91484-2

Court of appeals No. 45398-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRIAN EDWARD WILSON, Petitioner,

PETITION FOR REVIEW

Brian E. Wilson
916 Hanford Ave.
Bremerton WA 98310

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A. IDENTITY OF PETITIONER

I Brian Edward Wilson, the Petitioner, ask this Court to accept review of the decision designated in part B of this Motion B.

DECISION

Petitioner seeks review of the entire decision of the Court of Appeals affirming the conviction and sentence entered in the Superior Court of Washington for Kitsap County. A copy of the Court of Appeals Decision is attached to this Motion.

C. ISSUE'S PRESENTED FOR REVIEW

1. Does the Court of Appeals decision conflict with my right to a speedy trial.

2. Does the Court of Appeals decision conflict with my claim to ineffective assistance of council.

3. Does the Court of Appeals decision conflict with my claim of insufficient evidence and facts on the record for the Court to review.

4. Does the Court of Appeals decision conflict with my claim as to the violation of my constitutional right to a fair trial.

5. I believe my rights were violated, when my entire appeal was written by my court appointed appeals lawyer John A. Hays, without any input from me, while I was incarcerated at the Kitsap County Jail, for DUI physical control.

This incident occurred in downtown Port Orchard. At the Kitsap Transit foot ferry bus transfer station bus stop. My arrest took place in this area at 4:05 p.m.. During the peek hours of shipyard traffic, in the unpublished opinion it's stated that four witnesses saw basically the same thing, a drunk man inappropriately close to H.B. at the transfer station bus stop. Only the prosecutions witness H.B., provided a statement on record of any inappropriate touching, for the appeals court to review. H.B. states the drunk man grabbed her boob at the bus stop. What was not provided to the Court of Appeals for them to review, was a time line of the events of that day. What time witness, Helen Henry, called her dispatch. What time Kitsap Transit dispatch called and reported this incident to Cencom. What time were the Kitsap Transit buses coming and going from that transfer center? What time was H.B. escorted home by officer Patrick Pronovost. What time was I arrested in relation to the time the incident actually happened.. This was information excluded in my trial to mislead the jury, also the Court of appeals. This is information that was vital. I will clearly state why at the end of this statement, if you make it that far. The jury, and

the Court of Appeals, were mislead to believe that the incident occurred at,, or very close to the time of my arrest. Kitsap Transit driver Helen Henry called this in at 3:33 pm. As she was leaving the transfer station, en route 86 southworth ferry. As she spotted drunk man returning to the area after threatening him she would call police if he didn't leave the area. Ms. Henry would not return to the transfer station from this route until 4:30 pm. She was not in the area at the time of my arrest. It is hard to see emotion in words typed on paper. But being that in court the day Henry gave her statement. This was the first time in over five months that she was able to see who they had arrested for this incident. Kitsap Transit had been my main form of transportation for the four years before this arrest. Kitsap Transit dispatch called Cencom at 3:50 pm. Describing a male twenties, blue knit hat, and sweatshirt, intoxicated, harassing passengers in bus shelter at POF dock. The prosecutions witness Ms. Henry, describes basically the same scenario as the other three of the prosecutions witnesses. One would assume that all that was witnessed would have happened at around 3:30 pm. While Henry had been parked at the transfer station. Then when the drunk male was seen by Henry returning to area , she then

called dispatch. The prosecutions witness, Talkington, states on the record. The incident she witnessed happened around noon that day, and she had gotten on the foot ferry to Bremerton. Soon after and left the area. Ms. Henry states on record after confronting the drunk man and H.B. at the bus stop, and getting the drunk man to leave the area. Ms. Henry asks H.B if she needs help or if she would like for her to call anyone for her. H.B. Declines, and Ms. Henry see's H.B. onto a bus. On the record, officer David Walker is the first officer to arrive to the call. Cencom recording 3:57 pm, officer Walker spots a man at Kentucky Fried Chicken. Haft a mile away from the transfer station. Wearing a blue cap, blue sweatshirt, tan jacket, matching the description. Officer Walker states he was the first officer to arrive and the arresting officer on the record. How would the second officer to arrive, Pronovost, be a witness to something officer Walker was not. How would officer Pronovost, be a witness to what three other witnesses stated on the record. How would officer Pronovost be a witness to an incident that occurred before the police were called to respond. Buses come to the transfer center in question every haft hour from the time 7:30 am to 7:00 pm. Kitsap Transit dispatch called Cencom

at 3:50 pm, police arrived soon after. There would have been buses parked in front of that bus stop at that time. H.B. States on the record she was taken off bus route number five. By a driver named Dan she had talked to and was taken over to police. Bus route 5 runs at 4:00 pm on the hour. This is easy information to get from the KT website. Officer Pronovost states on the record seeing me with H.B. that day. Also states to seeing exactly what the other three witnesses had witnessed in the same way. The incident he described was going on earlier in the day. The only way officer Pronovost would get away with making such statements on record. Without perjuring himself would be that he was repeating what the three other witnesses had stated in written, and phone reports. Pronovost took the statement from H.B. at around 7 pm later that night on 3-6-13. The other two witnesses written statements were taken in mid April. The statements made by Pronovost stated on the record were very misleading to the jury in my trial, and the Court of Appeals. Pronovost stated on the record he is retired state patrol 28 years. This is most likely why the older Pronovost saw what the arresting officer Walker did not that day. On the record, the prosecutor Lewis, asks Pronovost, "Can you identify him with

the color of shirt". Pronovost states " A black shirt". I was clearly wearing a blue shirt that day at trial. The video of my trial would prove that. The opinion states I inquired regarding facts not on the record. Concerning a convenience store videotape. There are multiple cameras in the area. One is located very close to the bus stop in question. Outside the Port Orchard Marina office that surveys the parking lot and surrounding area. Also three around walkway of Kitsap Bank and the foot ferry waiting area. In the unpublished opinion, states that the incident happened at night. I am interested in how they came to this conclusion. There are three times stated on the record. Officer Walker stated he had been working the 2 pm to 10 pm shift. Helen Henry stated that she had been working the 12 am to 7:40 pm shift. The other reference to a time was given by witness Talkington. The time she stated seeing the drunk man with H.B., and what she had saw happen that day before getting on the foot ferry. Talkington stated on the record this all happened around noon on 3-6-13. This was very confusing to me at trial. I had told both the private investigator, and council Ms. Taylor. I had been dropped off at the ferry at 1:30 pm, in the first weeks in jail. Also that I had three witnesses who could have testified to that, and

everything I had done that day, verbally and in writing. I sent two signed statements from two of these witnesses in the statement of additional grounds with the appellant brief. My counsel set over my trial around a month to interview witness Talkington. On the record, Pronovost states " She was shaky. She was excited. Her voice was wavering. When she looked toward the car where we put Mr. Wilson, she kind of looked down, like she didn't want to look directly at it. She was intimidated". This was Pronovost's shady, misleading way of saying she didn't identify me at the scene. On the record prosecutor Lewis questions witness Helen Henry, describing the suspect she saw that day as "the individual" and " the individuals", and confusing the jury by mentioning a few things I said about myself. In a letter I wrote to kitsap Transit while I was in jail. That prosecutor Lewis attempted to use against me in trial. But never having Ms. Henry identify me as the man she saw that day. In the cross examination of Henry by my counsel. Ms. Taylor had her assistant a Mr. Raheem ask one question of Henry. "Ms. Henry, you didn't witness Mr. Wilson grab H.Bs breast, did you?". Henry stated, "No, sir, I didn't see that". I only needed my counsel to ask Ms. Henry one question. Was I the man she that had

seen at the bus stop with H.B on 3-6-13. My request was not granted. None of my requests were, and I had made quiet a few. In the unpublished opinion it's stated, my defense is general denial, and I did not argue that no crime had been committed. I was not given a choice of what defense would be used in my trial. My counsel did not discuss with me what questions would be asked of me if I took the stand. I was not discussed what questions would be asked buy the prosecution. I had seen what happened when witness Helen Henry took the stand. She was cut off at times in cross examination, and not asked the right questions. The weeks leading up to the trial, I was unable to contact my counsel. Taylor had sent her assistant Mr. Raheem to get my measurements in the week before the jury trial. For the clothes they got me at a thrift store. I had to wear my beat up work shoes I'd wore to jail, and I had not had a hair cut in over five months. I wasn't given the option to get one. I was unable to find out the most basic information about my case. What time was I arrested. Where was I arrested when the officer found me. While in jail, maybe by dumb luck or chance. I found out some information about my case. That the Court of Appeals has some information about in the statement of additional

grounds. After my trial was set over the third time by my own counsel. On the forth when she did it again successfully. Even though when the judge asked me if I was ok with the set over. I told him I wanted the date the prosecutor Lewis had asked for that would have started my jury trial in two days time. Soon after that day in court my counsel set up a meeting with prosecutor Lewis. The focus of this meeting was my abuse of alcohol. I was offered one year of outpatient treatment, and time severed. I had told my counsel I had no interest in taking any kind of deal, and getting my case to trial was my main concern months prior. In this meeting prosecutor found out things about case she may not have known if this did not occur. One of the things I had told her is that. I've been riding Kitsap Transit buses for years, and the bus driver would surely recognize me. In my trial, in the opening statements Ms. Taylor's assistant counsel member, Mr. Raheem, stood up and said a single line stating on the record ,none of the witnesses were in the area of my arrest. This statement was unchallenged by the prosecution. The opening statements were not received by the Court of Appeals due to cost. I don't know why they would put a statement like this on record, and not challenge the prosecution. In a

document they were most likely aware the Court of Appeals would not be able to review. In my last meeting with the private investigator, Ms. Durkee. She had told I would most likely have to go after them afterwards. I didn't understand what she had meant at the time she had told me that. She had no involvement in the jury trial. When I was picked up, I found out the next day I was charged with sexual misconduct of a minor. Soon after,I was taken to video court and charged with child molestation 3. I was called a danger to society in court bail was set at 100,000. I was 31 years old at the time, never had a felony before. Or anything on my record related to a sex offence. At the sentencing the judge said it was a shame I didn't remember. It's not that I don't remember what I had been doing that day, and what I doing outside that 7-11, I do. The crazy thing is people that had direct contact me. Tried to convince me had something to do with a incident I had no involvement in. Officer Walker stated in is report that I had told him. I had no idea what he was talking about when he mentioned a girl. He also mentioned he knew me in the report. I had been over served at the Blue Goose Tavern a few weeks earlier. I had been homeless at the time sleeping on a bench the cops woke me up and had me call a ride. I

don't remember meeting Walker that day also. Maybe my medical reports or er visits could have explained this. That was a path my counsel didn't have any interest in pursuing.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals decision conflicts to my right to a speedy trial. From the I was arrested to my trial was 132 days. From the time of my trial was 105 days. My trial was set over several times by my counsel. Against my wishes, I appeared in court nine times from my arraignment to my jury trial. I had wrote judge Jennifer A. Forbes a written letter I gave her in court. Expressing my concerns about my counsels setting over of my trial and her odd behavior. When she sets over my trial again successfully. On May 16, 2013 after writing Judge Forbes that letter. I state on record asking Judge Kevin Hull for the earlier trial date set by prosecutor Lewis had requested. My request was not granted. The Court of Appeals was given both the letter to Forbes and the recorded statement to Kevin Hull. In the statement of additional grounds with the appellant brief.

2. The Court of Appeals decision conflicts with my claims to ineffective assistance of counsel. Ms. Taylor set over my trial numerous times against my approval, and attempts to get my trial to a earlier date.

Taylor did not discuss with me the defense she planned to use in my jury trial, and I was not given an option of a defense to use in trial. I was not explained to by Taylor what putting the burden on the state meant.

Taylor did not discuss with me I had the option of a bench trial or a jury trial. Taylor was well aware of my issues with anxiety and other medical issues. Taylor had discussed my case with other inmates on her client roster in the same dorm I had been in at the jail. Taylor discussed statements I had wrote to her and the private investigator in confident in open court with other lawyers. After a meeting with Taylor and Lewis several weeks before my trial. Where I had declined the deal offered by Lewis. I witnessed Lewis intimidating Taylor in the interview room. Maybe this was the reason Taylor performed the way she had in the jury trial, and as my counsel.

3. The Court of appeals decision conflicts with my claim of insufficient evidence for a fair trial. Key witnesses did not properly identify me in the jury trial while examined on the record. Times and Events of key details of the day in question. Were not brought to the jury's attention for them to make a clear decision.

Questions that should have been asked of the witnesses were not. Questions I had asked my counsel to ask in trial we not. Evidence that would have aided in my defense was not included, and was guarded from me, and the jury, to aid the prosecution.

4. The Court of Appeals decision conflicts with my claim of violation of my constitutional right to a fair trial. I was arrested for an incident where I had been in the area of where it may have happened. Arrested and charge with no line up or speedy trial, and was not properly identified. I lived in a fish bowl jail where every conversation is recorded. My bail was set at 100,000. A defense was chose for me that provided no defense.

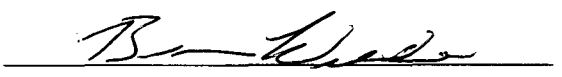
5. At the time my appellant brief was prepared I had been in Kitsap County Jail. I was arrested on 12-12-2013 for DUI physical control. While sleeping in my SUV at 7 am near a Labor Ready job site. Where I was to be working that day. I was in jail 3 months. While in jail I was not able to find out who was appointed my appellant lawyer appointed

In the felony conviction. I was not able to talk with John A. Hays or provided any input on the issues on the record. I had very little time to prepare my statement of additional grounds. But I provided the Court of Appeals with much information. Police reports, witness statements, and much more. What I was not able to provide the Court of Appeals with was the Cencom recording and event chronology. Also the information I received from Kitsap Transit.

CONCLUSION

I, Brian Wilson, believe the current system of justice is broken. I have lived through this and have researched this, and the failure of post conviction review to check ineffective trial attorney performance, is one large part of the problem. Procedural barriers to review in state and federal court should be revisited so that the attention of the judiciary is focused on the indigent defense crisis. Maybe then, there will be a chance for lasting reforms.

Respectfully submitted, Brian Wilson, Petitioner



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN EDWARD WILSON, Appellant.	No. 45398-3-II UNPUBLISHED OPINION

JOHANSON, C.J. — A jury found Brian Edward Wilson guilty of third degree child molestation based on an incident at a Port Orchard ferry dock. Wilson appeals, contending that the trial court erred by allowing the State to use the term "victim" and by continuing the trial over Wilson's objection. Wilson also filed a statement of additional grounds (SAG) alleging additional error. We hold that (1) use of the term "victim" was not improper, but even if it were, any alleged error is harmless, (2) the court properly granted Wilson's trial attorney's motion to continue even over Wilson's objection, (3) Wilson's ineffective assistance of counsel claim fails, and (4) Wilson's remaining SAG claims rely on facts outside the record and fail to inform this court as to the nature and occurrence of other alleged errors such that we decline to review those claims. Therefore, we affirm.

FACTS

In March 2013, Kitsap Transit driver Helen Henry pulled her bus into the passenger ferry stop in downtown Port Orchard. As she did so, Henry noticed Wilson pressing against a young woman. Henry could see that Wilson had his chin and arm over the woman's shoulder and that he was blowing cigarette smoke in the woman's face. According to Henry, Wilson appeared to be under the influence of alcohol, drugs, or both. Henry asked the young woman, H.B., if she was okay and whether she needed Henry to call someone on her behalf. H.B. declined, then boarded Henry's bus.

Laura Talkington was also at the passenger ferry dock on the day of the incident. Talkington noticed H.B., a former acquaintance, who appeared frightened and distressed as Wilson stood behind H.B. with his body pressed against her back. When H.B. saw Talkington, H.B. mouthed the word "help." 3 Report of Proceedings (RP) at 96. Talkington told Wilson that H.B. was only 15 years old and that he needed to leave her alone. Talkington then informed two nearby Port Orchard police officers that they needed to address the developing situation.

Officer Patrick Pronovost and Officer David Walker responded to Talkington's request. Officer Pronovost saw Wilson leaning over H.B. According to Officer Pronovost, H.B. looked as though she did not want Wilson to be there.

H.B. explained that she was at the passenger ferry dock when Wilson, whom she did not know, came up to her and attempted to initiate conversation. H.B. did not respond. Despite her refusal, Wilson tried to kiss her. Confused, H.B. backed away, but Wilson persisted, placing his hand down H.B.'s shirt and touching her breast. Wilson then tried to kiss H.B. a second time. After H.B. told the police what happened, the officers placed Wilson under arrest.

The State charged Wilson with third degree child molestation.[1] Before his trial, Wilson's attorney requested that the court continue the trial date, explaining that she needed additional time to prepare:

> My investigator and I have been working with Mr. Wilson with regard to trying to locate some witnesses that he believes can be helpful in potentially providing a defense for him. It's been a bit of a struggle to get identifying information for these witnesses.

RP (May 16, 2013) at 2. The State objected. Wilson himself also protested, asking why his trial date could not be sooner. But the trial court granted the motion over both objections.

Before trial began, Wilson moved in limine to preclude the State from referring to H.B. as the "victim." The State objected, and the trial court denied the motion. The trial court noted, and Wilson did not disagree, that Wilson's position was that he was not involved in any crime, not that H.B. was not victimized in some capacity.

The State's witnesses testified consistently with the facts as described above. Wilson called no witnesses and did not testify. Wilson's defense was general denial.

During trial, the State and a State witness used the term "victim" to refer to H.B. a total of six times. First, the State asked a question regarding H.B's demeanor:

> [THE STATE]: You briefly described the *victim's* demeanor while she was still sitting at the bus station. Did you have additional contact with the *victim*?
> [OFFICER PRONOVOST]: Yes.

[1] "A person is guilty of third degree child molestation when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.089(1).

4 RP at 118 (emphasis added). The third and fourth use of the word occurred as part of the following exchange:

> [THE STATE]: So when you got there, what was your role in it?
> [OFFICER WALKER]: We arrived, the suspect was pointed out, and I immediately recognized him. So I sort of gravitated to the suspect, since I was the lead car and I was closer to him. So I went that way while Officer Pronovost spoke to *the victim*.
> [THE STATE]: Okay. Did you ever have a chance to talk to the *victim*?

4 RP at 123-24 (emphasis added). Officer Walker also referred to H.B. as the "victim" one additional time on cross-examination. Finally, the State referred to H.B. as the "victim" in its closing argument, noting Wilson's proximity to the "victim."

The jury found Wilson guilty of third degree child molestation. Wilson appeals.

ANALYSIS

I. IMPERMISSIBLE OPINION ON WILSON'S GUILT

Wilson argues that the trial court violated his constitutional right to a fair trial in which the jury is the sole judge of the facts when it allowed the State and its witnesses to refer to H.B. as the "victim." We hold that, in context, the State's use of the term "victim" was not an impermissible opinion on Wilson's guilt, and even if it were, any error is harmless beyond a reasonable doubt.

We review a trial court's decision on a motion in limine for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Quaale*, __ Wn.2d __, 340 P.3d 213, 216 (2014).

"'Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury].'" *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642

(2009) (internal quotation marks omitted) (alterations in original) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because it violates a defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. *Demery*, 144 Wn.2d at 759.

Thus, witnesses may not offer opinions on the defendant's guilt, either directly or by inference. *King*, 167 Wn.2d at 331 (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).

Testimony that does not directly comment as to personal belief of the defendant's guilt or the veracity of a witness is helpful to the jury, and testimony that is based on inferences from the evidence is not improper opinion testimony. *State v. Blake*, 172 Wn. App. 515, 528, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013). "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Heatley*, 70 Wn. App. at 579. And constitutional error, if any, is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *See Quaale*, 340 P.3d at 218 (discussing constitutional harmless error as applied to improper opinions on guilt).

Here, whether Wilson was in fact guilty of the crime clearly is an "ultimate issue" in the case. Accordingly, we view the references to H.B. as the "victim" in context, considering the nature of the charges, the circumstances involved, the type of defense, and the nature of the testimony. Bearing these factors in mind, the references to the "victim" here do not rise to the level of impermissible opinions as to Wilson's guilt. Officers Pronovost and Walker testified that when they arrived on the scene, they encountered H.B. who was shaky, upset, and appeared intimidated. H.B. explained to the officers what had happened to her. For purposes of their investigation, H.B. was the "victim" as that term is used by law enforcement to refer to a complaining witness.

Moreover, the State merely asked the witnesses questions about whether they had an opportunity to speak to the victim and questions regarding H.B.'s perceived demeanor at the time of the incident. Neither the questions nor the responses give rise to an inference that the State presented impermissible opinions as to Wilson's guilt or the veracity of a witness. To constitute improper opinion as to a defendant's guilt, the testimony must "relate to the defendant." *State v. Wilber*, 55 Wn. App. 294, 298, 777 P.2d 36 (1989). No use of "victim" here related to Wilson specifically. And importantly, Wilson's defense was a general denial. Wilson denied committing the crime, but he did not argue that no crime had been committed.

Furthermore, our courts have previously held that use of the term "victim," while perhaps not encouraged, was harmless beyond a reasonable doubt. In *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44, *review denied*, 97 Wn.2d 1018 (1982), a statutory rape case, the trial court read the following stipulation to the jury: "'There has been a stipulation . . . that [Alger] has never been married to the victim.'" 31 Wn. App. at 248-49. The court noted that "[i]n the context of a criminal

trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." *Alger*, 31 Wn. App. at 249. As such, the court held that "the one reference to 'the victim' by the trial judge, did not, under the facts and circumstances of this case, prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence." *Alger*, 31 Wn. App. at 249.

Here, the State presented four uncontroverted witnesses who corroborated important aspects of H.B.'s version of the events. Even were we to consider the references to H.B. as the "victim" error, we hold that any error was harmless under the facts and circumstances of this case because any reasonable jury would have reached the same verdict beyond a reasonable doubt despite the alleged error.

II. TIME FOR TRIAL

Wilson also argues that his time for trial rights were violated when the court continued his case beyond the original June 3 trial date over Wilson's objection. The State responds that Wilson's claim is waived under CrR 3.3(f)(2). We agree with the State and hold that Wilson's claim fails because the motion to continue was brought by Wilson's trial attorney, who has the authority to make binding decisions on his behalf.

CrR 3.3 governs time for trial and accords with the United States Supreme Court's determination that states can prescribe reasonable periods for commencement of trials consistent with constitutional standards. *State v. Ollivier*, 178 Wn.2d 813, 823, 312 P.3d 1 (2013). Under CrR 3.3(b)(1)(i), an individual held in custody pending trial must be tried within 60 days of arraignment. But certain time is excluded from the computation of this 60-day period, including

continuances granted by the trial court. CrR 3.3(e). With regard to continuances, CrR 3.3(f)(2) provides,

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. . . . The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

Here, Wilson's trial attorney sought to continue Wilson's trial beyond the original time for trial date because she needed additional time to work with her investigator to locate witnesses she felt would be helpful to Wilson's defense. Our Supreme Court has concluded that counsel has the authority under CrR 3.3(f)(2) to make binding decisions to seek continuances. *Ollivier*, 178 Wn.2d at 825. Consequently, as the rule expressly provides, we hold that any objection is waived. *Ollivier*, 178 Wn.2d at 824; CrR 3.3(f)(2).

III. Statement of Additional Grounds

Wilson advances a number of arguments that essentially amount to a claim of ineffective assistance of counsel. Specifically, Wilson contends that his trial attorney failed to present key evidence and denied him a fair trial by not asking certain questions and by requesting that the court proscribe the State from eliciting certain testimony from its witnesses.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice; failure to show either prong defeats this claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). An appellate court reviews an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When counsel's conduct can be characterized as a legitimate trial strategy or tactics, performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Here, the majority of Wilson's claims of deficient performance by his trial attorney can be characterized as legitimate trial tactics. Wilson takes issue with his trial attorney's refusal to ask Henry what time the incident occurred and with the way his attorney phrased some of her questions during her cross-examination of the State's witnesses. But the record reveals that these are clearly strategic choices made by Wilson's attorney in her attempt to aid in his defense.

Wilson's mention of his attorney's request to prohibit the State from eliciting certain testimony is a reference to a motion in limine made before trial to exclude testimony regarding statements, presumably by Wilson, taken several weeks after the incident. Such a motion represents a similarly tactical choice by Wilson's attorney to prevent arguably irrelevant evidence from prejudicing her client.

Wilson's claim that his attorney refused to present key evidence that Wilson alleges would have changed the outcome of his trial relies on facts outside the record. And when a defendant raises issues that require evidence or facts not in the existing record, the appropriate means of doing so is through a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, Wilson's ineffective assistance of counsel claim fails.[2]

Separately, Wilson makes a number of inquiries regarding facts that are not in the record. For instance, Wilson asks whether the police searched the area for other potential suspects or whether they arrested the only intoxicated person in the area, whether the police tested his blood

[2] Wilson also argues in his SAG that his attorney violated his time for trial rights by requesting to continue his trial. We addressed this issue above and, therefore, address it no further here.

alcohol levels, whether a nearby convenience store had a videotape of Wilson entering on the day of the incident, whether the victim identified Wilson when the police arrived, and other similar questions. But there are not corresponding facts in the record, and even if there were, Wilson does not explain how the answers to these questions affected his case. We hold that Wilson has failed to inform this court as to the nature and occurrence of these alleged errors. RAP 10.10(c). Consequently, we decline to reach his additional issues.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Maxa, J.
MAXA, J.

J
LEE, J.