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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WARREN J. PITTMAN, PETITIONER

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Warren Pittman was convicted of serious kidnapping and rape offenses. At the trial readiness hearing three weeks prior to the second trial setting, a substitute defense attorney indicated trial counsel was not ready for trial because she had yet to interview the victim. The attorney asked the court to keep the same trial date based on Mr. Pittman's personal objection but indicated trial counsel might file a future motion to continue the trial date. The court memorialized this representation.

One week prior to that trial date, the State moved for a continuance of the trial date due to the unavailability of the assigned prosecutor. At a subsequent hearing, the State indicated the defense had still not interviewed the victim, even though the defense had not filed the motion to continue the trial date earlier alluded to. Substitute defense counsel again confirmed that trial counsel was not ready for trial and had not interviewed the

victim. The court continued the trial date, finding both reasons justified the continuance.

Mr. Pittman's petition for review minimizes, if not ignores, that his trial counsel was never ready for trial. He instead claims the continuance was not justified by "general system congestion" or not justified because the accused may personally "make his own judgments about what trial preparation is necessary." Pet. at 5. Had trial occurred, this Court would likely be faced with a petition for review based on ineffective assistance of counsel for failing to investigate the case.

The Court of Appeals addressed only the prosecutor's requested basis for a continuance because it was unnecessary to reach the other basis. The Court of Appeals correctly affirmed the trial court's grant of a continuance. Review is not warranted, given the circumstances present in this case.

II. STATEMENT OF RELIEF SOUGHT

Mr. Pittman has filed a petition for review. The State seeks denial of Mr. Pittman's petition for review of the unpublished opinion issued by the Court of Appeals on February 1, 2024, *State v. Pittman*, No. 39171-0-III, 2024 WL 374709 (Wash. Ct. App. Feb. 1, 2024) (Op.).¹

III. ISSUE PRESENTED FOR REVIEW

The need for defense counsel to adequately prepare for trial, including interviewing key witnesses, provides a basis for a trial court to extend the time for trial pursuant to CrR 3.3. Does Mr. Pittman present a case of significant public interest, where defense counsel was not ready for trial at the second trial setting because defense counsel had yet to interview the victim of a rape

¹ This case is unpublished and cited pursuant to GR 14.1(a) for context only.

and kidnapping, and where the court indicated that was one of the two bases justifying continuance of the trial date?

IV. STATEMENT OF THE CASE

On May 10, 2021, the State charged Mr. Pittman with first degree rape, first degree robbery, first degree kidnapping, first degree criminal impersonation of a police officer, second degree taking of a motor vehicle without permission, and third degree malicious mischief. CP 1-2. The court scheduled trial to begin on April 25, 2022. Op. at 2.

April 4, 2022 – defense requests a first continuance to prepare for trial.

On April 4, 2022, the defense requested a first continuance of the original trial date from April 25, 2022, to May 23, 2022. RP (April 4, 2022) 3. A trial readiness date was scheduled for May 2, 2022. *Id.* The basis for the continuance was the defense was not ready for trial. *Id.* The State did not object. *Id.* The Court granted the defense's request. CP 25.

May 2, 2022 - trial readiness hearing.

At the May 2, 2022, trial readiness hearing, the defense represented to the court that trial counsel was not ready for trial on May 23, 2022, but Mr. Pittman was personally objecting to a continuance. RP (May 2, 2022) 3. Another attorney was covering for Mr. Pittman's assigned counsel and reported, "I was not instructed to call it ready, so I am not doing that." *Id.* The State had anticipated that defense was seeking a continuance. *Id.* The court orally indicated the parties were not ready for trial, and indicated "defense to file a motion" to continue because the defense was not ready for trial. *Id.* at 3-4, 6.

May 16, 2022 - the State files a motion to continue after the defense failed to do so; the defense is still not ready for trial.

Defense did not file a motion to continue the trial date based on lack of preparation, despite the trial court's previous resolution of the May 2 readiness hearing. CP 26.

Two weeks later, on May 16, 2022, the State moved the court to continue the trial date two weeks, to June 13, 2022. CP 26-27. The assigned prosecutor stated he was currently scheduled to go to trial on a different case on June 6, 2022, which had already been called ready and which the court had indicated would not be continued further. CP 27. In addition, the State observed the defense did not call ready for trial on May 2, 2022, and had yet to set a motion to continue as indicated at that hearing. CP 26. The State also noted that on May 11, 2022, the defense asked for the State to set up witness interviews, but those interviews could not occur before the scheduled trial date of May 23, 2022. CP 26-27.

The court held a hearing on the State's request on May 19, 2022. RP (May 19, 2022) 5. An attorney covering for the assigned prosecutor stated the assigned prosecutor was not available for trial, but also noted defense counsel was still not

ready for trial. *Id.* An attorney covering for the assigned defense attorney agreed that the assigned defense attorney “has been wanting to interview the alleged victim for a bit and needs that to be set up in this case.” *Id.* at 5-6. Counsel for both parties acknowledged Mr. Pittman was personally objecting to the continuance. *Id.* at 5, 6.

The court inquired whether Mr. Pittman’s assigned counsel would be ready for the current trial date of May 23, 2022. *Id.* at 6. The following exchange occurred:

THE COURT: Is the defense ready on the current date?

[DEFENSE COUNSEL]: The only notes I have from Ms. Wasilewski, Your Honor, is that she needs the interview set up with the alleged victim; it didn’t say one way or the other.

THE COURT: Can you identify any prejudice the continuance would cause?

[DEFENSE COUNSEL]: I mean, I cannot, Your Honor; however, Mr. Pittman is in custody.

THE COURT: Very well. Thank you. The Court will grant a good cause continuance. There is a finding by the Court that the continuance is necessary in the administration of justice; neither side is ready for trial at this time. There's only been one prior agreed continuance that was jointly agreed by the parties, so I will grant the continuance. [The prosecutor] is unavailable for trial due to being in another trial, and **additional work needs to be done on the defense side, and Ms. Wasilewski needs to conduct an interview, and she would not be prepared or adequately prepared on the current date.**

RP (May 19, 2022) 6 (emphasis added).

The court continued the trial to June 13, 2022, and set a new readiness hearing for May 31, 2022. *Id.* at 7-8; CP 28. The court's written order reflected its finding that the defense attorney still needed time to interview the victim. CP 28. The scheduling order notes an objection but fails to specify that the objection was the defendant's personal objection to the trial date, not defense counsel's objection. CP 28. The court also found

that this was only the second continuance of the trial date in this case. CP 28.

V. ARGUMENT

A. THIS COURT SHOULD DENY REVIEW.

This Court should deny Mr. Pittman's petition for review, which was brought solely under RAP 13.4(b)(4).

1. RAP 13.4(b)(4).

This Court has the discretion to grant review when a petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). Mr. Pittman relies only on this rule of appellate procedure in his petition for review. Pet. at 5.

Although Mr. Pittman's issue is public in nature, it is not significant because he has neglected to analyze his own counsel's request for the trial date to be set aside, which presented a far more compelling justification for the trial court's order setting a new trial date. The Court of Appeals, pursuant to well-settled

standards applicable to continuance requests, rejected Mr. Pittman's claim, but did so without reaching the second basis of the trial court's ruling. Although the Court of Appeals did not err by affirming the decision and declining to address defense counsel's readiness for trial, the State responds to Mr. Pittman's petition primarily to demonstrate why review is also unwarranted due to defense counsel's need to prepare for trial.

2. The time for trial court rule.

CrR 3.3 governs a defendant's right to be brought to trial in a timely manner. CrR 3.3(b)(1) and (c)(1) provide that a defendant who is detained in jail must be brought to trial within 60 days of arraignment. The purpose of this rule is to protect a defendant's constitutional right to a speedy trial, but analysis of the rule and the constitutional right differ. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009).

CrR 3.3(e) provides that certain time periods are excluded in computing the time for trial. These excludable time periods include continuances the court grants for “[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties,” and for continuances under CrR 3.3(f). CrR 3.3(e)(3),(8). Under CrR 3.3(f), the trial court may continue the trial date on motion of the court or a party “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.” CrR 3.3(f)(2). In granting a motion for a continuance, “[t]he court must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2).

This Court reviews an alleged violation of the time for trial rule de novo. *Kenyon*, 167 Wn.2d at 135. However, this Court reviews the trial court’s decision to grant a continuance under CrR 3.3(f)(2) for an abuse of discretion. *See id.* In addition, once

a continuance is properly granted, the trial court has discretion in selecting the new trial date. *See State v. Flinn*, 154 Wn.2d 193, 200-01, 110 P.3d 748 (2005). A court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Kenyon*, 167 Wn.2d at 135. Invited errors are not subject to review, even where the error is not based in negligence or bad faith. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

Simply put, Mr. Pittman has recast the defense's necessity to prepare for trial as the State "superseding the defendant's right to make his own judgments about what trial preparation is necessary." Pet. at 5. However, the State did not argue for a continuance on behalf of the defendant. Instead, the State reminded the court that defense counsel had made an oversight in failing to file a formal request to continue the trial date after counsel indicated to the court she was not ready for trial because

she had not interviewed the victim in a serious kidnapping and rape case.² At the May 19, 2022 readiness hearing, substitute counsel indicated to the court that the assigned trial attorney was not prepared because she had been unable to interview the victim. If an error did occur, it was partially invited.

The court's reasoning in granting the continuance on this basis, in part, was tenable: defense counsel's lack of preparation is a legitimate basis for a continuance. *Kenyon*, 167 Wn.2d at 138. "It is not a manifest abuse of discretion for a court to grant a continuance under CrR 3.3(h)(2) to allow defense counsel more time to prepare for trial, even over [the] defendant's objection, to ensure effective representation and a fair trial." *State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2001) (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)).

² At a minimum, any alleged error should not be reviewed as it was invited by the multiple acknowledgements on the record that defense counsel was not ready for trial on May 23, 2022.

Of course, had the trial court forced counsel to go to trial, without an opportunity to interview the victim, it is very likely that Mr. Pittman would have a strong claim of ineffective assistance of counsel for failure to investigate. “[T]rial counsel must investigate the case, and investigation includes witness interviews,” particularly where the witness is “important.” *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997)); see also *State v. Jury*, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978) (failure of counsel to “adequately acquaint himself with the facts of the case by interviewing witnesses” may support a claim of ineffective assistance of counsel). Defense counsel needed more time to investigate the case to ethically represent Mr. Pittman, and properly indicated she was not ready. While the State provided an independent basis to request a continuance, there was nothing improper about the State providing the court with a complete

record that defense counsel had never filed the motion requesting a continuance of the trial date and had been unable to interview the victim.³ Because the trial date had not been resolved in accordance with the court's notation that defense was to file a motion, the court did not err by inquiring further of defense counsel. While *extensive* delay due to counsel's need for preparation may—in extreme circumstances—not justify further continuance, this was the second trial setting, only one month removed from the first setting. Under these circumstances, this Court should decline review.

VI. CONCLUSION

Mr. Pittman's counsel was not ready for trial, as she had yet to interview the victim, an important witness in Mr. Pittman's

³ RPC 3.8 cmt. 1 indicates a prosecutor has a responsibility to accord an accused procedural justice. Permitting trial counsel an opportunity to prepare for a serious trial in accordance with the defense attorney's own ethical obligations fits the spirit of that rule.

trial on serious charges. The trial court appropriately based in part its continuance of the first trial setting on the defense's representation. This case does not warrant further review.

This document contains 2,437 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 27 day of March, 2024.

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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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WARREN PITTMAN,

Appellant,

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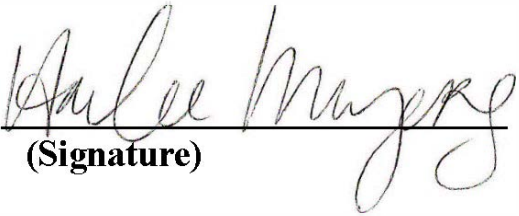
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I certify under penalty of perjury under the laws of the State of Washington, that on March 27, 2024, I e-mailed a copy of the Response to Petition for Review in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
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3/27/2024
(Date)

Spokane, WA
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(Signature)

SPOKANE COUNTY PROSECUTOR

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