

NO. 37122-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE POWELL,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 JUN -5 PM 4:57

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally F. Olsen  
The Honorable Leila Mills

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STATE OF WASHINGTON  
DEPT. OF JUSTICE  
COURT OF APPEALS  
DIVISION II

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of Powell's Sixth Amendment right to the effective assistance of counsel, defense counsel rendered deficient performance by failing to propose jury instructions on the defense to rape in the second degree that Powell reasonably believed the victim was not mentally incapacitated.

2. In violation of Powell's constitutional and CrR 3.3 right to a speedy trial, the trial court erred in finding good cause to continue the trial date beyond the speedy trial expiration period over Powell's objection.

3. The trial court erroneously took judicial notice of facts that had not been proven on the record and were subject to reasonable dispute.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An attorney's failure to propose jury instructions on an affirmative defense where it is supported by the evidence and the instructions are necessary to argue the defense theory is deficient performance for which no reasonable tactical or strategic justification exists. It is a statutory defense to a charge of rape in the second degree that the defendant reasonably believed the victim was capable of consenting to sexual intercourse. Although

this was Powell's theory at trial, defense counsel did not propose instructions that would have informed the jury of the defense. Did defense counsel's omission deprive Powell of the effective assistance of counsel he was guaranteed by the Sixth Amendment? (Assignment of Error 1)

2. Where the evidence established T.M. was standing and walking on her own, and Powell testified she appeared to be capable of consenting to a sexual encounter with him and did so consent, was Powell prejudiced by his attorney's failure to propose jury instructions on the affirmative defense contained in RCW 9A.44.030? (Assignment of Error 1)

3. A trial date may be continued beyond the speedy trial expiration period only where it is required in the administration of justice. Where the prosecutor failed to establish a four-week continuance was necessary to "reinterview" the complainant and confer with the state toxicology laboratory, did the trial court abuse its discretion in granting the requested continuance? (Assignment of Error 2)

4. Judicial notice is limited to facts that either are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to

sources whose accuracy cannot reasonably be questioned.” Did the trial court err in taking judicial notice of the “fact” that it might take a long time to subpoena an unknown witness from the crime laboratory as a justification for a continuance past the speedy trial expiration period? (Assignment of Error 3)

C. STATEMENT OF THE CASE

After spending an evening in downtown Seattle drinking beer with members of the local Russian community, Bremerton resident Jesse Powell returned to the ferry terminal to take the last scheduled ferry of the evening. 5RP 79-84.<sup>1</sup> At the ferry terminal he saw Washington State Patrol officers talking to a young woman who appeared to be intoxicated. 5RP 84-85. Aware that if the woman was not permitted to board the ferry, she would be forced to stay overnight in Seattle, Powell approached the officers and told them, “My wife does not speak English.” 5RP 86. Powell believed that when he said this, the woman turned to him and grinned. Id.

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<sup>1</sup> Seven volumes of transcripts are referenced herein as follows:

|                   |   |     |
|-------------------|---|-----|
| October 2, 2007   | - | 1RP |
| October 24 2007   | - | 2RP |
| November 6, 2007  | - | 3RP |
| November 7, 2007  | - | 4RP |
| November 8, 2007  | - | 5RP |
| November 9, 2007  | - | 6RP |
| December 14, 2007 | - | 7RP |

Having no reason to disbelieve Powell, the officers permitted the woman to board with him. 5RP 53.

On the ferry, Powell guided the woman to a seat and then fell asleep. 5RP 89. When he awoke as the ferry was docking in Bremerton, he was amazed to discover she was still with him. Id. He disembarked from the boat, and the woman followed him. 1RP 90. He told her he would be taking a taxi and she and another man got in the taxi with him. Id. After the man got off at his destination, Powell took the woman with him to the Dunes Motel, reasoning she could spend the night there and then he would be able to help her get home in the morning. 5RP 91-92.

Powell checked in, telling the desk clerk the woman was his wife. 5RP 93. In the motel room, Powell removed the woman's shoes and told her he wanted to give her a massage. 5RP 96. She said "okay," and she helped Powell remove her pants, one leg at a time, and then her panties. Id. Powell performed oral sex on her, which she seemed to enjoy. Id. At one point, she asked him to insert his fingers in her vagina, but this seemed disgusting to him, so he offered to have intercourse with her instead. 5RP 99-100. The woman climbed on top of Powell, then, after a few moments, said, "You know what would make sex more stimulating,

you know, more exciting, is if we have ice.” 5RP 102-04. The woman did not appear to be impaired during this encounter. 5RP 102.

Powell went to fetch the ice. When he returned, the woman was gone. 5RP 106. Powell was subsequently arrested on suspicion of rape. 5RP 107.

According to the woman, T.M., earlier that evening she had met friends in Seattle and gotten very drunk. 5RP 17-20. She remembered walking to the ferry terminal, then the next thing she remembered was waking in a motel room with her pants off to find a strange man performing oral sex on her. 5RP 22. She was frightened and tried to contrive a way to get out of the situation, and for this reason asked him to bring her ice. 5RP 24. T.M. described herself as a lesbian and believed she would not have gone home with a man, even drunk. 5RP 27.

Based on this incident, the Kitsap County Prosecutor charged Powell with second degree rape and in the alternative with third degree rape. CP 11-13. At trial, although he theorized that T.M. was capable of giving consent and in fact did so, and that

Powell reasonably believed she was not incapacitated,<sup>2</sup> defense counsel did not propose any jury instructions regarding affirmative defenses. The jury convicted Powell of second degree rape as charged. CP 39. The count alleging third degree rape was dismissed. CP 63-64. Powell appeals. CP 62.

#### D. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO PROPOSE JURY INSTRUCTIONS NECESSARY TO ARGUE THE AFFIRMATIVE DEFENSES PRESENTED AT TRIAL DEPRIVED POWELL OF THE EFFECTIVE ASSISTANCE OF COUNSEL HE WAS GUARANTEED BY THE SIXTH AMENDMENT.

- a. It is a defense to a charge of rape in the second degree that at the time of the offense the defendant reasonably believed the victim was not mentally incapacitated, but defense counsel failed to propose instructions on this defense although he relied on it at trial. The State prosecuted Powell for second degree rape under RCW 9A.44.050(1)(b). CP 11-13, 27, 30-31. That statute provides:

- (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

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<sup>2</sup> See 5RP 136-45 (defense closing argument).

....

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

RCW 9.94A.050(1)(b).

There is a statutory defense to a charge of second degree rape under this section:

In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

RCW 9A.44.030(1).

The Washington Pattern Jury Instructions contain a proposed instruction regarding this defense. WPIC 19.03. The proposed instruction reads:

WPIC 19.03 Rape--Second Degree Or Indecent Liberties (Victim Helpless Or Incapacitated)—Defense

It is a defense to a charge of *[rape in the second degree] [indecent liberties]* that at the time of the offense the defendant reasonably believed that \_\_\_\_\_ was not *[mentally defective or mentally incapacitated] [or] [physically helpless]*.

This defense must be established by a preponderance of the evidence.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

WPIC 19.03.

At trial, defense counsel pursued the theory that Powell reasonably believed T.M. was not mentally incapacitated. The State called two independent witnesses who observed T.M. over the course of the evening prior to Powell's sexual encounter with her. Defense counsel vigorously questioned both of these witnesses regarding T.M.'s level of impairment.

Through Suk James, the proprietor of the Dunes Motel, defense counsel established T.M. did not have any difficulty standing and did not smell like alcohol. 5RP 12-13.

Jesse Sizemore, a trooper cadet with the Washington State Patrol, was called by the State to testify regarding Powell's intervention in his efforts to provide T.M. with assistance at the ferry terminal. 5RP 53. Sizemore described T.M. bumping into the turnstile at the entrance to the ferry trying to get it to turn. Id. He said she appeared to be intoxicated. Id.

In cross-examination, Sizemore acknowledged the turnstile system was fairly new and that people who were not intoxicated occasionally had difficulties negotiating their way through. 5RP 53. Defense counsel cross-examined Sizemore as well regarding the fact that T.M. appeared to have no difficulty standing. 5RP 56. Defense counsel established Sizemore had the authority to prohibit people who appeared excessively intoxicated from boarding the ferry, but that he did not prevent T.M. from getting on the vessel. 5RP 57.

Defense counsel also elicited testimony from Powell that T.M. appeared responsive to Powell's verbal and physical cues, looking at him and grinning when he intervened in the state troopers' efforts to ascertain her status, following him from the ferry to a taxi, and participating in the sexual encounter in the motel room. 5RP 86, 90, 95-105.

In closing argument, defense counsel's key theme was that T.M. "didn't seem that intoxicated." 5RP 141. He argued,

The question is how was she acting. Was she capable of making a decision? From his eyes, was she capable of making a decision about having a sexual encounter? And all lights were green. All signs said "yes."

5RP 142.

Despite making the reasonableness of Powell's perception that T.M. was not mentally incapacitated the central focus of Powell's defense at trial, however, defense counsel did not propose any jury instructions regarding the statutory defense contained in RCW 9A.44.030(1). Defense counsel also did not propose any instructions regarding the law of "consent" although "consent" was his defense to count 3, the rape in the third degree charge.<sup>3</sup> In fact, defense counsel proposed no instructions at all.

b. Defense counsel's failure to propose jury instructions necessary to the defense theory was deficient performance for which there could have been no reasonable strategic or tactical justification. The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. 6;<sup>4</sup> Const. art. 1, §§ 3,<sup>5</sup> 22;<sup>6</sup> State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984). To obtain relief based on ineffective

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<sup>3</sup> Powell does not provide separate argument regarding this omission because the jury convicted of the greater offense and count 3 was ultimately dismissed.

<sup>4</sup> In relevant part, the Sixth Amendment provides that in criminal prosecutions the accused shall "have the Assistance of Counsel for his defence."

<sup>5</sup> Const. art. 1, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

<sup>6</sup> Const. art. 1, § 22 secures an accused "the right to appear and defend in person, or by counsel . . ."

assistance of counsel, an accused person must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

The Strickland test was adopted in Washington to "ensure a fair and impartial trial." State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing Thomas, 109 Wn.2d at 225). To establish the first prong of the Strickland test, an accused must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 229-30. If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Id. at 229-30. However, "tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory

is supported by substantial evidence. State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003). A reasonable attorney would have proposed jury instructions on a statutory defense where it was supported by the facts and necessary to argue the defense theory. Thomas, 109 Wn.2d at 228 (attorney of reasonable competence would not have failed to offer an instruction supported by the law and warranted by the facts); State v. Ward, 125 Wn. App. 243, 249, 104 P.3d 670 (2004) (defense counsel's failure to request instruction on lesser included offense constituted ineffective assistance of counsel where the record supported giving the instruction and there was no reasonable strategic or tactical justification for not making the request); Kruger, 116 Wn. App. at 693-94 (counsel's performance fell below an objective standard of reasonableness when he did not request voluntary intoxication instruction); State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978) (counsel's lack of preparation caused him to ignore a potential defense to the charge, and constituted deficient performance).

All of Powell's testimony and defense counsel's elicitation of the facts were geared toward establishing Powell reasonably believed that T.M. was capable of consenting to sexual intercourse

with him. However, this theme was immaterial if the jury was not informed that Powell's reasonable belief was a defense to the charge. This Court should conclude counsel's failure to propose jury instructions necessary to argue Powell's affirmative defense fell below an objective standard of reasonableness.

c. Powell was prejudiced by his lawyer's omission. The second prong of the Strickland test requires the defendant to show prejudice from his lawyer's deficient performance. 466 U.S. at 693-94. Although it is not enough for an accused to establish merely that "the errors had some conceivable effect on the outcome of the proceeding," he is not required to "show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. To prove prejudice, an accused must demonstrate only that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with a reasonable probability defined as "a probability sufficient to undermine confidence in the outcome." Id. at 694.

Prejudice is amply demonstrated on this record. Again, the gravamen of the defense theory was that Powell reasonably believed T.M. was not incapacitated. Indeed, this – and the contention that she consented, also a theory on which defense

counsel failed to request jury instructions – were the sole contested issues at trial.

Independent witnesses confirmed T.M. was standing and walking without difficulty. Powell believed she was responsive to him. Although T.M. was obviously intoxicated, a reasonable person may have believed she was capable of consent, refuting an essential element of a prosecution for rape under RCW 9A.44.050(1)(b). Thus, had the jury been properly instructed, even if it credited T.M.'s testimony, it may have also found that Powell had established he reasonably believed T.M. was capable of consenting. There is a reasonable probability, therefore, that but for defense counsel's deficient performance, the outcome would have been different. Powell is entitled to reversal of his conviction and remand for a new trial.

2. THE TRIAL COURT ERRED IN FINDING THE PROSECUTOR'S REQUEST TO SPEAK WITH THE COMPLAINING WITNESS ABOUT THE RESULTS OF HER TOXICOLOGY SCREEN AND OBTAIN A WITNESS FROM THE TOXICOLOGY LABORATORY ESTABLISHED GOOD CAUSE TO CONTINUE THE TRIAL PAST THE SPEEDY TRIAL EXPIRATION DATE.

a. Powell objected to the State's request for a continuance. On the eve of trial, after Powell had been in custody for seven weeks, the prosecutor asked the court for a 27-day continuance. 1RP 2. The reason for the prosecutor's request was that the State had just received a fax from the toxicology laboratory indicating the results of a urine screen of the complaining witness. Id. Powell objected to the continuance, noting the State had the urine sample in its possession since the date of the offense, and that the urine test showed a blood alcohol level of 0.13, which was consistent with T.M.'s statements during the defense interview and with her statements to the police. 1RP 3. Powell stated, "I don't know why we need four weeks from today to some how [sic] work through that evidence." Id.

The prosecutor responded that she was surprised by the presence of illegal substances in T.M.'s urine and wanted to "reinterview" her and "give us time to subpoena the lab, a

toxicology expert, to talk about what these results could mean.” Id.  
The prosecutor did not identify a factual basis for the court to find a toxicologist’s testimony would be difficult to obtain. Nevertheless, the court granted the continuance “based on the lengthy time that it takes to subpoena the toxicologist.” 1RP 5.

The prosecutor set a second motion for continuance on October 24, 2007, before a different judge. At that hearing, the prosecutor admitted that when she requested the new trial date of October 29, 2007, she did not confirm with necessary law enforcement witnesses that they would be available that day. 2RP 5. When she notified these witnesses of the new trial date, both of them indicated they could not appear. Id.

The prosecutor explained,

I didn’t select the trial date on purpose knowing that people would be unavailable, it was simply, as we always do, kind of a random date selected when we’re in here.

2RP 5. Powell objected to this continuance as well. 2RP 4-5.

The court was displeased. The court stated,

Well, Miss Pendras, I can fully appreciate the frustration that Mr. Powell is probably experiencing so far as the way you and your office has [sic] handled this case. And put plainly, I simply don’t like it. I just don’t like the way it’s been handled.

2RP 6.

The court continued the case one more time, but emphasized, "I'm making it very plain to you, this is unacceptable behavior from your end, and this will be the absolute last time."

2RP 7.

b. The prosecutor failed to establish the continuance beyond the speedy trial expiration date was necessary in the administration of justice. An accused person is guaranteed the right to a speedy trial by both the federal and state constitutions. Barker v. Wingo, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); State v. Iniguez, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2008 Wash. App. LEXIS 797 at 9 (No. 25218-3-III, April 28, 2008); U.S. Const. amend. 6; Const. art. I, § 22.

Under court rule, a defendant who is in custody must be brought to trial within 60 days of the commencement date of the action. CrR 3.3(b)(1)(i). Certain periods may be excluded in computing the time for trial, including continuances granted by the court pursuant to CrR 3.3(f). CrR 3.3(e)(3). "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). The court is required to state the reasons

for the delay on the record. CrR 3.3(f)(2). The ruling on a motion for continuance is reviewed for an abuse of discretion. Iniguez, 2008 Wash. App. LEXIS 797 at 5.

Powell was arraigned on August 13, 2007, thus, absent a valid finding that a continuance was necessary in the administration of justice, his speedy trial expiration date was October 12, 2007. Supp. CP \_\_ (Sub No. 2). The court continued the case based in part on the prosecutor's assertion that she needed to talk to the complainant about the presence of drugs in her urine at the time of the charged incident. 1RP 3. The prosecutor requested a lengthy delay to accomplish this – nearly four weeks, and 17 days past the speedy trial expiration period. She stated this delay was necessary because she also wished to speak with and possibly subpoena a witness from the toxicology laboratory. Id.

This Court should conclude the trial court abused its discretion in granting the prosecutor's request. The court conducted only a perfunctory inquiry into the prosecutor's claimed justification. As Powell argued, and the court found, the prosecutor should have been able to contact the complainant "almost immediately." 1RP 3, 5. The prosecutor presented no evidence whatsoever that four weeks would be required to obtain a witness

from the toxicology lab – for example, she did not indicate she had contacted the laboratory and affirmatively established their unavailability – but the court apparently took judicial notice of the “fact” that it would take a long time to secure the presence of a witness from the toxicology laboratory. 1RP 5. This was improper.

ER 201 permits a court to take judicial notice of facts that are not subject to reasonable dispute in that they are either “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). The rule has been narrowly construed. For example, the federal Advisory Committee’s Note to FRE 201 suggests that the rule is inapplicable to facts used as part of the judge’s “judicial reasoning process” and “peripheral facts.” Advisory Committee Note to FRE 201 Subdivision (a); 5 Karl Teglund Wash Prac. § 201.2 at 128 (4<sup>th</sup> Ed. 1999).

The Washington Supreme Court also has read the provision narrowly. See e.g., In Re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (declining to take judicial notice of order not from record in case or proceeding “engrafted, ancillary or supplementary

to it.”) (citing Swak v. Dep’t of Labor and Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952)).

In Swak, the Court explained the strong prudential reasons for narrowly construing a court’s authority to take judicial notice:

The reason for the rule is apparent. The decision of a cause must depend upon the evidence introduced. If a court should take judicial notice of facts adjudicated in a different case, even between the same parties, it would make those facts, unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced, they might have been controverted and overcome.

40 Wn.2d at 54.

Here, the trial court apparently drew upon its own experience in other cases of “knowing how the lab works and subpoenas” in continuing the trial beyond the speedy trial expiration date. 1RP 5. This violated ER 201. The impropriety was only underscored by the fact that at the time the prosecutor requested a four-week continuance, she had not even ascertained that it would be necessary for her to call a witness from the toxicology laboratory. 1RP 4. This Court should find the State did not establish a continuance was required in the administration of justice, and dismiss.

c. The prosecutor did not exercise due diligence.

The court also erred in granting the continuance without first ascertaining whether the State's witnesses would be available on the new trial date. In fact, as the prosecutor was compelled to admit at the hearing on October 24, 2007, she selected the October 29<sup>th</sup> trial date at "random," as "we always do." 2RP 5. As it turned out, two key witnesses were unavailable on October 29<sup>th</sup> – something that the prosecutor would have known, had she bothered to check.

A prosecutor must act with diligence when a motion for continuance is based on the need to secure the presence of a witness at trial. Iniguez, 2008 Wash. App. LEXIS 797 at 7. The prosecutor's admission that she chose the new trial date at "random" and without ascertaining the availability of her witnesses establishes that she did not act with diligence in her initial motion for a continuance.

d. The remedy is reversal and dismissal. The remedy for a violation of the right to a speedy trial is dismissal with prejudice. CrR 3.3(h); State v. Mack, 89 Wn.2d 788, 794-95, 576 P.2d 44 (1978), approved by State v. Dearbone, 125 Wn.2d 173, 180, 883 P.2d 303 (1994); accord State ex rel Moore v. Houser, 91

Wn.2d 269, 274, 588 P.2d 219 (1978); State v. Edwards, 94 Wn.2d 208, 215, 616 P.2d 620 (1980) (holding strict rule necessary to preserve integrity of judicial process and compliance with constitutional guarantee). This is true regardless of whether the defendant is prejudiced by the delay. State ex rel Moore v. Houser, 91 Wn.2d at 274.

Prejudice “should be assessed in the light of the interests ... the speedy trial rule was designed to protect.” Barker, 407 U.S. at 532. These interests include: (1) preventing oppressive pretrial incarceration, (2) minimizing the anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired.

Iniguez, 2008 Wash. App. LEXIS 797 at 14 (citing Barker, 407 U.S. at 532). In light of these considerations, Powell was prejudiced.

This Court should conclude the continuance violated both Powell’s CrR 3.3 and constitutional right to a speedy trial. The remedy is reversal and dismissal with prejudice.

E. CONCLUSION

Powell's conviction for rape in the second degree should be reversed and dismissed for a violation of his right to a speedy trial. In the alternative, this Court should conclude Powell was denied his constitutional right to the effective assistance of counsel. The remedy is reversal of the conviction and remand for a new trial.

DATED this 5<sup>th</sup> day of June, 2008.

Respectfully submitted:



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Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 JESSE POWELL, )  
 )  
 Appellant. )

NO. 37122-7-II

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DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEP.

**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 5<sup>TH</sup> DAY OF JUNE, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] KELLIE PENDRAS<br>KITSAP COUNTY PROSECUTING ATTORNEY<br>614 DIVISION ST.<br>PORT ORCHARD, WA 98366-4681            | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] JESSE POWELL<br>896599<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVENUE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF JUNE, 2008.

x \_\_\_\_\_ *gmi*

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