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Court of Appeals  
Division I  
State of Washington

NO. 72168-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW DEMPSEY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LEROY MCCULLOUGH

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**STATE'S RESPONSE TO SUPPLEMENTAL BRIEF**

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**A. ISSUES PRESENTED**

1. A defense attorney's failure to request a voluntary intoxication instruction amounts to ineffective assistance of counsel only if there is substantial evidence that the intoxicant affected the defendant's ability to form the requisite mental state, and there is a reasonable likelihood that an instruction would have led to a different verdict. Although there was evidence at trial that Dempsey consumed methamphetamine, there was no evidence that any methamphetamine use affected his intent to rape a child. Has Dempsey failed to show that his attorney was deficient for failing to request an instruction and that he was prejudiced thereby?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The State's brief of respondent was filed on March 17, 2015. On April 1, Dempsey filed a motion to file a supplemental brief with a supplemental assignment of error, to raise an ineffective assistance of counsel claim. This Court granted Dempsey's motion and accepted his supplemental brief. The State now responds.

**2. FACTS NECESSARY TO RESOLVE  
SUPPLEMENTAL ASSIGNMENT OF ERROR.**

The State relies in part on the statement of facts contained in its previously filed brief of respondent. Additional facts necessary to resolve Dempsey's ineffective assistance of counsel claim are reviewed below. Because a claim of ineffective assistance of counsel is reviewed in light of the entire record as a whole,<sup>1</sup> the State presents facts from pre-trial proceedings as well as those elicited at trial, and also reviews the trial court's jury instructions and the arguments of trial counsel.

**a. Pre-trial Proceedings.**

At a pre-trial CrR 3.5<sup>2</sup> hearing, the State questioned several witnesses regarding Dempsey's mental state in order to establish the voluntariness of his statements to the police.

King County Sheriff's Deputy Benjamin Miller was the first police officer on scene and arrived as Dempsey was still struggling with Albertson's employees. 1RP 14, 18-19.<sup>3</sup> He handcuffed Dempsey, led him back to his patrol car, and searched him. 1RP 19. He asked Dempsey

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<sup>1</sup> State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

<sup>2</sup> CrR 3.5(a) ("When a statement of the accused is to be offered in evidence, the judge . . . shall hold . . . a hearing . . . for the purpose of determining whether the statement is admissible.").

<sup>3</sup> The verbatim report of proceedings is cited as follows: 1RP – Mar. 12 and 17, 2014; 2RP – Mar. 17, 18, 19, 20, 24, and 25, 2014; 3RP – Mar. 25 and 26, 2014; 4RP – Mar. 26, 27, and 31, 2014; 5RP – Mar. 31, 2014, and Apr. 1, 2014; 6RP – Apr. 1 and 2, 2014; 7RP – Apr. 3, 4, 7, and 8, 2014, and Jul. 11, 2014. The seven volumes are labeled Volume I – VII.

if he needed any medical attention and Dempsey said that he did not.

1RP 24. Dempsey was able to tell Deputy Miller his driver's license number from memory. 1RP 21, 25.

Deputy Miller then drove Dempsey to the Burien Precinct.

1RP 25. Along the way, they "chit-chatted." 1RP 25. When Deputy Miller asked Dempsey if he was from the area, Dempsey told him that he was homeless and stayed in Burien—specifically around 146th Street and Highway 509. 1RP 25, 44. Dempsey was speaking in complete sentences, seemed to understand Deputy Miller, and gave appropriate and logical responses to his questions. 1RP 25.

When they arrived at the precinct, Dempsey told Deputy Miller that his handcuffs were too tight, so Deputy Miller loosened them.

1RP 27. Deputy Miller asked Dempsey what had occurred at Albertson's.

1RP 27. Dempsey told him that he had just been using the bathroom and had been in one of the stalls. 1RP 27. When he had finished using the bathroom, he opened the door to leave and it hit a boy in the back.

1RP 28. The boy fell on top of him and then "freaked out." 1RP 28.

When he left the bathroom, several men tackled him—the same men that were on top of him when Deputy Miller arrived. 1RP 28.

From his interactions and conversation with Dempsey, it did not appear to Deputy Miller that Dempsey was under the influence of drugs or alcohol. 1RP 31.

The court next took testimony from Detective Robin Ostrum. 1RP 50. Detective Ostrum was the second officer on scene, and arrived just as Deputy Miller was removing Dempsey from underneath the pile of Albertson's employees and placing him into handcuffs. 1RP 19, 54-55.

Detective Ostrum followed Dempsey and Deputy Miller back to Deputy Miller's patrol car and asked Dempsey his name. 1RP 55. Dempsey told Detective Ostrum his first name, Andrew. 1RP 55. Detective Ostrum then read Dempsey his Miranda<sup>4</sup> rights. 1RP 56-57. As she read Dempsey his rights, Dempsey maintained eye contact with her and seemed engaged in what she was telling him. 1RP 57. He did not look elsewhere, appear distracted, or "zoned out." 1RP 57. He nodded his head affirmatively as she read each right. 1RP 57. When she asked him if he understood his rights, he nodded his head again and said, "Yes." 1RP 57-59.

From her training and 17 years of experience as a police officer, Detective Ostrum was familiar with the indicia of drug impairment. 1RP 59-60. She had come into contact "numerous times" with individuals who

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<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

were high on drugs. 1RP 60. While Dempsey's appearance was consistent with someone who had been living on the streets, he did not appear to be under the influence of any drugs or alcohol. 1RP 60, 72. Instead, he was engaged, made eye contact, and responded to Detective Ostrum's questions. 1RP 72.

Sergeant John McSwain testified next. 1RP 74. Sergeant McSwain was present when Dempsey was placed in the back of Deputy Miller's patrol car. 1RP 88. He asked Dempsey if he wanted to speak to him about what happened and Dempsey told him that he did not.<sup>5</sup> 1RP 89. Dempsey was quiet during this interaction and hung his head. 1RP 90. There was nothing unusual or atypical about this behavior. 1RP 90. He observed nothing to make him believe that Dempsey was under the influence of drugs or alcohol. 1RP 90.

Back at the precinct, Sergeant McSwain asked Dempsey to change out of his clothing and into a jumpsuit, so that his clothing could be collected for evidence. 1RP 91-92. Dempsey was quiet but cooperative and paid attention to removing his clothing. 1RP 92. He did not exhibit any behavior that was out of the ordinary. 1RP 92-93.

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<sup>5</sup> The content of Dempsey's subsequent conversations with Deputy Miller—while *en route* to and at the precinct—was therefore suppressed for purposes of the State's case-in-chief. 1RP 155. The trial court ruled that the conversations could still be admissible for other purposes, such as impeachment. 1RP 154-55.

Detective Christine Elias testified next. 1RP 93. She met with Dempsey at the precinct in order to interview him. 1RP 96-97. Another detective, Marylisa Priebe-Olson, read Dempsey his Miranda rights again and asked if he wanted to make a statement. 1RP 98. Dempsey told them that he had already told another officer what had happened, and that he didn't want to talk. 1RP 98-99. Detective Elias did not observe anything to make her think that Dempsey was under the influence of drugs or alcohol. 1RP 101.

Detective Priebe-Olson testified next. 1RP 108. She met Dempsey in a holding cell at the precinct, introduced herself, and told him that she was there to investigate the case. 1RP 111. Dempsey acknowledged what she had to say and was cooperative. 1RP 112.

Detective Priebe-Olson then read Dempsey his Miranda rights and asked him if he wanted to make a statement. 1RP 116. Dempsey answered each question about his rights appropriately. 1RP 116-19. He told the detectives that he had already given a statement and didn't want to talk anymore. 1RP 119.

On cross-examination, Detective Priebe-Olson testified that Dempsey smelled bad and that his appearance—for example, some sores—was consistent with “potential drug use.” 1RP 130-31. He also seemed “agitated” and “kind of twitchy.” 1RP 130-31. These facts were

consistent with someone who “might have consumed methamphetamine.”  
1RP 129-30.

The State then conceded that Dempsey’s statements to Deputy Miller—made *en route* to and upon arriving at the precinct—were inadmissible in the State’s case-in-chief, because Dempsey had (unbeknownst to Deputy Miller) invoked his Fifth Amendment right against self-incrimination when speaking to Sergeant McSwain. 1RP 139-43. The State asked the trial court to find that the statements were nevertheless voluntary and admissible for other purposes, such as impeachment. 1RP 141, 143.

Defense counsel below argued that the statements were involuntary because Dempsey was high on methamphetamine, and moved to suppress his statements entirely. 1RP 151-52. The trial court denied defense counsel’s motion—declining to find expressly whether there “may or may not have been some impairment”—finding that Dempsey was able to answer questions appropriately, and that his statements were voluntary and admissible for impeachment. 1RP 154-55. The trial court also expressly found that the testimony of the State’s witnesses at the CrR 3.5 hearing had been credible. 1RP 158.

The State then moved the court to require that Dempsey disclose the nature of his defense. 1RP 161. Counsel for Dempsey reiterated that he was claiming general denial. 1RP 161.

**b. Testimony At Trial.**

The issue of Dempsey's possible methamphetamine use arose multiple times at trial. Once again, Deputy Miller testified first. 2RP 58. When searching Dempsey at the crime scene, Deputy Miller found no lighter, matches, pipes, tin foil, or any other smoking device. 2RP 82-83. Deputy Miller was trained at the academy to recognize signs of alcohol intoxication and had interacted routinely over the course of his 15-year law enforcement career with individuals under the influence of drugs. 2RP 88-89. While he lacked specialized training in drug recognition (i.e., to be able to differentiate between the effects of *different* non-alcoholic drugs), he was able to recognize if someone was under the influence of drugs. 2RP 89.

Deputy Miller spent about half-an-hour with Dempsey, from the time that he arrested him to the time that he took him to the precinct. 2RP 89. Dempsey did not appear to be under the influence of any intoxicant. 2RP 89. He walked fine, maintained his balance, and did not seem confused. 2RP 89. Dempsey was cooperative when being handcuffed and did not fight, resist arrest, or appear angry. 2RP 95, 100.

Store manager Roy Scherer testified next. 2RP 106. He observed that Dempsey appeared to be in a hurry when leaving the bathroom. 2RP 132. He also saw what appeared to be hypodermic needles spill from Dempsey's bag. 2RP 167. He did not testify that Dempsey appeared under the influence of any drug.

The State next called Shawna Miller.<sup>6</sup> 2RP 175. Shawna was shopping at Albertson's when she saw J.M. crying and screaming, and called 911 to report that he had been attacked. 2RP 185-86. Shawna was an administrator in child services with the state Department of Social and Human Services, and a former social worker for Child Protective Services. 2RP 176-77. Her training to become a social worker included training on substance abuse. 2RP 180.

Although Shawna had no direct contact with Dempsey, she believed that he appeared "intoxicated" because he was yelling, disorganized, fighting with people, and had his pants down around his ankles. 2RP 196; 3RP 27, 29-32. She testified that fighting is not typical sober behavior and that a sober person simply would have explained to the other men what was going on. 3RP 31-32. She also saw that Dempsey's bag had opened, spilling "hypodermic needles," and knew that

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<sup>6</sup> Shawna Miller is referred to hereafter as Shawna, to avoid confusion vis-à-vis Deputy Miller. No disrespect is intended.

methamphetamine could be injected. 2RP 195, 197; 3RP 30. She believed that Dempsey's behavior was "consistent" with "different kinds of intoxication, including methamphetamine addiction or use[.]" 3RP 32. However, his appearance was also consistent with someone who was homeless or a drug addict. 3RP 43.

The next witness was Albertson's employee Ounguan Saechao. 3RP 54. Saechao grabbed Dempsey's bag when Dempsey was struggling with other employees. 3RP 58. He saw some "hypodermic needles" or "syringes" fall out. 3RP 59. He thought that Dempsey appeared "scruffy," "homeless," "kind of twitchy," and either "intoxicat[ed] . . . on drugs or just not all there." 3RP 78.

Barbara Karlstrom, an Albertson's cake decorator, testified next. 3RP 97. She heard banging in the restroom and went to investigate with another employee. 3RP 99-101. Her co-worker, Teasha, opened the door and said, "[O]h my God, he's raping this little boy[.]" 3RP 102. Dempsey then came out of the bathroom with his head bent down, looking sheepish. 3RP 108-09. He seemed unsure of himself and hesitated for a moment, fastening his pants. 3RP 108-09, 128-29. He had no difficulty walking. 3RP 135. He did, however, appear scruffy and possibly homeless. 3RP 108, 127. Karlstrom did not testify that Dempsey appeared to be under the influence of any drug.

The next witness was Detective Robin Ostrum. 3RP 136, 139-41. Detective Ostrum responded to Albertson's to assist Deputy Miller and arrived just as Deputy Miller was placing Dempsey in handcuffs. 3RP 141-43. Sergeant McSwain arrived and asked Detective Ostrum to gather up Dempsey's bag and whatever had spilled on the ground. 3RP 145. She collected several syringes, all of which had orange caps. 3RP 154, 189. She pulled off the caps and saw that the syringes *did not have needles*. 3RP 154. The syringes also had no liquid, substance, or residue inside of them and appeared unused. 3RP 154; 4RP 27.

Detective Ostrum observed that Dempsey had a disheveled appearance, similar to the homeless population that she had encountered in her law enforcement duties. 3RP 190-91. While his appearance also was consistent with some drug addicts or users that she had encountered, she did not believe that he was actively under the influence of any drug. 3RP 192. She added that, without a blood test, it would be impossible to confirm that he had actually consumed methamphetamine:

**Defense:** . . . I think when we talked to you, you said you really had no way to tell if he was currently using meth, how much meth he had used, or anything like that without a blood draw. Isn't that correct.

**Det. Ostrum:** I mean, that would be the definitive [way to know]. Certainly, Mr. Dempsey's behavior was not overtly indicative of people I generally talk

to who are on meth. Their slang term for it is “tweakers.” And because they have sort of a tweaking, jerking, sort of very quick, very spastic, very just, like this the whole time you’re talking to them. They’re in fast motion in part of the high, can be often that’s one of the first things that jumps out at you when you’re talking to someone who’s—

**Defense:** That’s part of it.

**Det. Ostrum:** Who’s—that may be part.

**Defense:** And there may be other parts that—

**Det. Ostrum:** And, yes, and there can be other parts of it. Mr. Dempsey was not exhibiting that type of behavior, so his initial demeanor to me, in dealing with [him] at the scene, did not speak to that . . . .

3RP 192-93.

Later, Detective Ostrum described her experience in more detail and reiterated her opinion that Dempsey did not seem impaired:

**Prosecutor:** . . . You had said, and I think I got this down right, that you thought that the defendant’s behavior was [not] indicative of a person actively using methamphetamine when you had interactions with him. Is that—did I have that right?<sup>[7]</sup>

**Det. Ostrum:** Correct.

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<sup>7</sup>The transcript here records the prosecutor as saying, “*was* indicative” of methamphetamine use, as opposed to, “*was not* indicative.” 4RP 23 (emphasis added). Read in context, either this is an obvious transcription error or the prosecutor misspoke.

**Prosecutor:** And that opinion was based on what?

**Det. Ostrum:** Well, again, after seventeen years of being on the department, eight years or better [of] that being exclusively on patrol, all of which was in the White Center and Burien area where we have a very large homeless population, large drug usage population. I dealt with people on drugs probably every day that I was on patrol. And inductively [sic], demeanor that I see that's someone that's in active use of meth or having recently shot up, is—again I don't mean to be derogatory, but the term that's used is “a tweaker” or “they are tweaking.” And that is because of sort of this very fast manner of physical behavior. Fast talking, sort of twitching, picking at their skin; the meth will keep them up for days at a time, so they get almost kind of this hyper vigilance sort of behavior, where it's just, you know, kind of this paranoid thing. And your whole time, kind of dealing with a person when they're in that active use, tends to exhibit more of that behavior.

**Prosecutor:** And you didn't see that in him at that time?

**Det. Ostrum:** I did not observe that type of demeanor with Mr. Dempsey in my brief contact with him, no.

4RP 23-24.

Instead of exhibiting any of the typical signs of methamphetamine use, Dempsey was quiet and cooperative. 3RP 191. He appropriately answered Detective Ostrum's questions, telling her that his name was “Andrew,” when asked. 3RP 191. However, when searching Dempsey's

bag, Detective Ostrum did find 0.2 grams of methamphetamine. 3RP 194-95; 5RP 151.

The State next called Detective Christine Elias. 4RP 31. Detective Elias interacted with Dempsey at the precinct, to help collect his clothes. 4RP 35-36, 42-43. Dempsey was awake and appeared to be okay. 4RP 43. When collecting Dempsey's pants, she noticed that they had no button attached. 4RP 45-46. She did not testify to observing any signs that Dempsey was impaired.

The next witness was Albertson's employee Teasha Ward. 4RP 51-52. Ward heard noises in the bathroom and opened the door to see Dempsey with his pants down around his ankles, holding J.M. close to his body, from behind, with his arm around the boy's neck. 4RP 54-55, 62-63, 71, 87. Dempsey stared at her confusedly when she opened the door. 4RP 96. She thought that this behavior was consistent with somebody who might be under the influence of drugs. 4RP 96.

Former Albertson's employee Laurissa Engelhardt testified next. 4RP 102-03. She had been at work when she heard a little boy screaming, "Call 911." 4RP 105. She stood with the little boy while other people called the police. 4RP 106. She saw Dempsey leave the restroom and her manager wrestle Dempsey to the ground. 4RP 107. Dempsey's bag ripped open and some "empty syringes" fell out. 4RP 110, 118. She did

not testify to observing anything that made her believe that Dempsey was impaired.

The next witness was Albertson's grocery manager Christopher Perkins. 4RP 121-22. Perkins heard an urgent call over the intercom and saw Dempsey on the ground with two other employees. 4RP 123-24. Dempsey was "dirty" and tried to bite one of the employees. 4RP 125. Dempsey's bag ripped open and "needles" fell out. 4RP 126. Perkins believed that the "needles" looked like they had been used because they were uncapped and bent. 4RP 136. He did not testify to believing that Dempsey appeared impaired.

J.M.'s father testified next. 4RP 146-48. He briefly saw Dempsey in police custody as he arrived at the store to meet his family. 4RP 152. He did not testify that Dempsey appeared impaired.

The State next called J.M.'s fifteen-year-old sister. 4RP 182-84. She had gone to check on her brother at Albertson's after he had been in the restroom for a long time, and found him scared, shaking, and red in the face. 4RP 186, 189-90. J.M. fell to the ground and said, "Oh, it's him, get him." 4RP 186. She then saw Albertson's employees apprehend Dempsey. 4RP 186, 193. Dempsey had baggy clothes and looked like a "hobo." 5RP 21. She did not testify that Dempsey appeared to be under the influence of drugs.

J.M.'s mother testified next. 5RP 24. She was at Albertson's when her son ran out of the restroom, frightened, and collapsed to the floor. 5RP 27-31. J.M. then pointed to Dempsey and said, "That son of a bitch wanted to kill me." 5RP 32, 48-49. She tried to comfort J.M. by saying that maybe the man was just drunk or sick, but J.M. told her that he was not. 5RP 50. She did not testify that Dempsey appeared to be under the influence of any substance.

The State next called Deputy James Schauers. 5RP 64. Deputy Schauers took photographs of the bathroom where Dempsey tried to rape J.M. 5RP 68. He searched the entire bathroom, including in the garbage can, and did not find anything out of the ordinary. 5RP 68. If there had been drugs in the garbage can, he would have seen them. 5RP 74.

The next witness was Sergeant John McSwain. 5RP 80. Sergeant McSwain was dispatched to Albertson's and saw Dempsey being searched by Deputies Miller and Ostrum. 5RP 86-87. Dempsey seemed "disheveled." 5RP 87. His pants were undone and falling down. 5RP 87. Back at the precinct, Sergeant McSwain asked Dempsey to remove his clothing one item at a time and hand it to him. 5RP 93. Dempsey had no difficulty following his instructions. 5RP 94. Sergeant McSwain did not testify that Dempsey exhibited any signs of impairment.

The next witness to testify was Captain Jesse Anderson. 5RP 111. Captain Anderson arrived at Albertson's after the crime scene had already been secured and the patrol deputies had left. 5RP 116. He helped process the scene by searching the bathroom. 5RP 133. He went through the garbage with gloves, checked all of the stalls, and even looked inside the diaper table, and found nothing of significance—i.e., no drug paraphernalia. 5RP 133-36.

The next witness, Washington State Patrol Crime Laboratory forensic scientist Janice Wu, verified that the 0.2 gram substance recovered from Dempsey's backpack testified positive for methamphetamine. 5RP 140, 151. Dempsey did not question Ms. Wu regarding the effects of methamphetamine consumption or intoxication.

Albertson's employee Terrie Carlson testified next. 5RP 159-60. She heard a commotion in the bathroom and a child screaming. 5RP 161-63. A co-worker pushed open the door and a child ran out, terrified. 5RP 166, 178. Dempsey then walked out of the bathroom. 5RP 168. He had "scraggly hair" and "looked like a bum." 5RP 168. He was walking normally, but had an expression on his face "like he did something wrong." 5RP 168-69. She thought that Dempsey looked "high on something" or "higher than a kite" because "his eyes [were] all big." 5RP 179, 183. She had three brothers who used methamphetamine and

Dempsey's appearance was consistent with her brothers when they were high. 5RP 183-84. She also saw that some "needles" fell out of Dempsey's bag. 5RP 184.

The State next called Detective Marylisa Priebe-Olson. 6RP 7-8. Detective Olson interviewed J.M. at the precinct. 6RP 19. Afterward, she stood around the corner while Sergeant McSwain collected Dempsey's clothing from him. 6RP 51. She saw that Dempsey had sores, like a user of intravenous drugs. 6RP 54. He also seemed agitated and twitchy. 6RP 54. She thought that he appeared to be under the influence of something. 6RP 54. However, there was no blood draw in this case, so there was no confirmation that Dempsey was intoxicated. 6RP 56-57. She also testified that there is a difference between someone who *uses* methamphetamine versus someone who is *on* methamphetamine. 6RP 62.

The final witness to testify was J.M. 6RP 90. J.M. described being attacked by Dempsey in the bathroom. 6RP 95-147. Dempsey grabbed him, picked him up from the floor, and put him in a headlock. 6RP 103. Dempsey's pants were down around his ankles and his penis was partially erect. 6RP 101-02, 106-08. J.M. told Dempsey, "I'll do whatever you want, however you want me to do [it]," so Dempsey momentarily let him go. 6RP 99, 109. When J.M. ran for the door, Dempsey pursued him, grabbed him, and dragged him back toward the

stalls. 6RP 110-13. He broke away from Dempsey three separate times, only to be pursued and grabbed again. 6RP 138. He noticed that Dempsey had scars on his face and thought that they looked like scars that he had seen on “before and after” pictures of drug users, at the Department of Licensing. 6RP 142.

**c. Jury Instructions.**

The trial court instructed the jury that, in order to convict Dempsey of Attempted Rape of a Child in the Second Degree, the State had to prove beyond a reasonable doubt:

- 1) That on or about September 29, 2012, the defendant did an act that was a substantial step toward the commission of Rape of a Child in the Second Degree.<sup>[8]</sup>
- 2) That the act was done *with the intent* to commit Rape of a Child in the Second Degree; and
- 3) That the act occurred in the State of Washington.

7RP 14-15; CP 91 (Instruction 14) (emphasis added).

The trial court also instructed the jury on the meaning of intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

7RP 13; CP 86 (Instruction 9).

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<sup>8</sup> “A person commits the crime of rape of a child in the second degree when the person has sexual intercourse with a child who is less than fourteen years old, who is not married to the person and not in a state registered domestic partnership with the person, and who is at least thirty-six months younger than the person.” CP 85 (Instruction 8); see RCW 9.44.076.

**d. Closing Argument.**

In closing argument, the prosecutor argued that Dempsey exhibited the requisite intent to rape J.M. when he pursued him multiple times in the bathroom, with his penis semi-erect, while grabbing J.M. and pulling him back toward the stalls. 7RP 25-26. The prosecutor acknowledged that defense counsel would likely argue that Dempsey was merely high on methamphetamine. 7RP 27. In anticipation of this argument, the prosecutor explained that the witnesses who had actually interacted directly with Dempsey—Deputy Miller and Detective Ostrum—did not believe that Dempsey was under the influence. 7RP 28-29. The State also highlighted that Sergeant McSwain had requested Dempsey's clothing from him, one item at a time, and that Dempsey had complied without trouble. 7RP 29.

The prosecutor conceded that there was ample evidence to conclude that Dempsey was a user of methamphetamine, but argued that there was a difference between a person who used methamphetamine and a person who was actively under the influence of methamphetamine. 7RP 29. The prosecutor also argued that, even if Dempsey was under the influence of methamphetamine, there was no evidence that this would prevent him from forming the intent to have sexual intercourse with J.M. 7RP 29. Finally, the prosecutor pointed out that the jury instructions did

not contain a defense for being under the influence of methamphetamine.  
7RP 29.

Dempsey's attorney then argued that Dempsey was not a child-rapist, but a drug addict. 7RP 32. He was in the bathroom with his pants down, in a drug-induced stupor, when J.M. startled him. 7RP 46. He attacked J.M. because of hyper-vigilance or paranoia, caused by methamphetamine. 7RP 46. The State's evidence was "just as consistent with somebody who, for whatever reason, is having a paranoid freak-out and wants to kill the object of their paranoid delusion . . . [a]s it [was] with someone who wants to have sexual intercourse with the child[.]" 7RP 47.

Defense counsel then argued that methamphetamine intoxication *was* a defense to the crime, because it constituted a failure of the State's burden to prove the intent element of attempted child-rape:

The State says, so what if Mr. Dempsey was using. Show me where in the jury instructions it says that being high on methamphetamines is a defense to this kind of crime.

Well, it's a defense to this kind of crime because the State bears the burden of proving what was going on inside Mr. Dempsey's head at the time of this incident. And we all know, from the testimony that we heard from the witnesses, that a person on methamphetamines experiences certain symptoms that Mr. Dempsey was demonstrating at the time of his arrest in this case. And we all know, from Deputy Ostrum, that that includes hyper-vigilance and paranoia.

And we know from [J.M] that what Mr. Dempsey was saying to him doesn't make sense in the context of an attempt to rape the

child. But does make sense in the context of somebody who's having some kind of paranoid moment at that moment in time.

The bottom line is, it does affect what's going on inside someone's head. It is relevant to the question of what was going on inside Mr. Dempsey's head. And the State has to prove what was going on inside Mr. Dempsey's head at the time of this incident. And we don't know what was going on inside Mr. Dempsey's head. But we certainly have a reasonable explanation that fits more consistently with the evidence before you, than the State's effort to turn this into a sexual offense.

And I want to point out—I don't want to suggest for you by providing an alternative explanation for what happened in the bathroom, that for some reason you should think "I have to do that." We don't have to do that. You know that the defense doesn't bear the burden of proof in the case. It's the State's burden of proof.

7RP 47-48.

Defense counsel also decried the police for not testing Dempsey's blood for intoxicants, or the syringes recovered from the scene, arguing that the State myopically pursued an investigation of a sex offense while ignoring evidence of intoxication:

. . . There was no effort to investigate whether Mr. Dempsey was in his right mind or not at the time of this incident.

No effort to get a blood draw from him. And, in fact, because it—because law enforcement thought there wasn't a compelling overriding necessity to keep the needles, the needles that they recovered. They went ahead and destroyed [them], even though they were photographed. And there's a process for them to preserve them.

So there were choices made early on in this investigation to try to support the State's theory of the case.

7RP 52.

Defense counsel also pointed out that Dempsey had not touched J.M. sexually or engaged in any overt sexual conduct. 7RP 49. If he had wanted to rape J.M., he had the opportunity to do so. 7RP 53. Instead, Dempsey had only threatened to kill J.M. 7RP 52. The State could have charged Dempsey with attempting to kidnap, assault, or threatening to kill J.M., but did not. 7RP 44.

Defense counsel then emphasized again that there was no direct evidence of Dempsey's mental state at the time of the crime, and that the State therefore had failed to prove its case:

We don't have the burden of proof, but we do get the benefit of the evidence that comes in, even if it comes in through the State's witnesses.

It's a much more reasonable interpretation of what happened here. Mr. Dempsey was high. We don't know what was going through his mind. But what he was saying was he was going to kill this child.

Clearly [he was] not functioning properly. You listened to the description that the witnesses give of him later, he's staring off into space, not responding, not talking, "high as a kite" as Terrie Carlson described; whose brothers, three of them have addi[c]tion issues of their own including addiction to meth, so she knows something about it, intoxicated.

From Shawna Miller, who has worked as a substance abuse counselor and has training in that regard. In addition, Deputy

Priebe-Olson saying that Mr. Dempsey seemed twitchy, agitated. Exact sort of symptoms that Deputy Ostrum said she would expect to see.

Bottom line is, we don't know what was going through Mr. Dempsey's mind on that day. But to say he had the intent to have sexual intercourse with a child is taking it too far. There just isn't evidence of that. There just isn't.

7RP 56.

In rebuttal, the prosecutor argued that there was no evidence to support defense counsel's assertion that Dempsey was suffering from drug-induced, paranoid delusions. 7RP 59. Dempsey's physical sexual arousal and his continuous pursuit of J.M., grabbing him, choking him, and dragging him back toward the stalls, all showed that Dempsey acted with the intent to rape J.M. 7RP 66.

**C. ARGUMENT**

**1. DEMPSEY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

Dempsey asserts that he received constitutionally inadequate representation because his attorneys failed to request a jury instruction on voluntary intoxication. This claim fails. Dempsey was not entitled to a voluntary intoxication instruction because there was no evidence at trial that any methamphetamine use would have rendered him incapable of forming the requisite intent to rape J.M. Counsel cannot be deemed

deficient for failing to request an instruction to which Dempsey was not entitled.

Given the complete lack of evidence establishing that methamphetamine would have negated Dempsey's intent to rape J.M., counsel also had legitimate tactical reasons not to request an instruction. Counsel likely realized that requesting an instruction would only have focused the judge's attention on this lack of evidence, presenting the State with an opportunity to move to preclude defense counsel from making any argument on the subject to the jury. Counsel also likely realized that an instruction would have undermined Dempsey's defense by providing a clear standard against which the jury would have measured this lack of evidence.

Second, even if counsel should have requested a voluntary intoxication instruction, Dempsey cannot show prejudice because there is no reasonable probability that, had the trial court instructed the jury on voluntary intoxication, the jury would have found that Dempsey lacked the intent to rape J.M.

**a. Standard Of Review.**

A challenge based on ineffective assistance of counsel is reviewed *de novo*. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant

bears the burden of proving both: (1) that trial counsel's performance fell below a minimum objective standard of reasonableness; and (2) that the defendant was prejudiced by counsel's deficient performance. State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Regarding the performance prong, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

Regarding the prejudice prong, a defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694). If a defendant fails to meet either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Thus, in order to find that Dempsey received ineffective assistance of counsel, this Court must find that Dempsey was entitled to the instruction, that counsel was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced Dempsey. See State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

**b. Defense Counsel Below Was Not Deficient For Failing To Request A Voluntary Intoxication Instruction Because Dempsey Was Not Entitled To Such An Instruction.**

Although not a “defense” to the commission of a crime, a defendant’s voluntary intoxication may constitute a failure of the State to prove a necessary element of a crime, where proof of intent is required and where the defendant’s intoxication prevented him from forming that intent. State v. Coates, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987); RCW 9A.16.090. In the appropriate case, trial courts may therefore instruct the jury as follows:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with (fill in requisite mental state).

WPIC 18.10 (3d Ed. 2008) (brackets and parenthetical in original).

A defendant is entitled to a voluntary intoxication instruction only if three conditions are met: (1) one of the elements of the crime charged is a particular mental state; (2) there is substantial evidence that the defendant ingested an intoxicant; and (3) the defendant presents evidence that this activity affected his ability to acquire the required mental state. State v. Harris, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004) (citing State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)).

Critically, “it is not the *fact* of intoxication which is relevant, but the *degree* of intoxication and the *effect* it had on the defendant’s ability to formulate the requisite mental state.” Coates, 107 Wn.2d at 891 (emphasis added); see also State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549, 551 (1996) (“Evidence of [consumption] alone is insufficient to warrant the instruction; instead, there must be ‘substantial evidence of the *effects* of the [drug] on the defendant’s mind or body.’” (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991) (emphasis added) (alterations supplied))). Thus, Dempsey’s trial attorney can be deemed deficient for failing to request a voluntary intoxication instruction only if substantial evidence supported the proposition that Dempsey’s asserted methamphetamine consumption prevented him from forming the requisite intent to rape J.M. There was no such evidence.

There certainly was evidence below that Dempsey was a user of methamphetamine. There was also conflicting evidence that Dempsey may have been under the influence of methamphetamine. Some witnesses, who did not interact with Dempsey directly, believed that he appeared to be high. 2RP 196; 3RP 27, 29-32, 78; 4RP 96; 5RP 179, 183-84. Other witnesses, such as the police officers who actually interacted with Dempsey directly, believed that he was not under the

influence of drugs.<sup>9</sup> 2RP 89, 95, 100; 3RP 191-93; 4RP 23-24. And as defense counsel elicited on cross-examination and emphasized during closing argument, there was no test of Dempsey's blood and therefore no toxicological proof of his mental state. 3RP 192; 6RP 56-57; 7RP 52.

All this is ultimately irrelevant, however, because irrespective of whether the evidence proved that Dempsey was under the influence of methamphetamine, there was absolutely no evidence that methamphetamine would have affected—much less negated—Dempsey's ability to form the intent to rape J.M. No witness testified that methamphetamine has any effect on a person's inclination to perform a sex act, or the ability to control the same. Instead, the sole evidence at trial concerning the effects of methamphetamine was Deputy Ostrum's testimony that methamphetamine can cause "tweaking," characterized by hyperactivity, hypervigilance, and paranoia. 3RP 192-93; 4RP 23-24. Even assuming for the sake of argument that Dempsey was abnormally vigilant and paranoid when he attacked J.M. in the bathroom, it does not follow that he was unable to form the requisite intent to rape him. If

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<sup>9</sup> Detective Priebe-Olson believed that Dempsey may have been under the influence, but she testified at trial only to observing Dempsey from around a corner while he provided Sergeant McSwain with his clothing. 6RP 51-54. Sergeant McSwain testified that Dempsey had no trouble following directions and did not testify to observing any signs of impairment. 5RP 93-94.

anything, the logical conclusion from Deputy Ostrum's description is that methamphetamine would amplify a person's intent to perform an act.

Indeed, Dempsey did not really argue that methamphetamine intoxication prevented him from committing a voluntary act. Counsel admitted that Dempsey attacked J.M. and threatened to kill him. 7RP 42-43. He argued that the State could have charged Dempsey with attempted kidnapping, or assault, or threatening to kill—effectively conceding that Dempsey had committed those crimes. 7RP 44. His argument, as far as methamphetamine intoxication was concerned, was simply that Dempsey's use of the drug negated the State's ability to prove that he was motivated by the desire *to have sexual intercourse*. 7RP 42-48. But this assertion was wholly unsupported; nothing in the record even addressed the effects of methamphetamine on a person's ability to form the intent to have sexual intercourse.

Dempsey nevertheless urges this Court to find that he exhibited classic signs of intoxication, such as appearing disorganized, thrashing, sweating, and failing to button his pants.<sup>10</sup> Supp'l Br. of App't at 7-8. He cites cases relying upon physical manifestations of alcohol intoxication for the proposition that such manifestations may support a voluntary

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<sup>10</sup> Detective Elias testified that Dempsey's pants actually had no button—thus his failure to fasten his clothing is not evidence of intoxication. 4RP 45-46.

intoxication defense, even in the absence of specific testimony about the effects of alcohol on a person's ability to form the requisite mental state. Supp'l Br. of App't at 7-8 (citing State v. Walters, 162 Wn. App. 74, 83, 255 P.3d 835 (2011) (defendant entitled to voluntary intoxication instruction when evidence showed that he had consumed at least seven beers and two shots of alcohol and exhibited typical signs of alcohol intoxication); Gabryschak, 83 Wn. App. at 253 (defendant may rely on physical manifestations of intoxication to support voluntary intoxication defense, where such evidence establishes both fact of "defendant's drinking and . . . the effects of the alcohol on the defendant's mind or body").<sup>11</sup>

Dempsey's reliance on these cases is unavailing because the effects of methamphetamine are not manifested in such easily observable ways, and are not so clearly tied to cognition in a way that makes it more likely that Dempsey would rape a child. Cf. City of Seattle v. Heatley, 70 Wn. App. 573, 580, 854 P.2d 658 (1993) ("The effects of alcohol are

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<sup>11</sup> And yet, in Gabryschak, the Court of Appeals found that evidence of the defendant's alcohol intoxication was insufficient to support an instruction, because the record established only that the defendant became angry, violent, and threatening when drunk. 83 Wn. App. at 254. There was "no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged." Id. Likewise, in the instant case, even if the evidence established that Dempsey became violent when high on methamphetamine, there was no basis to conclude that he was too high on methamphetamine to form the intent to rape J.M.

commonly known and all persons can be presumed to draw reasonable inferences therefrom.”) (quotation marks and citation omitted). It is well understood that people become belligerent, have lowered inhibitions, and may even “black out” when drunk; do people likewise commit involuntary acts of child rape when high on methamphetamine? Neither the record nor common experience answers this question.

The California Court of Appeals has recognized this exact distinction between alcohol and methamphetamine. In People v. Cox, the court rejected the contention that the defendant’s methamphetamine use entitled him to a voluntary intoxication instruction, when there was no evidence establishing that methamphetamine would have prevented him from forming the intent to enter a dwelling in order to commit rape:

Where the voluntary intoxication instruction is sought in a situation not involving alcohol, however, we conclude it must be supported by evidence advising the manner in which ingestion of the nonalcoholic drug affects the mind of the user. These are unusual times, and it is indeed possible that there are those in our society who know full well the effects of the use of various drugs on the human system. We believe, however, that the ordinary juror probably does not have such knowledge. Based on the lack of expert testimony in this case, *it would have been pure speculation for the jurors to determine what impact the ingestion of an undetermined amount of methamphetamine might have had on Cox’s mental capabilities. . . .*

221 Cal. App. 3d 980, 989-90, 270 Cal. Rptr. 730 (Cal. Ct. App. 1990)

(internal citations omitted) (emphasis added).

Other appellate courts have also declined to find that evidence of methamphetamine consumption entitles a defendant to a voluntary intoxication defense, in the absence of evidence specifically establishing that methamphetamine rendered the defendant unable to form the mental state necessary to commit the crime. See, e.g., Mashburn v. State, 148 So. 3d 1094, 1126-27 (Ala. Crim. App. 2013); McElmurry v. State, 60 P.3d 4, 23 (Okla. Crim. App. 2002); Gambill v. State, 675 N.E.2d 668, 673 (Ind. 1996); see also State v. Jones, 188 Ariz. 388, 400, 937 P.2d 310, 322 (Ariz. 1997) (evidence of defendant's methamphetamine use insufficient to support sentence mitigation where evidence did not establish effect on defendant's mental state at time of crime); State v. Torres, 283 Neb. 142, 182-83, 812 N.W.2d 213, 247-48 (Neb. 2012) (same).

Because the evidence provided no basis upon which a reasonable juror could have concluded that Dempsey's alleged methamphetamine use rendered him unable to form the requisite intent to rape J.M., Dempsey was not entitled to a voluntary intoxication instruction. His attorney was not deficient for failing to request the same. Because Dempsey has not met his burden to establish the first prong of the Strickland test, his claim should be rejected.

**c. Counsel Had Legitimate Strategic Reasons Not To Request A Voluntary Intoxication Instruction.**

Even if counsel could have requested a voluntary intoxication instruction, counsel was not deficient because he had legitimate strategic reasons not to request one. Courts presume that counsel's choices were the result of legitimate trial tactics or strategy. Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 689). So long as counsel's choices "can be fairly characterized" as legitimate, counsel will not be found ineffective. See State v. Hayes, 81 Wn. App. 425, 442, 914 P.2d 788 (1996) (emphasis added). A defendant can defeat this presumption only by demonstrating that "*no conceivable* legitimate tactic explain[ed] counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quotation marks and citation omitted) (emphasis added).

The legitimate reasons for Dempsey's attorney not to request a voluntary intoxication instruction are abundantly clear. First, as noted, Dempsey simply was not entitled to such an instruction. Counsel is presumed to have been aware of the lack of evidence establishing the

effect of methamphetamine on Dempsey's mental state.<sup>12</sup> Requesting an instruction on unsupported grounds was fraught with risk; it would have drawn the judge's attention to the lack of evidence, as well as presented the State with the motivation and opportunity to move to exclude any argument that methamphetamine prevented Dempsey from forming the intent to rape J.M. Counsel sidestepped this pitfall simply by attacking the State's proof without a formalized voluntary intoxication instruction—thus allowing him to make effectively the same argument, without the risk of exclusion.

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<sup>12</sup> The record actually reveals rather extensive efforts by defense counsel to secure funding for expert services, in order to prepare for Dempsey's defense. *See, e.g.*, Supp. CP \_\_\_ (Sub No. 34, Motion and Protective Order for Expert Witness), \_\_\_ (Sub No. 38, Order Authorizing Expert Services at Public Expense), \_\_\_ (Sub No. 39, Order Authorizing Expert Services at Public Expense, Medical/Mental Health Copy Costs). One such document shows that defense counsel sought reimbursement for costs associated with obtaining Dempsey's medical and mental health records: "This matter comes before the undersigned authorized representative of the Office of the Public Defender (OPD) on behalf of the defendant, through his/her attorney, Scott Schmidt, for medical and/or mental health records copy costs necessary to an adequate defense in this case to be performed at public expense. The defendant is charged with Attempted Rape in the Second Degree and Violation of the Uniform Controlled Substance Act. An invoice documenting the costs is attached." Supp. CP \_\_\_ (Sub No. 39, Order Authorizing Expert Services at Public Expense, Medical/Mental Health Copy Costs at 1). Indeed, the electronic court file contains over 25 separate pleadings or orders, associated with expert services for the preparation of Dempsey's defense. *See* Appendix A. While the critical documents are sealed, given the nature of Dempsey's defense and the facts of this case, it is entirely consistent with Strickland to presume that counsel thoroughly evaluated the merits of calling an expert witness and requesting a formal voluntary intoxication instruction. It is further consistent with Strickland to presume that after consulting with the expert who was retained, counsel determined, for legitimate tactical reasons, that neither expert testimony nor a voluntary intoxication instruction would aid Dempsey's case.

Second, a voluntary intoxication instruction also ran the risk of highlighting the deficiencies in Dempsey's defense, by providing the jury with a standard against which to measure the lack of evidence establishing the effect of methamphetamine on Dempsey's mental state. As counsel acknowledged during closing argument—because of the lack of a blood test, among other things—“[W]e don't know what was going on inside Mr. Dempsey's head.” 7RP 48, 52. A voluntary intoxication instruction would not have served this argument. It would have expressly informed the jury that “[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition[.],” while adding only the rather anemic provision that “evidence of intoxication may be considered in determining whether the defendant [acted][or][failed to act] with (fill in requisite mental state).” WPIC 18.10. The prosecutor could very well have used this instruction *against* Dempsey, by pointing out that Dempsey's conduct was still criminal, even if he was high, and that there was no evidence showing that methamphetamine prevented him from forming the intent to rape J.M. In light of these risks, counsel strategically chose to make the more amorphous claim that the State had simply failed to prove what Dempsey was thinking, one way or the other, and that Dempsey's methamphetamine use weighed against the likelihood of his actions being sexually motivated.

Finally, given that his client was accused of violently attacking and attempting to rape a small child in a public bathroom, counsel may simply have decided that openly claiming “voluntary intoxication” would have presented his client in such a negative and unsympathetic light as not to be worth it. It would be tantamount in some ways to telling the jury, “Yes, my client has done everything that the State has accused him of doing; but you should not hold him responsible because the methamphetamine, which he *chose* to take, so addled his mind that he uncontrollably attempted to rape a child without knowing what he was doing.” Absent incontrovertible proof that this was indeed the case, a defense attorney reasonably could decline to present such an argument to a jury.

Given the many tactical disadvantages of claiming voluntary intoxication, counsel wisely chose to forgo this instruction in favor of a more diffuse and much less risky strategy: to argue that the *possibility*—that Dempsey’s methamphetamine use negated his intent to rape J.M.—meant that the State had failed to prove its case beyond a reasonable doubt. Counsel’s performance in walking this fine line was laudable, not deficient. At the very least, because Dempsey has not shown that there is no conceivable legitimate justification for counsel’s choices, his claim should be rejected.

**d. Dempsey Was Not Prejudiced By His Attorney's Decision Not To Request A Voluntary Intoxication Instruction Because There Is No Reasonable Probability That The Jury Would Have Found That He Lacked The Requisite Intent To Rape J.M.**

Because Dempsey has failed to show that his attorney's performance was deficient, this Court need not reach the second prong of the Strickland test. Hendrickson, 129 Wn.2d at 78. Nevertheless, even assuming for the sake of argument both that Dempsey was entitled to a voluntary intoxication instruction and that his attorney was deficient for failing to request one, Dempsey's claim still fails because he has not demonstrated that there is a reasonable probability that, had the jury been so instructed, the outcome of his trial would have been different. See Strickland, 466 U.S. at 694. In other words, Dempsey has failed to establish prejudice.

A reasonable jury could not have found that Dempsey's purported methamphetamine intoxication rendered him incapable of forming the intent to rape J.M. The fact that an instruction may have prompted the jury to *speculate* about the effect of methamphetamine on Dempsey's mental state is legally insufficient to establish prejudice. Strickland dictates that "[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy,

caprice, 'nullification,' and the like." 466 U.S. at 695. The court must instead presume "that the . . . jury acted according to law." Id. at 694. Here, because no testimony established that methamphetamine intoxication negates a person's ability to form the intent to rape, the jury could only have speculated about these effects. Strickland precludes Dempsey from establishing prejudice on this basis.

Instead, the evidence proved that Dempsey, with his pants down and with his penis semi-erect, repeatedly pursued an eleven-year-old boy in a public restroom, grabbed him, and dragged him back toward the bathroom stalls. 6RP 91, 98-99, 101-03, 106-07, 109-16, 138. He momentarily let J.M. go when the child promised him, "I'll do whatever you want, however you want me to do [it]." 6RP 99. This was compelling evidence that Dempsey acted with the intent of raping J.M. Because there was no evidence that methamphetamine intoxication would in any way contradict this conclusion, a voluntary intoxication instruction would have made no difference in the outcome of the trial. Dempsey's conviction should be affirmed.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Dempsey's convictions for attempted second-degree child rape and possession of methamphetamine.

DATED this 16<sup>th</sup> day of June, 2015.

Respectfully submitted,

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King County Prosecuting Attorney

By:   
\_\_\_\_\_  
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# APPENDIX A

Electronic Court Record (ECR) –  
List of “Court Orders” Filed in King County  
Superior Court Cause No. 12-1-06296-6 KNT

# Electronic Court Records

Case Selection Report Problems Security Login Help

Dept. of Judicial Administration, Office of the Superior Court Clerk's Office

Select Another Case

Get Case

# 12-1-06296-6

Case Number: **12-1-06296-6 KNT**

Save Preferences

Case Title: **STATE OF WASHINGTON VS DEMPSEY, ANDREW WILLIAM**

Activity Log

Filter by Group: Court Orders

View Selected Documents

Print

Clear All

Select	Sub #	Date	Description	Pages
<input type="checkbox"/>	2	10-03-2012	ORDER FOR WARRANT \$1,000,000	4
<input type="checkbox"/>	8	10-15-2012	ORDER FOR SEXUAL ASSAULT PROTECTION /ISSUED	2
<input type="checkbox"/>	10	10-25-2012	ORDER SETTING STATUS CONFERENCE	1
<input type="checkbox"/>	12	11-15-2012	ORDER SETTING STATUS CONFERENCE	1
<input type="checkbox"/>	14	11-19-2012	ORDER DENYING SEALING DOCUMENTS	2
<input type="checkbox"/>	15	11-19-2012	ORDER DENYING SEALING DOCUMENTS	2
<input type="checkbox"/>	16	11-19-2012	ORDER SEALING DOCS SUBS 26 TO 29 /ORD ATZ EXPRT SRVC PUB EXP 11-15 /MTN&CERT APPT EXPRT DTD 11-15	2
<input type="checkbox"/>	17	11-19-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	18	11-19-2012	ORDER SEALING DOCS SUBS 26 TO 29 /ORD ATZ EXPRT SRVC PUB EXP 11-15 /MTN&CERT APPT EXPRT DTD 11-15	2
<input type="checkbox"/>	19	11-19-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	20	11-19-2012	ORDER SEALING DOCS SUBS 26 TO 29 /ORD ATZ EXPRT SRVC PUB EXP DT11-15 /MTN&CERT APPT EXPRT DTD 11-15	2
<input type="checkbox"/>	21	11-19-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	22	11-21-2012	ORDER SEALING DOCS SUBS 26 TO 29 /ORD ATZ EXPRT SRVC PUB EXP 11-15 /MTN&CERT APPT OF EXPRT DTD 11-15	2
<input type="checkbox"/>	23	11-21-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	24	11-21-2012	ORDER SEALING DOCS SUBS 26 TO 29 /ORD ATZ EXPRT SRVC PUB EXP 11-15 /MTN&CERT APPT OF EXPRT DTD 11-15	2
<input type="checkbox"/>	25	11-21-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	25A	11-26-2012	ORDER SEALING DOCS SUBS 39E & 39F /ORD ATZ EXPRT SRVC PUB EXP 11-15 /MTN&CERT APPT OF EXPRT DTD 11-15	2
<input type="checkbox"/>	25B	11-26-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	26	11-28-2012	ORDER FOR EXPERT SERVICES /SEALED PER SUBS 16,18,20,22,24	2
<input type="checkbox"/>	28	11-28-2012	ORDER FOR EXPERT SERVICES /SEALED PER SUBS 16,18,20,22,24	2
<input type="checkbox"/>	33	12-05-2012	ORDER SEALING DOCS SUBS 40 & 41 /ORD ATZ EXPRT SRVC PUB EXP 11-30 /MTN&CERT APPT EXPRT DTD 11-30	2
<input type="checkbox"/>	34	12-05-2012	PROTECTIVE ORDER FOR EXPERT WITNESS	3
<input type="checkbox"/>	35	12-06-2012	ORDER SETTING TRIAL DATE	1
<input type="checkbox"/>	38	12-06-2012	ORDER FOR EXPERT SERVICES	12
<input type="checkbox"/>	39	12-06-2012	ORDER FOR EXPERT SERVICES	8
<input type="checkbox"/>	39A	12-12-2012	ORDER SEALING DOCUMENT SUB 39B /ORD FOR EXPRT ACCESS TO JAIL -A	2
<input type="checkbox"/>	39B	12-12-2012	ORDER AUTH EXPERT ACCESS TO JAIL -A /SEALED PER SUB 39A	2
<input type="checkbox"/>	39C	12-12-2012	ORDER SEALING DOCUMENT SUB 39D /ORD FOR EXPRT ACCESS TO JAIL -B	2
<input type="checkbox"/>	39D	12-12-2012	ORDER ATZ EXPRT ACCESS TO JAIL -B /SEALED PER SUB 39C	2
<input type="checkbox"/>	39E	12-12-2012	ORDER FOR EXPERT SERVICES /SEALED PER SUB 25A	2
<input type="checkbox"/>	40	12-13-2012	ORDER FOR EXPERT SERVICES /SEALED PER SUB 33	2
<input type="checkbox"/>	43	01-18-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1

<input type="checkbox"/>	47	02-22-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	50	04-05-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	54	05-10-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	56	06-13-2013	ORDER TO CONTINUE OMNIBUS HRG	1
<input type="checkbox"/>	57	06-21-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	60	08-02-2013	ORDER TO CONTINUE OMNIBUS HRG	1
<input type="checkbox"/>	61	08-16-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	65	09-20-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	67	10-18-2013	ORDER TO CONTINUE OMNIBUS HRG	1
<input type="checkbox"/>	68	10-25-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	70	11-22-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	72	12-12-2013	ORDER TO CONTINUE OMNIBUS HRG	1
<input type="checkbox"/>	73	12-20-2013	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	75	01-17-2014	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	77	02-07-2014	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	79	02-21-2014	ORDER TO CONTINUE OMNIBUS HRG	1
<input type="checkbox"/>	79A	02-28-2014	ORDER TO CONTINUE OMNIBUS HRG	1
<input type="checkbox"/>	80	03-03-2014	OMNIBUS ORDER	3
<input type="checkbox"/>	82	03-04-2014	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	83	03-05-2014	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	85	03-07-2014	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	86	03-10-2014	ORD FOR CONTINUANCE OF TRIAL DATE	1
<input type="checkbox"/>	90	03-12-2014	ORD PERMITTING FILING AMENDED INFO	2
<input type="checkbox"/>	95	03-17-2014	ORDER AUTH/2 SETS OF TRIAL CLOTHING	1
<input type="checkbox"/>	105	04-08-2014	STIP&OR RET EXHIBTS UNOPND DEPOSTNS	2
<input type="checkbox"/>	107	04-08-2014	ORDER FOR PAYMENT WITNESS EXPENSES	4
<input type="checkbox"/>	108	04-16-2014	PRESENTENCE INVESTIGATION ORDER	1
<input type="checkbox"/>	111	06-25-2014	ORDER WAIVING SPEEDY SENT 06-13-14	1
<input type="checkbox"/>	117	07-11-2014	FINDINGS OF FACT&CONCLUSIONS OF LAW	8
<input type="checkbox"/>	119	07-11-2014	ORDER WAIVING SPEEDY SENT 07-11-14	1
<input type="checkbox"/>	120	07-11-2014	ORDER FOR SEXUAL ASSAULT PROTECTION	2
<input type="checkbox"/>	122	07-11-2014	ORDER AUTHORIZING REVIEW PUBLIC EXP	3
<input type="checkbox"/>	122A	07-11-2014	FELONY JUDGMENT AND SENTENCE	10
<input type="checkbox"/>	135	01-23-2015	ORDER OF INDIGENCY /SUPPLEMENTAL	1

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the appellant, at swiftm@nwattorney.net, containing a copy of the State's Response to Supplemental Brief, in State v. Andrew William Dempsey, Cause No. 72168-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16<sup>th</sup> day of June, 2015.

U Brame

Name:

Done in Seattle, Washington