

NO. 46717-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAUL BENICIO CASTILLO-LOPEZ,

Petitioner.

PETITION FOR REVIEW

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A. *IDENTITY OF PETITIONER*

Raul Benicio Castillo-Lopez asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the published decision of the Court of Appeals affirming the Lewis County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

C. *ISSUES PRESENTED FOR REVIEW*

Does a trial court abuse its discretion and deny a defendant counsel of choice if it refuses to consider a motion for substitution and a motion to continue based upon an unwritten Superior Court policy of refusing all motions to substitute and continue criminal trials without consideration of the facts underlying the motion?

D. *STATEMENT OF THE CASE*

By information filed on February 11, 2014, the Lewis County Prosecutor filed an information charging the defendant Raul Benicio Castillo-Lopez with three counts of Second Degree Rape of a Child. CP 1-8. At that time the defendant was living in Mexico. RP 262-264. Towards the end of May that year the defendant was arrested on a warrant out of this case as he crossed the border from Mexico into California at San Diego. *Id.* On May 20, 2014, a Lewis County Sheriff's Deputy flew to California and took custody of the defendant out of the San Diego County Jail. *Id.* That deputy then brought the defendant back to Lewis County to appear on the charges in this case. *Id.*

On May 22, 2014, the defendant was arraigned on the charges brought in the original information and the court set a trial for July 7, 2014, 47 days after arraignment. RP 6/19/14 1-6. The court also appointed an attorney to represent the defendant. *Id.* On June 12, 2014, the Lewis County Prosecutor amended the information to add three more counts of Second Degree Rape of a Child, alleging that he had engaged in sexual intercourse with his step-daughter TS on three occasions separate from those alleged in the original information. CP 1-8, 9-17.

The defendant later became dissatisfied with this attorney, and his family was eventually able to raise enough funds to hire an attorney to represent him. RP 6/19/14 1-6. On June 19, 2014, 28 days after arraignment, the parties appeared before The Honorable Judge Hunt of the Lewis County Superior Court with the defendant now represented by both his court-appointed attorney as well as his recently retained attorney. RP 6/19/14 1-2. Retained counsel then moved for permission to substitute in as the defendant's attorney of record and for a continuance on the basis that he needed time to adequately prepare for trial. *Id.* Without consideration of any of the factors set out in *State v. Roth, infra*, Judge Hunt refused to consider granting a continuance to allow the defendant's retained counsel time to adequately prepare and refused to allow defendant's retained counsel to even enter the case. RP 6/19/14 4-6.

Judge Hunt based his decision on a blanket, unwritten policy of the Lewis County Superior Court judges to always deny motions to continue in order to allow newly retained counsel time to adequately prepare regardless of the underlying facts. RP 6/19/14 2-3. Judge Hunt stated the following in regards to this “unwritten” policy in response to the statements of defendant’s court-appointed attorney and retained attorney.

MR. GROBERG [court-appointed attorney]: Your Honor, Mr. Castillo had sent a letter to the court asking for new counsel. He also since that time has retained Mr. Samuel Marsh, who is here today. He’s brought a substitution/withdrawal with him, and I just thought we should put this on because we have a jury trial currently scheduled for July 7th in this matter. So that’s what Mr. Castillo would like.

THE COURT: The rule is you can substitute in at this late date, but he has to be ready for trial on the 7th. Trial date is not going to be continued.

[PAUSE IN PROCEEDINGS]

THE COURT: Yes or no?

MR. MARSH [retained counsel]: Yes, we’re - Your Honor, we’ll go ahead and go along with the scheduled trial date. I mean, if we feel that that prejudices our case, we’ll go ahead and file an appeal afterwards, I mean. You know, we’d like to continue the case to allow us enough time to look over the discovery and obtain all the witnesses and get all the evidence we need, but if you are not going to allow that, well, we have no choice.

THE COURT: Yes, you do. You can not substitute in and then Mr. Groberg goes to trial, because he’s done all of that work already.

MR. MARSH: Well, I mean, I think the guy has a right to substitute his attorney if he wants to, so . . .

THE COURT: No, he doesn’t. The rule requires my - that the court

allow this, and I will allow it if you're ready to go to trial on the 7th. If you're not going to be ready or you're going to say, oh, it's going to be ineffective assistance of counsel, then I'm not going to allow the substitution.

RP 6/19/14 2-3.

At this point both the defense and the prosecution moved for a continuance on the basis that (1) the Washington State Patrol Crime Lab (WSP) had yet to provide the parties with the analysis of the DNA evidence the police obtained from TS's blanket and the DNA taken from the defendant, (2) that the WSP scientist who had performed the analysis was out on maternity leave, and (3) that given these facts neither party was available to go forward on the date set. *Id.* In making this motion the state specifically represented that the complaining witness did not object to a continuance of the trial date. RP 6/19/14 4. The trial court refused to grant a continuance on this basis also. RP 6/19/14 4-5.

The defendant's retained attorney then made a second motion to continue the trial for two weeks to give him time to prepare. RP 6/16/14 4. Judge Hunt also denied this request. RP 6/16/14 5. This exchange, which ended the hearing, went as follows:

MR. MARSH: You're saying we can't even move this not even like two weeks?

THE COURT: No. The matter is not going to be continued. I don't know how many more times I have to say this. You can substitute in, but you're saying that you're ready to go to trial on the 7th.

When the person moves at this late date saying, “I don’t think my attorney is doing a good job so I hired -” the one that we’ve provided because he’s indigent, and has hired somebody now, it appears to me, and I think the record will support this, that’s an effort to get the matter continued.

I’m not going to do that. You have to have my permission to do it. I’m not giving you that permission unless you say you’re going to be ready to try this case the week of July 7th.

I think I’ve said that about six time now. Is there something that’s not clear about that?

MR. MARSH: I didn’t know it was going to hurt to ask you if I could just do that. I mean, I don’t even have availability on the 7th or the 9th to –

THE COURT: Then you shouldn’t have taken the case, should you? This case is set for trial on the week of the 7th, and it is not going to be continued. That’s seven times.

MR. MARSH: Then don’t grant the substitution, Your Honor.

THE COURT: Okay. I’m not.

MR. MARSH: All right.

THE COURT: Now, there’s nothing else to do in this matter, so let’s move on.

MR. MARSH: All right.

RP 6/19/14 5-6.

Two weeks after this hearing the parties again appeared in court, this time in front of the Honorable Judge Brosey. RP 7/3/14 1-8. At that time the defendant’s retained attorney again moved to continue the trial to give him time to prepare. *Id.* Judge Brosey denied the request on the basis that it was

the long-standing, unwritten “policy” of the Lewis County Superior Court to deny any continuances to allow recently retained counsel adequate time to prepare for trial. RP 7/3/14 2-3. The following gives Judge Brosey’s statements on this “policy” and his refusal to consider a continuance based upon it.

THE COURT: We don’t – we have an informal policy have had it for years in Lewis County. We do not accept substitution of counsel that’s dependant upon getting a continuance of the trial date. The Court runs the Court’s calendar, not the attorneys.

MR. MARSH: Right.

THE COURT: The case is set for trial. If you want to substitute, I don’t know what Judge Hunt –

MR. MARSH: Yes.

THE COURT: – I don’t know what Judge Hunt told you, but if you basically came before me, said I want to substitute, my response would be, fine, you can substitute, but there’s the trial date. When somebody comes in and says I’ll substitute in provided I can get a continuance, we don’t do that. It may very well be that the case doesn’t necessarily go to trial as originally set, but I can’t condition appearances on getting a continuance.

RP 7/3/14 2-3.

THE COURT: What I need to know is if we’re going to be confirming? I also need to know what’s going to happen with respect to Mr. Marsh, if you are going to appear or not because Mr. Castillo-Lopez as far as I’m concerned is entitled to counsel of his own choosing. If he wants to have you here Mr. Marsh, again, as far as I’m concerned Mr. Marsh can be hired, but I’m not conditioning that on a continuance of the trial date which is set for next week.

MR. MARSH: I totally understand that. I apologize for not being up to speed on the rules of this Court, not really aware of that, . . .

THE COURT: I understand, Mr. Marsh. As far as I'm concerned, you don't have to apologize. It has been an informal policy. There's nothing in writing, but that's just the problem is if you start continuing cases, because somebody is changing counsel then some cases never get to trial. I need to know what's going to [happen] here.

RP 7/3/14 5-6.

MR. GROBERG: First of all, it is my understanding Mr. Marsh is not going to be subbing in unless this court has granted a continuance.

THE COURT: I will not grant a continuance, based upon substitution of counsel.

RP 7/3/14 8.

THE COURT: If Mr. Castillo-Lopez and/or his family wants to hire Mr. Marsh or anybody else to represent him, that's his prerogative. I'm not going to do anything to interfere with that. But Mr. Groberg is counsel of record for Mr. Castillo-Lopez, unless or until the Court approves the substitution, and my understanding from what I've been told is that Mr. Marsh's proposed appearance was conditioned on the idea that he would get a continuance of the trial date, which I'm not granting, . . .

RP 7/3/14 10.

Based upon this ruling the defendant went to trial on the date set represented by appointed counsel. RP 1, 372-376; CP 92-96. The jury convicted the defendant on all charges. *Id.* The court later called the case for sentencing with both parties agreeing that the mandated sentence on each count was life in prison with a standard minimum mandatory time from 210 to 280 months on each count. RP 389. However, based upon three aggravators found by the jury, plus the fact that the defendant's offender score was 12 points on each count, the court sentenced the defendant to life

in prison on each count with a minimum mandatory time to serve before first qualifying to appear before the Indeterminate Sentencing Review Board of 500 months on each count. CP 129-164. The Defendant thereafter filed timely notice of appeal. CP 169-204.

By decision originally entered February 9, 2016, and then ordered published on March 8, 2016, the Court of Appeals affirmed the defendant's convictions. *See* Order Publishing Opinion and Opinion, attached. Appellant now seeks review of this decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The case at bar presents this court with three separate bases for review: (1) under RAP 13.4(b)(1) the decision of the Court of Appeals is in conflict with a decision of this court; (2) under RAP 13.4(b)(3), this case presents a significant question of law under the Constitution of the State of Washington; and (3) under RAP 13.4(b)(4), this case presents a question of substantial public interest that should be determined by this court. The following sets out the arguments in support of these claims.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” *Wheat v. United States*, 486 U.S. 153, 158, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Similarly, Washington Constitution, Article 1, § 22, provides that “[i]n criminal prosecutions the

accused shall have the right to appear and defend in person, or by counsel” *State v. Chase*, 59 Wn.App. 501, 799 P.2d 272 (1990). These constitutional rights provide a particular guarantee: that “the accused be defended by the counsel he believes to be best.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). As the United States’ Supreme court held in *Gonzalez-Lopez*, the denial of counsel of choice is a structural error requiring reversal and a new trial, even if counsel who represented the defendant at trial was effective. In this case the court held that the deprivation of a defendant’s right to counsel of choice is

“complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez-Lopez, 548 U.S. at 148, 126 S.Ct. 2557.

The decision whether or not to grant a continuance to allow time for retained counsel to prepare lies within the sound discretion of the trial court and will only be overturned upon proof that the trial court abused that discretion. *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010). An abuse of discretion occurs “when the trial court’s decision is arbitrary or rests on untenable grounds or untenable reasons.” *State v. Lawrence*, 108

Wn.App. 226, 31 P.3d 1198 (2001). It also occurs when it is based on an erroneous view of the law or when the trial court applies an incorrect legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Traditionally, our trial courts have applied the following four part test established in *State v. Roth*, 75 Wn.App. 808, 881 P.2d 268 (1994), when determining whether or not to grant a continuance to allow newly retained counsel adequate time to prepare.

(1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

State v. Price, 126 Wn.App. 617, 632, 109 P.3d 27 (2005) (citing *State v. Roth*, 75 Wn.App. at 825).

In a case from 2014, *State v. Hampton*, 182 Wn.App. 805, 332 P.3d 1020 (2014), Division I of the Court of Appeals recognized that the United States Supreme Court's 2006 decision in *Gonzalez-Lopez*, *supra*, has now invalidated the second and fourth *Roth* factors. In *Hampton*, the court noted the following concerning the second *Roth* factor:

In light of *Gonzalez-Lopez*, the second *Roth* factor – the legitimacy of the defendant's dissatisfaction with appointed counsel – is an improper consideration when a court evaluates a defendant's request for counsel of choice. Indeed, the right "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." Thus, a

defendant who hires an attorney whom he or she prefers – subject to qualifications recognized in *Gonzalez-Lopez* – retains the Sixth Amendment right to be represented by that attorney without regard to a trial court’s assessment of the legitimacy of the defendant’s dissatisfaction with present counsel.

State v. Hampton, 332 P.3d at 1029 (citations omitted).

In *Hampton*, the court went on to recognize that the fourth *Roth* factor suffered from the same defect as the second. The court held:

In addition, the fourth *Roth* factor – whether the denial of the motion to continue to facilitate substitution of retained counsel is likely to result in identifiable prejudice to the defendant’s case of a material or substantial nature – is also an improper consideration. The right to counsel of choice is not dependent on the quality of the representation being provided by present counsel. Importantly, “the purpose of the rights set forth [in the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.” Indeed, the Court in *Gonzalez–Lopez* rejected the contention “that the Sixth Amendment violation is not ‘complete’ unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*. Instead, “[w]here the right to be assisted by counsel of one’s choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.” It follows that a trial court errs by searching for the likelihood of “identifiable prejudice to the defendant’s case of a material or substantial nature” when evaluating a defendant’s request to continue proceedings in order to substitute retained counsel of choice for present counsel.

State v. Hampton, 332 P.3d at 1029-1030 (citations omitted).

Thus, in *Hampton*, the court concluded:

The second and fourth factors applied in *Roth* and *Price* cannot be reconciled with a defendant’s right to hire and be represented by the “counsel he believes to be best.” In other words, when a trial court considers a continuance requested to facilitate the substitution of a defendant’s retained counsel of choice for present counsel, United States Supreme Court precedent precludes application of these two factors.

State v. Hampton, 332 P.3d at 1030 (citation omitted).

The facts in *Hampton* are instructive in determining whether or not the trial court abused its discretion in the case at bar. In *Hampton*, the state charged the defendant with third degree rape, which it amended to second degree rape upon the defendant's refusal to accept a proffered plea bargain. The case was continued once at the request of both parties. The defendant, who was in custody and represented by an appointed attorney, was eventually able to raise the funds necessary to retain his own attorney just prior to trial. That attorney then entered a notice of appearance contingent upon the trial court's agreement to continue the trial to allow counsel time to prepare. The state objected, noting that complaining witness opposed any continuance of the trial date. After consideration of the four *Roth* factors the court denied the motion and the defendant ended up going to trial with appointed counsel. Following conviction the defendant appealed, arguing in part that the trial court had abused its discretion when it denied the motion to continue to allow retained counsel time to prepare.

In addressing appellant's argument the court of appeals first reviewed the decisions in *Roth* and *Gonzalez-Lopez* and held that the trial court had erred when it based its decision in part upon the second and fourth *Roth* factors. The court then went on to address the state's arguments that the court had properly considered and applied the first and third *Roth* factors. The Court

of Appeals disagreed with this argument, noting that (1) the one continuance had been granted at the request of both parties, and (2) the trial court had failed to inquire on how much time retained counsel needed to prepare. The court then reversed, holding as follows:

Here, following *Roth*, the trial court applied a method of analysis precluded by controlling United States Supreme Court precedent. Thus, we conclude that the trial court erred by denying Hampton's motion. Because the deprivation of counsel of choice constitutes "structural error," Hampton is entitled to a new trial.

State v. Hampton, 332 P.3d at 1032 (2014).

In *Hampton* the trial court at least considered the *Roth* factors, including the still valid first and third, even though the court failed to correctly apply them by enquiring how long retained counsel needed to prepare. In the case at bar the trial court did not even consider any of the *Roth* factors, much less enquire into the time counsel needed to prepare. Rather, both judges who addressed the defendant's motion to continue refused to consider any relevant facts at all. These facts were: (1) that retained counsel was only asking for two weeks to prepare, (2) that the DNA analysis was not yet available to both counsel, (3) that a critical state's witness was not available, and (4) that the complaining witness did not oppose the continuance. By refusing to consider any facts at all in order to implement an unwritten policy that precluded meaningful consideration of either a state or defendant's motion to continue a trial date the trial court abused its discretion and denied the defendant his

right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, to counsel of his own choice. Since this is a structural error, this court should reverse and remand for a new trial.

In this case the trial court's refusal to grant a continuance also suffered from a more fundamental trial court error. That error was the action of the Lewis County Superior Court judge of adopting and invariably following an "informal, unwritten" policy to *carte blanc* refuse all continuances requested to allow retained counsel time to prepare regardless of the facts. Even a cursory review of the record of both motions, let alone a careful examination of the record, reveals that this was the only reason the two Superior Court judges in this case refused to even consider a short continuance, even within speedy trial, in order to give retained counsel the time to adequately prepare for trial. Footnote five to the decision of the Court of Appeals implicitly recognized this fact. This footnote reads:

Castillo-Lopez argues throughout his brief that the trial court's determination was based on an informal unwritten rule in Lewis County referenced during the second occurrence of the motions. The trial court stated, "[W]e have an informal policy have had it for years in Lewis County. We do not accept substitution of counsel that's dependent upon getting a continuance of the trial date. The Court runs the Court's calendar, not the attorneys." RP (July 3, 2014) at 3-4. Although Castillo-Lopez may have been confused by this statement, it does not support his argument that the trial court abused its discretion. Trial courts are cautioned to not rely on unwritten policies or rules and to be aware of how they may affect parties' interpretation of rulings.

State v. Castillo-Lopez, No. 46717-8-II, 2016 WL 562757, at 4 (Wn. Ct. App.

Feb. 9, 2016).

In this footnote the court opines that the defendant “may have been confused” by the trial court’s statement that the Lewis County Superior Court has “an informal policy [and] have had it for years” that “[w]e do not accept substitution of counsel that’s dependent upon getting a continuance of the trial date.” With all due respect to the court below, the trial court’s statements at both hearings did not confuse the defendant. The statements could not have been clearer: the reason for denying the continuance did not have anything to do with the facts of the case. No analysis was performed of the court’s calendar. No facts were presented that the complaining witness objected. The state did not object. The requested continuance was short, even placing the new trial within the first speedy trial period. The reason the trial court twice denied the continuance was precisely for the reason both judges states: the Lewis County Superior Court has a “unwritten” policy to always deny requests to continue to allow new counsel time to prepare.

Under RAP 13.4(b)(1) this policy conflicts with decisions of this court. Under RAP 13.4(b)(3), this policy presents a significant question of law under the Constitution of the State of Washington, particularly (1) the due process right to have a court decide motions on the basis of the law and the facts as opposed to unwritten policies, and (2) the right to have counsel of choice. Finally, under RAP 13.4(b)(4), this case presents a question of

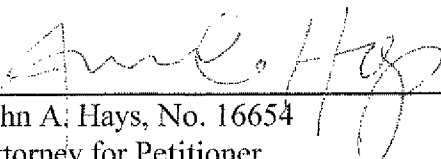
substantial public interest given the court's admission that it has applied this unwritten policy for many years. Consequently, appellant respectfully requests that this court grant review.

F. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 11th day of March, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**RAUL B. CASTILLO-LOPEZ,
Appellant.**

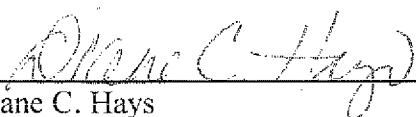
NO. 46717-8-II

**AFFIRMATION OF
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer
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Connell, WA 99326

Dated this 11th day of March, 2015 at Longview, Washington.


Diane C. Hays

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RAUL BENICIO CASTILLO-LOPEZ,

Appellant.

No. 46717-8-II

ORDER PUBLISHING OPINION

Respondent Raul Benicio Castillo-Lopez has moved to publish the court's February 9, 2016 opinion. Appellant State of Washington opposed Respondent's motion. The Court has determined that the opinion in this matter satisfies the criteria for publication. It is now

ORDERED, that the motion to publish is granted and the opinion's final paragraph reading:

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.

is deleted. It is further

ORDERED that this opinion will be published.

PANEL: Jj. Bjorgen, Lee, Melnick

DATED this 8th day of March, 2016.


Melnick, J.

February 9, 2016

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

STATE OF WASHINGTON,

Respondent,

v.

RAUL BENICIO CASTILLO-LOPEZ,

Appellant.

No. 46717-8-II

UNPUBLISHED OPINION

MELNICK, J. — Raul Castillo-Lopez appeals his convictions for five counts of rape of a child in the second degree.¹ He moved to substitute his court appointed attorney with a retained attorney and for a continuance of the trial date. He argues the trial court abused its discretion when it denied his motion to continue the trial because it prevented retained counsel from substituting. We affirm.

FACTS

T.S.'s mother, Kelly Castillo-Lopez,² is married to Castillo-Lopez. The State, by amended information, charged Castillo-Lopez with five counts of rape of a child in the second degree, alleging he engaged in sexual intercourse with T.S. on five separate occasions between January 2012 and February 2013. T.S. turned 12 years old in 2012. The court set the case for trial on July 7, 2014.

¹ RCW 9A.44.076.

² To avoid confusion, we will refer to Kelly by first name in this opinion. We intend no disrespect.

On June 19, 2014, the court heard Castillo-Lopez's motions for substitution of counsel and for a continuance of the trial date. Castillo-Lopez moved to substitute his appointed counsel, Samuel Groberg, with hired counsel, Samuel Marsh. Castillo-Lopez argued the case should be continued because Marsh needed time to prepare and the parties were still awaiting DNA evidence. The trial court ruled it would grant the substitution provided counsel would be prepared to go to trial on the date set. The trial court denied the continuance. Marsh then admitted to the court he was unavailable on the trial date. The court again declined to grant the continuance, and Marsh responded, "don't grant the substitution, Your Honor." Report of Proceedings (RP) (June 19, 2014) at 6.

In denying the continuance, the trial court referenced "a statute that says [the court has] to consider also the impact of this on the child. Since this is rape of a child 2, that means under the age that – we have to consider that, don't we?" RP (June 19, 2014) at 4. The State noted that the trial court would "have to find substantial and compelling reasons" to continue the case, and stated that the victim and the State would "definitely want the DNA results back before trial." RP (June 19, 2014) at 4. However, the trial court determined that the DNA analyst being on maternity leave did not constitute a substantial and compelling reason to continue the case and denied the motion for a continuance.

On July 3, a different judge presided over a trial confirmation hearing. The trial court heard new defense motions to substitute Marsh for Groberg and to continue the trial based on the substitution of counsel. The parties had obtained the DNA evidence at the time of these motions. The trial court again denied the motion for a continuance: "When somebody comes in and says I'll substitute in provided I can get a continuance, we don't do that." RP (July 3, 2014) at 4. The trial court made it clear that it would allow the substitution, but would not grant the continuance:

Mr. Cas[t]illo-Lopez as far as I'm concerned is entitled to counsel of his own choosing. If he wants to have you here Mr. Marsh, again, as far as I'm concerned, Mr. Marsh can be hired, but I'm not conditioning that on a continuance of the trial date which is set for next week.

RP (July 3, 2014) at 5. Additionally, the trial court stated:

If Mr. Castillo-Lopez and/or his family wants to hire Mr. Marsh . . . that's his prerogative. I'm not going to do anything to interfere with that. . . . [M]y understanding from what I've been told is that Mr. Marsh's proposed appearance was conditioned on the idea that he would get a continuance of the trial date, which I'm not granting.

RP (July 3, 2014) at 10. Castillo-Lopez indicated to Groberg that he did not want a continuance.

The matter proceeded to trial and T.S. testified as follows. Before her twelfth birthday, Castillo-Lopez began putting his hand on her inner thigh and touching her vagina under her clothes. After she turned 12 years old and on more than twenty occasions, Castillo-Lopez forced T.S. to engage in penile-vaginal intercourse, anal intercourse, and fellatio with him. On one occasion, he "ejaculated on [her] bed" on a blanket that was later given to Deputy Jeremy Almond. RP (July 8, 2014) at 70. Analysts conducted DNA testing on the semen on the blanket and determined it was Castillo-Lopez's. Castillo-Lopez and Kelly both testified that they had sex on the blanket with each other.

After Kelly discovered sexually explicit text messages from Castillo-Lopez on T.S.'s phone, T.S. told her mother about the abuse. Thereafter, Kelly kicked Castillo-Lopez out of the house and called the police. T.S. provided the police with a statement. Castillo-Lopez left the United States for Mexico shortly after being kicked out of the house. Castillo-Lopez was arrested in San Diego after he tried to reenter the United States and was transported back to Lewis County to stand trial.

The jury found Castillo-Lopez guilty of five counts of rape of a child in the second degree. The jury made special findings on each of the five counts that T.S. and Castillo-Lopez were

members of the same household, Castillo-Lopez used his position of trust and confidence to commit the crime, the current offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, and the crime was an aggravated domestic violence offense. The trial court sentenced Castillo-Lopez to a minimum of 500 months' confinement. Castillo-Lopez appeals.

ANALYSIS³

I. MOTIONS TO SUBSTITUTE COUNSEL AND MOTIONS FOR CONTINUANCES

Castillo-Lopez argues that the trial court denied him his counsel of choice and abused its discretion when it denied his motions to substitute counsel that were dependent upon the court granting his motions to continue the trial date. We disagree.

A. Standard of Review

When the defendant moves to replace his appointed counsel with retained counsel, but conditions the substitution on a continuance of the trial date, we review such decision for abuse of discretion. *State v. Hampton*, ___ Wn.2d ___, 361 P.3d 734, 740 (2015); *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010). In addition, the decision to grant or deny a continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *Downing*, 151 Wn.2d at 272.

A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Downing*, 151 Wn.2d at 272. "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported

³ Subsequent to oral argument on this case, the Washington Supreme Court decided *State v. Hampton*, ___ Wn.2d ___, 361 P.3d 734 (2015), upon which we rely.

facts, adopts a view ‘that no reasonable person would take,’ . . . and arrives at a decision ‘outside the range of acceptable choices.’” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990); *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); *Hampton*, 361 P.3d at 740-41. “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Rohrich*, 149 Wn.2d at 654 (quoting *Rundquist*, 79 Wn. App. at 793).

Relevant to this case, the United States Supreme Court has explained that one of the basic limits on the right to counsel of choice is “a trial court’s wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). We have characterized that balancing by the trial court as “weigh[ing] the defendant’s right to choose his counsel against the public’s interest in the prompt and efficient administration of justice.” *Aguirre*, 168 Wn.2d at 365. “The resolution of this balancing exercise falls squarely within the discretion of the trial court.” *Hampton*, 361 P.3d at 737 (quoting *Aguirre*, 168 Wn.2d at 365).

B. The Trial Court Did Not Abuse Its Discretion

In considering these types of motions, a trial court should consider all relevant information because “these situations are highly fact dependent and ‘[t]here are no mechanical tests’ that can be used.” *Hampton*, 361 P.3d at 740 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). In providing guidance to the lower court, the Washington Supreme Court held that trial courts should consider all relevant information including the 11 factors described in the most recent version of LaFave’s *Criminal Procedure* treatise:

- (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- (2) the length of the continuance requested;
- (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;
- (4) whether the court had granted previous continuances at the defendant's request;
- (5) whether the continuance would seriously inconvenience the witnesses;
- (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
- (7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
- (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
- (9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purpose of delay";
- (10) whether the current counsel was prepared to go to trial;
- (11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Hampton, 361 P.3d at 740 (quoting 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.4(c), at 718-20 (3rd ed. 2007)). The court made clear that the trial court need not evaluate every factor in every case. *Hampton*, 361 P.3d at 740.

Here, the trial court did not abuse its discretion in denying the continuance on June 19, 2014. It considered relevant information and applied a number of the above-listed factors in making its decision.⁴ Trial courts have discretion to manage their docket and deny continuances

⁴ It is abundantly obvious that not all of these factors will be raised by the parties and only some may be relevant.

in order to do so.⁵ Here, the trial court was willing to grant Castillo-Lopez's motion to substitute counsel but not the continuance. After the trial court inquired about substitute counsel's preparedness and availability, counsel repeatedly said he would not be available or ready for trial on the date set. Substitute counsel also indicated he did not want to substitute in for the appointed attorney unless the trial court also continued the trial. In ruling on this motion, the trial court considered RCW 10.46.085.⁶ The charges against Castillo-Lopez fell within the scope of crimes identified in the statute. RCW 10.46.085 also provides the trial court with further tenable grounds for denying the continuance.

On July 3, 2014, Castillo-Lopez again moved to substitute his appointed counsel with retained counsel and obtain a continuance of the trial. The trial court did not abuse its discretion in denying these motions. It considered relevant information and some of the factors listed in *Hampton*. Castillo-Lopez's sole basis to continue the trial date was to allow the substitution of counsel. By this time, the DNA results were available to the parties. Trial was scheduled to begin

⁵ Castillo-Lopez argues throughout his brief that the trial court's determination was based on an informal unwritten rule in Lewis County referenced during the second occurrence of the motions. The trial court stated, "[W]e have an informal policy have had it for years in Lewis County. We do not accept substitution of counsel that's dependent upon getting a continuance of the trial date. The Court runs the Court's calendar, not the attorneys." RP (July 3, 2014) at 3-4. Although Castillo-Lopez may have been confused by this statement, it does not support his argument that the trial court abused its discretion. Trial courts are cautioned to not rely on unwritten policies or rules and to be aware of how they may affect parties' interpretation of rulings.


⁶ When a defendant is charged with a crime which constitutes a violation of [chapter 9A.44 RCW], and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date unless the court within its discretion finds that there are substantial and compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the victim.

RCW 10.46.085.

four days later. Castillo-Lopez never expressed dissatisfaction with his appointed counsel. Castillo-Lopez did not want a continuance. Again, the trial court made it clear it would grant the motion for substitution of counsel, but without a continuance. Thus, the denial of the motion for a continuance on July 3, 2014 was not an abuse of discretion because there were no substantial or compelling reasons to continue the trial date and the benefit to Castillo-Lopez was outweighed by the detriment of a continuance on the child victim.⁷ The trial court did not abuse its discretion because the denial of the continuance was based on tenable grounds.

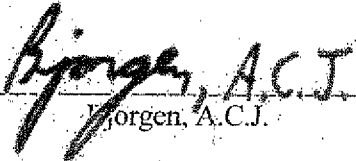
We affirm Castillo-Lopez's convictions.

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.

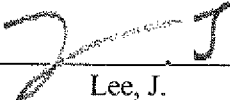


Melnick, J.

We concur:



Bjorge, A.C.J.



Lee, J.

⁷ RCW 10.46.085

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