IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of J. J. S.,
a Person Alleged to have Mental Illness.

STATE OF OREGON,
Respondent,

v.

J. J. S.,
Appellant.

Clackamas County Circuit Court
18CC04283; A168621

L. Randall Weisberg, Judge pro tempore.

Submitted May 6, 2019.

Joseph R. DeBin and Multnomah Defenders, Inc., filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and

Julia Glick, Assistant Attorney General, filed the brief for respondent.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

DeVORE, J.

Reversed.

DeVORE, J.

Appellant seeks reversal of an order of civil commitment. She argues that the trial court erred in denying her motion to dismiss, because she was held for more than five judicial days prior to a hearing. The state attributes the delay to appellant's attorney. Because the delay cannot be explained that way, we reverse.

Appellant's mental health providers placed her under a hospital hold on July 31, 2018, pursuant to ORS 426.232.[1] Four judicial days later, on August 6, 2018, the trial court issued an order setting the civil commitment hearing for the next day, August 7, the fifth judicial day after the hospital hold began. On August 7, appellant's attorney arrived late for a hearing that was scheduled before appellant's hearing. Although the prior hearing was unrelated to appellant's hearing, the attorney's tardiness delayed the prior hearing, leaving no time for appellant's hearing. Appellant's hearing had been set as the last on the docket for the day. On its own motion, the trial court ordered that appellant's hearing would be postponed to the next day, due to the court's inability to conduct the hearing.

At the commitment hearing on August 8, a new attorney represented appellant. Appellant moved to dismiss the case, because the court did not hold the hearing within five judicial days of the hospital hold and because the delay could not be explained by postponement at the request of a party. *See* ORS 426.095(2)(c) (providing for good

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[1] In relevant part, ORS 426.232 provides:

"(1) If a licensed independent practitioner believes a person *** is dangerous to self or to any other person and is in need of emergency care or treatment for mental illness, *** the licensed independent practitioner may do one of the following:

"(a) Detain the person and cause the person to be admitted ***.

"(b) Approve the person for emergency care or treatment at a nonhospital facility approved by the authority.

"(2) *** However, under no circumstances may the person be held for longer than five judicial days."

Judicial days are calculated by excluding the first day, including the last day, and not counting weekends or holidays. *See State v. L. O. W.*, 292 Or App 376, 377, 424 P3d 789 (2018) (citing ORS 174.120).

cause postponement when requested by the parties).[2] The trial court denied appellant's motion, concluding that the court was "not physically able" to conduct appellant's hearing on the prior day because of her counsel's tardiness to the earlier hearing and restrictions on the court's ability to hold after-hours hearings. After an evidentiary hearing, the court committed appellant for no more than 180 days.

On appeal, appellant assigns error to the trial court's denial of her motion to dismiss, arguing that dismissal was required for failure to conduct a hearing within the five-day period required by ORS 426.232(2). Appellant acknowledges that the statute authorizes the court to postpone a hearing on the motion of a party for "good cause" under ORS 426.095 (2)(c), but she argues that the statute does not authorize the court to postpone the hearing on its own motion. The state responds that the trial court did not commit reversible error, because appellant "invited" any error because her attorney appeared late at the earlier hearing for a different client on August 7, and that, in turn, caused the court to postpone this matter.

We have previously observed that, under ORS 426.232(2), a licensed independent practitioner

> "may detain a person for emergency care or treatment for mental illness, provided that the [licensed independent practitioner] immediately notifies certain specified local mental health personnel. However, the person may not be held for longer than five judicial days without a hearing except in certain circumstances. ORS 426.232(2); ORS 426.234(4); ORS 426.095(2). *See State v. A. E. B.*, 196 Or App 634, 635, 106 P3d 647 (2004) (so explaining)."

State v. W. B. R., 282 Or App 727, 728, 387 P3d 482 (2016). Those limited circumstances are provided by ORS 426.095.

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[2] In relevant part, ORS 426.095(2)(c) provides:

"(c) If requested under this paragraph, the court, for good cause, may postpone the hearing for not more than five judicial days in order to allow preparation for the hearing. * * * Any of the following may request a postponement under this paragraph:

"(A) The person alleged to have a mental illness or the person alleged to be an extremely dangerous person with mental illness.

"(B) The legal counsel or guardian of the person.

"(C) The individual representing the state's interest."

That statute "permits a 'good cause' postponement of a commitment hearing past the five-day judicial deadline, [but] that procedure is available only 'when requested' by certain parties, and only 'to allow preparation for the hearing.'" *W. B. R.*, 282 Or App at 728 (quoting ORS 426.095(2)(c)). The statute does not, however, authorize the court to postpone the hearing on its own motion. And we have consistently reversed civil commitment orders where appellants were held for longer than five judicial days in violation of ORS 426.232(2) and where none of the limited exceptions provided by the statute applied. *See, e.g.*, *State v. C. J. W.*, 289 Or App 63, 65, 407 P3d 979 (2017); *State v. L. O. W.*, 292 Or App 376, 382, 424 P3d 789 (2018); *State v. B. L. H.*, 287 Or App 885, 886, 403 P3d 538 (2017); *State v. J. N.*, 279 Or App 607, 608, 377 P3d 695 (2016); *State v. P. G.*, 225 Or App 211, 212, 200 P3d 614 (2009); *State v. J. D.*, 208 Or App 751, 752, 145 P3d 336 (2006); *W. B. R.*, 282 Or App at 729.

Here, appellant was detained on July 31, 2018, and the commitment hearing was held on the *sixth* judicial day, August 8, 2018. The court denied appellant's motion to dismiss, concluding that the court was "not physically able" to conduct appellant's hearing on the prior day because of her counsel's tardiness and restrictions on the court's ability to hold after-hours hearings. None of the parties listed in ORS 426.095(2)(c) requested postponement of the hearing, and there was no developed record demonstrating "good cause," as required by ORS 426.095(2)(c). Rather, the court, on its own motion, postponed appellant's hearing, causing appellant to be held longer than five judicial days. Under such circumstances, a court commits reversible error when it denies a motion to dismiss. *See, e.g.*, *W. B. R.*, 282 Or App at 728 (reversible error where trial court denied the appellant's motion to dismiss case after trial court postponed hearing because of a "crowded docket" and a limited "number of judges available," resulting in the appellant being held longer than five judicial days).

Nevertheless, the state contends that whatever error the trial court may have committed is not reversible because defendant "invited the error." The state argues that appellant was "actively instrumental in bringing about" the alleged error, because her trial counsel's tardiness for the

prior hearing on a matter for a different client rendered the court "physically incapable of conducting" appellant's hearing as scheduled.

Under the "invited error doctrine," this court will not reverse the trial court's error if the party seeking reversal is "actively instrumental in bringing about" the alleged error. *State v. Saunders*, 294 Or App 102, 105, 429 P3d 1049 (2018), *rev den*, 364 Or 294 (2019) (internal quotation marks omitted). "The rule applies when a party has *invited the trial court to rule in a certain way* under circumstances suggesting that the party will be bound by the ruling or at least will not later seek a reversal on the basis of that ruling." *Id*. (citing *State v. Ferguson*, 201 Or App 261, 270, 119 P3d 794 (2005), *rev den*, 340 Or 34 (2006)) (emphasis added). Although the primary purpose of the rule is to ensure that a party does not "blame the court" for an intentional or strategic choice that later proves unwise, a party can invite error also "'where counsel's failure to object was inadvertent or unintentional.'" *Id.* at 105-06 (quoting *Tenbusch v. Linn County*, 172 Or App 172, 177 n 6, 18 P3d 419, *rev den*, 332 Or 305 (2001)). *See, e.g.*, *State v. Rennells*, 253 Or App 580, 585, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013) ("[W]e agree with the state that any claim of error was not preserved and even, arguably, that any error was invited when defense counsel appeared to agree that the testimony established venue ***."); *State v. Saunders*, 221 Or App 116, 122, 188 P3d 449, *rev den*, 345 Or 416 (2008) (defense counsel's statement that he could not "think of a better way" to instruct the jury invited any error pertaining to the trial court's subsequent jury instruction).

The invited error doctrine has no application in these circumstances. Here, the alleged error is the trial court's denial of appellant's motion to dismiss. Appellant did not "invite[] the trial court to rule [that] way." *Saunders*, 294 Or App at 105. To the contrary, appellant directly challenged that ruling before the trial court. Appellant cannot be found to invite an error that she actively opposed.

To the extent that, by invoking "invited error," the state seeks to argue that appellant created the circumstances that gave rise to the need for postponement, the

argument is inapt. The state has not offered authority for a blame-shifting argument, nor has the state developed a doctrinal explanation such as estoppel or waiver. *See Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n 2, 64 P3d 1193, *adh'd to on recons*, 187 Or App 472, 68 P3d 259 (2003) (observing that it is "not this court's function to speculate as to what a party's argument might be," nor "is it our proper function to make or develop a party's argument when that party has not endeavored to do so itself"). As a factual matter, other circumstances contributed to the need for postponement, such as scheduling the hearing as the final matter to be heard on the fifth day after the hospital hold began. Ultimately, those facts do little to show that appellant created the need for postponement. An attorney's tardiness at a prior unrelated hearing for a different client is not logically attributable to this appellant.

For those reasons, we conclude that the trial court erred in denying appellant's motion to dismiss.

Reversed.