more sheriff's deputies converged on the property where Ms. Kristjanson's trailer was situated. RP 205–06, 230. They announced over a loudspeaker that Mr. Arviso was under arrest and told him to leave the trailer. RP 209, 232–33. Within minutes, Ms. Kristjanson and Ms. Maestas stepped out of the trailer, leaving Mr. Arviso alone inside. RP 233.

No officer testified that they had any reason to believe Mr. Arviso was armed or that he harmed or threatened to harm anyone. RP 227–65. Still, the officers decided to remove Mr. Arviso by force. RP 210, 234–35. They pried open a door, broke several windows, and fired volleys of pepper balls into the trailer until Mr. Arviso stepped outside. RP 212, 215, 217–18, 236. Mr. Arviso's hands were empty, and he complied with the officers' commands. RP 222–23, 238.

The prosecution charged Mr. Arviso with a felony violation of a court order and resisting arrest. CP 470–71. The first count was premised on the pretrial no-contact order entered in the prior case in which Mr. Arviso pleaded guilty. CP 470, 501.

On the first day of the trial, Mr. Arviso moved in limine to admit the guilty plea statement in the prior case. RP 40. Mr. Arviso's counsel argued the prosecutor's recommendation that there be no post-conviction no-contact order was relevant to show Mr. Arviso did not know the order remained in effect in October 2022. RP 40.

The trial court agreed the plea document was relevant, but refused to admit it without continuing the trial to allow the prosecution additional time to prepare. RP 47. Unwilling to delay his trial, Mr. Arviso chose instead to withdraw his motion. RP 51–52.

The jury found Mr. Arviso guilty of both charges. CP 417–19.

E. ARGUMENT

1. **The Court of Appeals held the trial court's refusal to admit defense evidence without continuing the trial was not an appealable ruling, burdening Mr. Arviso's right to present a defense.**

The State and federal constitutions entitle Mr. Arviso to present evidence in his defense. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295–96, 359 P.3d 919 (2015); Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV § 1. When the defense offers relevant evidence, the burden shifts to the prosecution "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Ward*, 8 Wn. App. 2d 365, 371, 438 P.3d 588 (2019) (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). The trial court may exclude the evidence only if the prosecution's "interest outweighs the defendant's

need." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Darden*, 145 Wn.2d at 622).

To convict Mr. Arviso of violating a court order, the prosecution had to prove "(1) there [wa]s an order, (2) the person to be restrained kn[ew] of the order, and (3) the person violate[d] the order." *State v. Melland*, 9 Wn. App. 2d 786, 812–13, 452 P.3d 562 (2019) (citing former RCW 26.40.110(1)(a)); RCW 7.105.450(1)(a).

Because knowledge of the order is an essential element, evidence suggesting Mr. Arviso lacked that knowledge is at least minimally relevant to his defense. *Jones*, 168 Wn.2d at 720.

Mr. Arviso sought to admit his guilty plea statement in an earlier case involving the same alleged victim, Ms. Maestas. RP 40. There, the prosecution charged Mr. Arviso with assault, and the court entered a pretrial no-contact order in favor of Ms. Maestas. CP

205–06, 501. Mr. Arviso then pleaded guilty to one count each of fourth-degree assault with domestic violence and attempting to elude. CP 243, 250.

As a term of the plea bargain, the prosecution agreed to recommend that the judgment contain no post-conviction no-contact order. CP 510, 521.

The trial court entered Mr. Arviso's guilty plea on June 21, 2022. CP 243. On June 22, the court granted Mr. Arviso a temporary release to allow him to secure his car. RP 41, 49. He was to return to court for sentencing on June 28, but did not do so. RP 41, 50–51. Judgment was not entered on his guilty plea until after the events of this case. CP 243.

The guilty plea statement supports an inference Mr. Arviso thought the no-contact order lost its effect when the court accepted his guilty plea. As a layperson, Mr. Arviso may not have grasped that the prosecution's

recommendation to dispense with a no-contact order would not take effect until sentencing, if ever. RP 40. As the trial court recognized, the statement bore at least "minimal relevance" to Mr. Arviso's defense. RP 47. Moreover, the prosecution's recommendation is both a verbal act and a statement of a party opponent, not hearsay. *State v. Gillespie*, 18 Wn. App. 313, 315, 569 P.2d 1174 (1977); ER 801(d)(2).

However, despite acknowledging the plea statement was relevant, the trial court refused to admit it without delaying the trial to allow the prosecution more time to prepare. RP 47, 50–51. Forced into the impossible choice to delay his trial and remain in jail, or present evidence in his defense, Mr. Arviso withdrew his motion to admit the guilty plea statement. RP 48, 51–52.

The trial court erred in conditioning admission of the evidence on a continuance because the prosecution's unpreparedness for trial was not good cause. *State v. Kearney*, 75 Wn.2d 168, 172, 449 P.2d 400 (1969); *State v. Woods*, 5 Wn. App. 399, 401, 487 P.2d 624 (1971). The prosecution indisputably knew about the guilty plea statement from the inception of this case, having signed it months before the alleged violation occurred. CP 518. It follows the prosecution knew of its recommendation that no post-conviction no-contact order be entered and should have foreseen Mr. Arviso would use it in his defense. CP 510. Accordingly, the prosecution had ample time to prepare to meet this evidence.

By refusing to admit key defense evidence without granting an unwarranted continuance, the trial court violated Mr. Arviso's right to a defense. *Cf.*

Simmons v. United States, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) (a court may not require "one constitutional right . . . to be surrendered in order to assert another").

The Court of Appeals declined to reach the merits of Mr. Arviso's argument. Slip op. at 7. According to the Court of Appeals, "the [trial] court simply took no action at all." *Id.* at 6. The Court of Appeals dismissed the trial court's remarks about a continuance as no more than "'tentative' rulings," and cast Mr. Arviso's withdrawal of his motion to admit the plea statement as a freely made choice independent of any action by the trial court. *Id.*

The Court of Appeals's reasoning is untenable. In stating it would admit the plea statement only on the condition of an unwarranted continuance to allow the prosecution additional preparation time, the trial court

forced Mr. Arviso to choose between his trial date and the right to defend himself. *Simmons*, 390 U.S. at 394. Whether the trial court's remarks are labeled a "final" ruling or a "tentative" one, the effect is the same.

Because the Court of Appeals's decision sanctions a violation of Mr. Arviso's constitutional right to present evidence in his defense, this Court should grant review. RAP 13.4(b)(3).

2. The Court of Appeals avoided ruling on Mr. Arviso's sufficiency challenge by recharacterizing it as an affirmative challenge to his arrest.

The unshakable foundation of our criminal legal system is the prosecution's burden to prove every element of the offense beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). On appeal, due process requires that this Court reverse a conviction if, viewed favorably to the prosecution, the evidence does not permit a reasonable fact-finder to

find all elements proven. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

It is also black-letter law that a convicted person may raise the sufficiency of the evidence to support conviction "for the first time on appeal." *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998); *accord, e.g.*, *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). This is because the sufficiency of the evidence "is a question of constitutional magnitude" that is necessarily based on the trial record and therefore "manifest." *Alvarez*, 128 Wn.2d at 13; RAP 2.5(a)(3). In addition, a party may always raise their opponent's "failure to establish facts upon which relief can be granted." RAP 2.5(a)(2).

That sufficiency can be raised for the first time on appeal is so ingrained that appellate courts routinely review such challenges without addressing RAP 2.5(a).

E.g., *State v. Green*, No. 85151-9-I, 2024 WL 4223403, at *9–10 (Wash. Ct. App. Sept. 16, 2024) (unpub.); *State v. Jagger*, No. 85037-7-I, 2024 WL 4025915, at *2–4 (Wash. Ct. App. Sept. 3, 2024) (unpub.); *State v. Cortez*, No. 84744-9-I, 2024 WL 3937452, at *1–5 (Wash. Ct. App. Aug. 26, 2024) (unpub.).

To convict Mr. Arviso of resisting arrest, the prosecution had to prove he (1) "intentionally" (2) "prevent[ed] or attempt[ed] to prevent" an officer from arresting him, and (3) the arrest was lawful. RCW 9A.76.040(1); *accord* WPIC 120.06; CP 434. Mr. Arviso argued the prosecution failed to prove the element of a lawful arrest because the prosecution's evidence would lead any reasonable jury to find the police used excessive force. Br. of App. at 29–37; Reply at 8–11.

An arrest is unlawful if the police carried it out in violation of the Fourth Amendment—for example, if

the police used excessive force. *State v. McCrorey*, 70 Wn. App. 103, 114–15, 851 P.2d 1234 (1993), *abrogated on other grounds*, *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998); *Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000). It follows that, if the prosecution's evidence would lead any reasonable juror to find the police used excessive force, then the prosecution failed to prove Mr. Arviso's arrest was lawful and failed to carry its burden of proving his guilt of resisting arrest.

A recent opinion of Division Two of the Court of Appeals illustrates this intersection of the sufficiency standard and the lawful arrest element. *See State v. J.G.*, No. 57188-9-II, 2024 WL 4213298 (Wash. Ct. App. Sept. 17, 2024) (unpub.). There, J.G. argued the prosecution did not prove a lawful arrest because the police arrested him based on a pretext. *Id.* at *3. The prosecution argued that RAP 2.5(a) precluded J.G.'s

argument on appeal because he did not argue the arrest was pretextual in the trial court. *Id.* at *4.

The Court of Appeals rejected the prosecution's argument that RAP 2.5(a) blocked J.G.'s sufficiency challenge. *Id.* at *4. It cited longstanding precedent that a convicted person may challenge the sufficiency of the evidence for the first time on appeal. *Id.* (citing *State v. Fleming*, 155 Wn. App. 489, 506, 228 P.3d 804 (2010)). The Court of Appeals went on to consider whether, under the applicable law, the evidence supported an inference that J.G.'s arrest was lawful. *Id.* at *4–5.

In this case, rather than address Mr. Arviso's sufficiency challenge as in *J.G.*, the Court of Appeals recharacterized it as an affirmative challenge to the lawfulness of his arrest. Slip op. at 8–9. As Mr. Arviso did not move before trial to suppress his arrest, the

Court of Appeals held he waived the issue whether the police used excessive force. *Id.*

What the Court of Appeals overlooked is that the prosecution bore the burden to prove *to the jury* that Mr. Arviso's arrest was lawful. *Rich*, 184 Wn.2d at 903; RCW 9A.76.040(1). If the evidence the prosecution presented did not permit a reasonable inference the police used less than excessive force, then the prosecution failed to prove this element. *J.G.*, 2024 WL 4213298, at *3–4; *Staats*, 139 Wn.2d at 774.

Put another way, Mr. Arviso *did* contest the lawfulness of his arrest in the only way that matters for a sufficiency challenge. Mr. Arviso pleaded not guilty to the charge of resisting arrest. 10/31/22 RP 3. "A plea of not guilty puts all elements of the crime in issue," *State v. Anderson*, 15 Wn. App. 82, 84, 546 P.2d

1243 (1976), including the essential element of a lawful arrest, RCW 9A.76.040(1); WPIC 120.06.

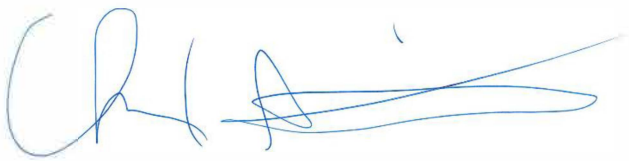
In declining to reach the merits of Mr. Arviso's sufficiency challenge on the erroneous basis that he failed to preserve it, the Court of Appeals burdened Mr. Arviso's due process right to have the prosecution prove all elements of the offense beyond a reasonable doubt. RAP 13.4(b)(3). This Court should grant review.

F. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this brief of appellant contains 2,577 words.

DATED this 2nd day of October, 2024.



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APPENDIX

Petitioner's Appendix

1. Opinion of the Court of Appeals
2. Order Denying Motion for Reconsideration

FILED
9/3/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT PATRICK ARVISO, Appellant.	No. 85334-1-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — A jury convicted Robert Patrick Arviso of felony violation of a no contact order (NCO) which protected his former girlfriend, E.M.,[1] and of resisting arrest. Before trial, Arviso moved to admit the plea agreement underlying the NCO to explain why, at the time of his arrest, he mistakenly thought the NCO had been rescinded. In response, the State sought a short continuance. Arviso now argues that the trial court—when it indicated it *would* grant the continuance *if* it admitted the plea agreement—forced him to forgo his right to present the defense that he did not "knowingly" violate the NCO. Arviso also argues that we should reverse his conviction for resisting arrest because law enforcement used excessive force in effectuating the arrest, rendering his arrest "unlawful" and vitiating an essential

[1] We refer to E.M. by her initials to protect her privacy.

element of that crime. We disagree with both arguments, affirm the trial court, but remand solely to strike the imposition of the victim penalty assessment (VPA).

I. BACKGROUND

Arviso and E.M. were in an intimate relationship between 2021 and 2022. In April 2022, the State charged Arviso inter alia with committing an assault in the second degree against E.M., with a domestic violence indicator. Two hearings then occurred. First, in May 2022, the trial court imposed a domestic violence NCO protecting E.M. Second, in June 2022, Arviso pled guilty to assault in the fourth degree, with a domestic violence indicator. As part of the plea agreement, the parties agreed that:

> c) The prosecuting attorney will make the following *recommendation* to the Judge:
>
> Count 1: . . . *NO POST CONVICTION NCO*.

(Emphasis added). The court then released Arviso prior to his sentencing hearing, for which he did not appear. The court issued a warrant for his arrest.

On October 8, 2022, Arviso visited a property in Snohomish County which E.M. was known to frequent. As told by Arviso, he visited the property to find a missing car, which he believed belonged to him and whose whereabouts he believed E.M. would know. Arviso entered and waited in a trailer on the property, and E.M. arrived at the trailer shortly thereafter. When the owner of the property arrived at the trailer, she saw them sitting together.

Contemporaneously, another resident of the property called law enforcement, knowing that there was an NCO between Arviso and E.M. Law enforcement arrived shortly after and confirmed both that there was an NCO

between Arviso and E.M. and that Arviso had multiple outstanding warrants for his arrest. When the sheriff deputies arrived, they surrounded the trailer and, over a loudspeaker, ordered Arviso to exit. Arviso testified he was aware of law enforcement's presence following their announcement. The owner of the trailer and E.M. exited the trailer, and the owner confirmed to law enforcement that Arviso was in the trailer.

Arviso remained inside the trailer for approximately an hour. Then, the deputies deployed pepper balls to extricate him. After that, Arviso complied and the deputies took him into custody.

The State charged Arviso with two new crimes, namely, with felony violation of an NCO (which was a felony because he had had two prior convictions for violating an NCO or other type of protection order), and with resisting arrest under RCW 9A.76.040 for refusing to exit the trailer.

The jury found Arviso guilty of both crimes. Arviso timely appeals.

II. ANALYSIS

A. Arviso's Right to Present a Defense

Before trial, Arviso moved to admit the plea agreement in the June 2022 assault case. His counsel argued the plea paperwork

> relates to the same cause number that the no-contact order is for, and in the section regarding the prosecutor's recommendation to the judge, the words on the document is 'no post-conviction no-contact order' . . . it does go to Mr. Arviso's understanding as to the status of the no-contact order if the last piece of paperwork he signs says the words 'no post-conviction no-contact order.'

In other words, Arviso argued the court should admit the agreement, not to prove that the NCO in fact had been rescinded, i.e., the "validity of the order," but

because

> the State has to prove that he *knowingly* violated an order. If he signs paperwork that says the words 'no post-conviction no-contact order,' it goes to his knowledge.

(Emphasis added).

The court found that the plea agreement had "very minimal probative value" in that the agreement "*could* . . . lend[] credibility to [Arviso's] belief that he didn't think [the NCO] was in effect, but *first* there would have to be some evidence of" the fact that the NCO was not in effect. (Emphasis added). The court did not grant the motion to admit at that time and, instead, heard from the State.

The State responded that it wished to obtain the transcript of the second hearing in June 2022, where the court accepted Arviso's change of plea, so as to determine, as the court had stated, "what [Arviso] was told, if anything about the NCO." The State also asserted that to obtain a transcript would require a continuance of the trial.[2]

The court then reiterated that "there is again some minimal relevance. I think it raises some issues that haven't been briefed . . . I think it would be fair in response to . . . [have] . . . a transcript of the hearing . . ." The court did not grant the motion to continue at that time and, instead, heard from Arviso's counsel who stated:

> because of my schedule, if the Court is inclined to grant a continuance for the State to get a transcript, then I – that puts me

[2] The State also read from an email between it and Arviso's counsel, in which his counsel indicated that their "recollection [of the June hearing] is that it was clear . . . that he cannot have contact with [E.M.]" and "that [Arviso] was probably just nodding along, focused on being released." We need not further discuss the content of that discussion.

> again in a situation where I'm trying to balance Mr. Arviso's speedy trial rights. [3]

The court responded "well, my *inclination* would be to grant [a] continuance for a week." (Emphasis added). The court did not grant the motion to continue at that time and, instead, Arviso's counsel interjected and stated:

> *If* the Court is indicating that they're granting a continuance . . . *I'll revoke my request to enter the plea paperwork*, which should not present the need for a continuance.

(Emphasis added).

At the court's suggestion, Arviso's counsel then spoke with Arviso off the record and, when they returned, Arviso's counsel confirmed the decision, stating:

> I'm asking to proceed today. *I'll retract my motion in limine* No. 10. I believe that would cure this issue if I'm not arguing that at all.
>
> I had that conversation with Mr. Arviso. It has been made clear to him that conversations about the plea paperwork would necessitate a continuance in this case. *We would like to proceed now*.

(Emphasis added).

The State asked whether that decision was "a strategic decision being made by defense" and Arviso's counsel responded "yes."

The court concluded this conversation by stating: "All right. Then information regarding . . . the plea paperwork will be excluded. And – or I guess *it's withdrawn* or the defense is not going to get into that. *I shouldn't say it's excluded*."

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[3] Arviso does not argue on appeal that the trial court actually violated his right to a speedy trial under CrR 3.3 by offering the possibility of a continuance, though he seems implicitly to suggest the court imposed such a Hobson's choice. Regardless, as the State argues, there is no dispute that the limited proposed continuance fell still within Arviso's "then-existing time-for-trial deadline." Therefore, we do not consider this argument.

(Emphasis added). Neither party objected to how the trial court characterized Arviso's decision. The court never granted either the motion to admit the plea agreement or the motion to continue the trial. Neither party asked for a ruling on either motion. The parties and trial court merely proceeded to a different topic of discussion.

Arviso first argues that the trial court's "refus[al] to admit the guilty plea statement without granting the prosecution" an "unwarranted continuance" violated his right to present a defense. This argument is factually incorrect and procedurally barred.

Factually, in the colloquy detailed above, the court simply took no action at all, made no decision of any kind, and did not grant or deny Arviso's motion to admit the plea agreement or the State's putative motion to continue the trial. Rather, Arviso made the "strategic decision" to "retract" his motion, to not "argu[e] [his defense] at all," and "to proceed now."

The effect procedurally is that "any error in admitting or excluding evidence is waived," *even if* we charitably construe the court's musings about the relevancy of the evidence and the need for a continuance as "tentative" rulings on those motions. State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991) ("Carlson *never sought a final decision*. He therefore waived any error in excluding that evidence") (emphasis added)). Stated otherwise, "[a] defendant who does not seek a final ruling on a motion in limine after a court issues a tentative ruling waives any objection to the exclusion of the evidence." State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994).

And specifically, as to the State's motion, "[i]n both criminal and civil cases, the *decision* to grant or deny a motion for a continuance rests within the sound discretion of the trial court." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (emphasis added). And the court may continue the trial date on its own motion or the motion of a party when the administration of justice so requires and the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(f)(2). These principles of our review, however, presume a "decision" to grant or deny a motion to continue. No such decision was made here.

In short, Arviso waived any claim that the trial court abused its discretion in its handling of the competing pre-trial motions because Arviso did not secure a final ruling by the trial court on the decisions he asks us to review.

In turn, we cannot conduct the two-part test our Supreme Court provides, e.g., in State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022), when a defendant challenges a trial court's evidentiary ruling by claiming a violation of their Sixth Amendment right to present a defense. We are unable to analyze the lower court's evidentiary ruling for an abuse of discretion, as no ruling occurred here. Id. at 58-59. And, for the same reasons, we cannot consider whether a non-existent ruling violated the defendant's Sixth Amendment right to present a defense. Id. And, "phrasing an evidentiary ruling as a constitutional claim" cannot provide "a means for an end run around the Rules of Evidence." State v. Ritchie, 24 Wn. App. 2d 618, 629, 520 P.3d 1105 (2022), review denied 1 Wn.3d 1006, 526 P.3d 851 (2023). Arviso did not comply with our procedural requirements, and his claim thus fails.

B. Resisting Arrest

Arviso argues, for the first time on appeal, that we should reverse his conviction under RCW 9A.76.040 for resisting arrest because the sheriff deputies used excessive force in arresting him, thus invalidating the "lawfulness" of his arrest, which is an essential element of the statute. We conclude Arviso waived this issue below, and cannot argue it now, for several reasons.

We may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). "The purpose underlying our insistence on issue preservation is to encourage 'the efficient use of judicial resources.'" State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). "Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." Id. at 304-05.

Arviso did not brief the legality of his arrest or whether the deputies used excessive force as an issue for trial. There is no record of his attorney arguing below that the officers used excessive force to effectuate his arrest. The most substantive reference to the circumstances of Arviso's arrest was his own testimony that he stayed in the trailer until he eventually surrendered, but without mentioning the pepper balls, or its purposes and general effects. Neither Arviso nor any of the law enforcement officer witnesses testified about why they chose to fire pepper balls to effectuate his arrest, or the manner in which they did.

Moreover, the trial court was not asked to and did not make any findings of fact about whether the use of pepper balls was proportionate. The court

furthermore was not asked to and did not issue any jury instructions related to what circumstances might make an arrest unlawful or ask the jury to consider it by means of special interrogatories.

Neither during trial nor afterward did Arviso move to dismiss the charges on the grounds that his arrest was "unlawful" under RCW 9A.76.040 or the case law he now adduces.

On appeal, Arviso does not argue that he could bring this issue for the first time as being within the bounds of RAP. 2.5(a). In his opening brief, he did not argue that the verdict was manifest constitutional error that he could raise for the first time on appeal. Instead, he simply argues that the statute was improperly applied. In its response brief, the State argued that Arviso waived his right to argue his arrest was unlawful by not raising the issue below. Arviso failed to address the State's arguments in his reply brief. Instead, he simply reiterated his argument that the State failed to prove his arrest was lawful under the relevant statute.

For these reasons, we conclude Arviso failed to preserve this argument below. Thus, we affirm the trial court.

C. VPA

Arviso argues that we should remand this matter to the trial court to strike the VPA. The State does not object to a limited remand for this purpose.

In 2023, our legislature amended RCW 7.68.035 to state that "[t]he court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). Further, courts now

are statutorily required to waive VPAs, even those imposed prior to the 2023 amendments, on the defendant's motion. Id.; RCW 7.68.035(5)(b).

Here, the court imposed a $500 VPA in May 2023. The court also found that Arviso was indigent. In State v. Ellis, this court determined that, although the fees were imposed prior to the effective date of these amendments, "it applies to Ellis because this case is on direct appeal." 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). Similarly, even though Arviso's restitution was imposed prior to the law's effective date, RCW 9.94A.753(3)(b) is applicable because his case is on direct appeal.

Thus, accepting the State's concession, we remand this matter to the trial court to strike the VPA.[4]

III. CONCLUSION

We affirm the trial court except to strike Arviso's VPA.

Díaz, J.

WE CONCUR:

Feldman, J.

Coburn, J.

[4] Arviso also filed a statement of additional grounds ("SAG"), under RAP 10.10(c), where he appears to argue (1) that his plea agreement legally and actually lifted his NCO and (2) that the law regarding felony NCO violations should be modified so that all three qualifying violations must be against the same person, instead of allowing qualifying violations to be against different persons. As to the former, we do not reach the merits of claims that rely on evidence outside of the record. See State v. McFarland, 127 Wn.2d 322, 338 n. 5, 899 P.2d 1251 (1995) ("a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record"). The latter is a policy-based argument better made to the legislature instead of to the court.

FILED
9/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT PATRICK ARVISO, Appellant.	No. 85334-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Robert Patrick Arviso, filed a motion for reconsideration of the opinion filed on September 3, 2024 in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied

FOR THE COURT:

Díaz, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 85334-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: October 2, 2024

WASHINGTON APPELLATE PROJECT

October 02, 2024 - 4:25 PM

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