

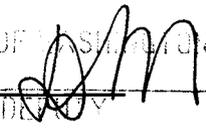
NO. 37122-7-II

FILED
COURT OF APPEALS
DIVISION II

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

OCT 14 3 37 PM '08

STATE OF WASHINGTON

BY: 

STATE OF WASHINGTON,

Respondent,

v.

JESSE POWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01147-0

BRIEF OF RESPONDENT

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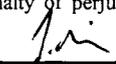
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DATED October 14, 2008, Port Orchard, WA 

Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS1

III. ARGUMENT13

 A. POWELL’S COUNSEL MADE A REASONABLE STRATEGIC DECISION TO MAKE THE STATE PROVE ALL THE ELEMENTS OF THE CASE RATHER THAN HAVE POWELL ASSUME THE BURDEN OF PROVING THE ELEMENTS OF AN AFFIRMATIVE DEFENSE.13

 B. THE TRIAL COURT PROPERLY GRANTED A BRIEF CONTINUANCE AFTER IT WAS DETERMINED THAT THE VICTIM HAD METHAMPHETAMINE IN HER URINE.....21

 1. Powell withdrew his objection to the continuance21

 2. Even were it preserved for appeal, the trial court properly continued the trial.....24

 3. The trial court’s selection of a timely trial date upon granting of a proper continuance is generally not reviewable.25

 4. Powell fails to show his constitutional right to speedy trial was violated.26

IV. CONCLUSION.....28

TABLE OF AUTHORITIES
CASES

Barker v. Wingo,
407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....27

In re Rice,
118 Wn. 2d 876, 828 P.2d 1086 (1992).....14

State v. Corrado,
94 Wn. App. 228, 972 P.2d 515 (1999).....27, 28

State v. Crane,
116 Wn. 2d 315, 804 P.2d 10 (1991).....15

State v. Farnsworth,
133 Wn. App. 1, 130 P.3d 389 (2006).....24

State v. Fladebo,
113 Wn. 2d 388, 779 P.2d 707 (1989).....27, 28

State v. Flinn,
154 Wn. 2d 193, 110 P.3d 748 (2005).....24, 25

State v. Harris,
130 Wn. 2d 35, 921 P.2d 1052 (1996).....24

State v. Hendrickson,
129 Wn. 2d 61, 917 P.2d 563 (1996).....14

State v. Higley,
78 Wn. App. 172, 902 P.2d 659 (1995).....27

State v. Iniguez,
143 Wn. App. 845, 180 P.3d 855 (2008).....26

State v. Jury,
19 Wn. App. 256, 576 P.2d 1302 (1978).....20

<i>State v. Kruger</i> , 116 Wn. App. 685, 67 P.3d 1147 (2003).....	19
<i>State v. Lord</i> , 117 Wn. 2d 829, 822 P.2d 177 (1991).....	14
<i>State v. McFarland</i> , 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	14
<i>State v. Monson</i> , 84 Wn. App. 703, 929 P.2d 1186 (1997).....	27
<i>State v. Terrovona</i> , 105 Wn. 2d 632, 716 P.2d 295 (1986).....	24
<i>State v. Thomas</i> , 109 Wn. 2d 222, 743 P.2d 816 (1987).....	19
<i>State v. Ward</i> , 125 Wn. App. 243, 104 P.3d 670 (2004).....	20
<i>State v. Welchel</i> , 97 Wn. App. 813, 988 P.2d 20 (1999).....	27
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14

STATUTES

RCW 9A.44.030(1).....	15
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Powell's counsel made a reasonable strategic decision to make the State prove all the elements of the case rather than have Powell assume the burden of proving the elements of an affirmative defense?

2. Whether the trial court properly granted a brief continuance after it was determined that the victim had methamphetamine in her urine?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jesse Powell was charged by information filed in Kitsap County Superior Court with second-degree rape, based on the victim's inability to consent due to extreme intoxication. CP 11. After trial, a jury found Powell guilty as charged. CP 39.

B. FACTS

Suk James owned the Dunes Motel in Bremerton. 3RP 7. She was working early on August 12. 3RP 7. A man and a woman came into the motel. 3RP 8. The man said the woman was his wife and they needed a room. 3RP 8. He did not have any ID and gave her a passport. 3RP 8. He kept saying, "This is my wife. This is my wife." Then he said "This is pretty. She is my wife. She is pretty." He kept repeating it. 3RP 8. She did not say anything. J

James tried to talk to her, but she was “just standing like a zombie or something.” 3RP 8. She just stood there. 3RP 8. He was holding on to her with his arm around her waist. 3RP 8-9. James gave them the keys. 3RP 9.

Thirty minutes later, he came back with the ice bucket and said that his wife needed ice. 3RP 9. Then about five minutes later she came down with another man. 3RP 9.

The first time James saw her it was like she was frozen. 3RP 10. James thought she was upset because she did not move or say anything. 3RP 10. Then when she saw her afterwards, she seemed scared and nervous. 3RP 10. She did not know where she was and was shaking and crying. 3RP 10. After James opened the office door, she ran into the rear apartment and hid. 3RP 10. She kept saying, “Why am I here? I don’t know why I am here.” 3RP 10. James called the police. 3RP 10.

On cross James testified that the man, whom she could not identify in court, gave his true name and passport. 3RP 11. He did not attempt to conceal his identity. 3RP 12. When they left the office, she was “kind of” walking but did not really move. 3RP 12. She did not appear drunk. 3RP 12. She seemed “kind of frozen.” 3RP 12. She was not moving at all in the office. 3RP 12. She did not even move her eyes. 3RP 12. James thought they had had an argument. 3RP 12-13. James did not notice any odor of

alcohol. 3RP 13. She did not appear drunk afterwards, either. 3RP 15.

TLM testified that she left Bremerton to meet a friend in Seattle around three or four in the afternoon. 3RP 17. The friend worked in a bar in Pioneer Square. 3RP 18. TLM had some food and some drinks and talked to her friend while the friend was working. 3RP 18.

The friend got off around 6:00. 3RP 19. They went to her house so she could change. 3RP 19. TLM had a few drinks and they smoked a little pot while she was at her house. 3RP 19. TLM did not recall doing any other drugs, but she did have quite a few gaps in her memory of the evening. 3RP 19.

Then they headed back to Pioneer square around eight or nine. 3RP 19-20. They stopped in quite a few bars and had a number of drinks. 3RP 19. TLM was not sure, but thought she might have had 10 or 12 drinks. 3RP 20. The last ferry left at midnight, and TLM stayed in Seattle until then, drinking with her friend. 3RP 20. TLM did not drink very often. 3RP 20. Although she had been drunk before, she had never previously blacked out. 3RP 20. She was drunk that night. 3RP 21. She was still able to talk and walk, carry on a conversation when she was in Pioneer Square. 3RP 21. TLM thought she probably stopped drinking around 11:45. 3RP 21.

After her last drink she started walking down to the ferry. 3RP 21.

She called several friends in Bremerton to make sure she would have a ride home from the ferry. 3RP 21. She later learned that her friends had met the ferry in Bremerton, and waited there until 3:00 a.m. wondering where she was. 3RP 22. She recalled seeing the ferry terminal across the street, but did not have any memory after that. 3RP 22. She did not recall buying a ticket or getting on or off the boat. 3RP 22.

The next thing she remembered was waking up in a motel room with her pants and panties off with some strange naked man. 3RP 22. He was performing oral sex on her. 3RP 22. She woke up suddenly. 3RP 23. She had absolutely no idea how she had gotten there. 3RP 23. She had never seen him before. 3RP 23. She was on her back with her knees up. 3RP 23. Her butt was on the edge of the bed and he was kneeling on the floor. 3RP 23. He continued to do it for 15 or 20 minutes. 3RP 24. She was scared to move because she had no idea who he was, what he was capable of, whether he was armed or what his intentions were. 3RP 24. She was in fear for her life, so she just went along until she could come up with an excuse for him to leave the room. 3RP 24.

She convinced him to go get her some ice. 3RP 24. When he left she jumped up and locked the door. 3RP 24. She found got dressed, looked around the room for any of her possessions, and grabbed some car keys from the night stand that might have been his. 3RP 24. They turned out to be his

dog tags. 3RP 24. Then she ran out of the room. 3RP 24.

She still did not know where she was. 3RP 25. She did not know if she was still in Seattle. She had no idea if she was in Bremerton or even in another state. 3RP 25. The room was on the second floor. 3RP 25. She cautiously made her way to the stairwell. 3RP 25. She figured the ice machine was either on the same floor or downstairs, so she went up. 3RP 25. There was a man on the walkway, and he asked her if she was all right. 3RP 25. When he spoke to her, she “pretty much just lost it.” 3RP 25. The man took her down to the office, where they called the police. 3RP 25.

After TLM spoke to the police, they put her in an ambulance to Harrison Hospital. 3RP 25. They called her parents and her roommates, and they all waited for a while at the hospital. 3RP 26. The detective came and spoke with her. 3RP 26. Then she was examined. 3RP 26. All this took an while, so she did not get home until 10:30 or 11:00 a.m. 3RP 26.

She was very sore in her vaginal area. 3RP 26. It was several days before she could wipe herself after using the bathroom. 3RP 26. She was not sore beforehand. 3RP 26. TLM was able to identify Powell as her assailant at trial. 3RP 27. Even really drunk, she would not have ever chosen to go home with a man. 3RP 27. She had self-identified as gay since 8th grade, and had been openly gay since she had gotten out of high school. 3RP 27.

On cross, TLM admitted she had a prescription for Zoloft, but did not take it the morning of the incident because she had been out for a couple of days. 3RP 30. It was possible that someone could have put something like Rohypnol in her drink at some point during the evening. 3RP 31. When she came to, Powell was not "forcing himself" on her, but he did have his hands around her ankles. 3RP 32. She did not recall using methamphetamine the day of the incident, though she tested positive for it. 3RP 34. At one point she got on top of him. 3RP 35. He was attempting to have intercourse with her, but never penetrated her. She did not know if he had an erection or not. 3RP 35.

On redirect TLM explained that she had to ask Powell several times before he agreed to go and get some ice. 3RP 36. She tried to gain his trust by allowing him to continue performing oral sex on her, and acting like she was enjoying it. 3RP 36.

Jolene Culbertson was a Sexual Assault Nurse Examiner and Coordinator of the Sexual Assault Nurse Program at Harrison Medical Center. 2RP 9. TLM was examined on August 12, 2007. 2RP 16. TLM had five areas that suffered injury. 2RP 17. Her labia majora bilaterally had redness, abrasions and tenderness. 2RP 17. On the left there was a large laceration with redness, tenderness, swelling and red spots all around the area. 2RP 18. The labia minora also had redness, abrasions, tenderness, and

also a laceration on the right side. 2RP 17. TLM's hymen was so painful that the nurse was unable to perform a Q-tip examination of it. 2RP 17-18. The pain in all these areas rated a four or five on a one-to-ten scale. 2RP 18. Because of the lacerations and swelling prolonged oral penetration would have been quite uncomfortable. 2RP 18. The vaginal area heals very quickly, like the inside of the mouth. 2RP 18. Nevertheless, the lacerations here would take a number of days to heal. 2RP 18. The examination was two and a half hours after the assault. 2RP 18. Urine and Q-tip samples were taken. 2RP 19.

On cross the nurse testified that TLM said she had four drinks in a café. 2RP 28. She made no mention of marijuana or methamphetamine. 2RP 28. She was using an antidepressant, Zoloft. 2RP 29. The urine sample was taken between 7:30 and 9:00 a.m. 2RP 31. The lacerations could have been from a consensual "rough sexual encounter," 2RP 31, or "possibly" from "rather extended oral sex." 2RP 32.

Bremerton detective Ken Butler was called out to the Dunes Motel around 3:30 a.m. 3RP 40. TLM had already been transported to Harrison Hospital. Powell was still at the scene in the back of a patrol car. 3RP 40. Butler asked Powell about the incident. 3RP 41. Powell asserted that it was "all consensual." He told Butler that all he did was "eat her pussy and eat her ass." 3RP 41. Butler asked if he could search the room, and Powell told him

he wanted him to go into the room. 3RP 41. Powell signed a consent to search form. 3RP 41. There were no personal belongings of any kind in the room. 3RP 42. The bed was the only thing that was disturbed, except for an ice bucket in the bathroom. 3RP 42.

After they transported him to the station, Butler advised Powell of his rights. 3RP 43. Powell waived those rights and agreed to talk to Butler. 3RP 43. He said the sex was consensual. 3RP 43. Powell stated that he had met TLM in Seattle, that they came back to Bremerton, and took a taxi to the motel. 3RP 43. He stated that she was a willing participant. 3RP 43. He explained that he initially approached TLM when she was talking to two ferry personnel. 3RP 43. They were concerned that because she was so incapacitated. 3RP 43. Powell told them he would take her and help her. 3RP 43. Powell did not know TLM or her name. 3RP 44. On several occasions he said that “she was very very incapacitated.” 3RP 44. Powell said that when they got to the motel, TLM took her pants and panties off. 3RP 44. Then he “conducted oral sex” and “ate her pussy very hard” and “ate her anus really hard.” Powell said he would expect her to be sore there because of it. 3RP 44. Powell also opened his mouth and said there should be hair in his teeth because she had a hairy anus. 3RP 44.

Powell was then transported to the jail for booking. 3RP 45. Butler went to the hospital and contacted TLM. 3RP 45. When he first walked in,

she was still shaking and crying. 3RP 45. She calmed down as they spoke, but remained on the edge of tears. 3RP 45. In an emergency case the lab can process evidence in a month. 3RP 46. If not, it could take several months to a year. 3RP 47.

On cross, counsel brought out that Powell had asked the patrol officer, Thuring, to speak to a detective. 3RP 47. He also offered to give a DNA sample. 3RP 47. Powell appeared to have been drinking. 3RP 48. He did not appear to be intoxicated. 3RP 49. "Incapacitated" was Powell's word with reference to TLM. 3RP 49.

State Patrol Trooper Cadet Jesse Sizemore was assigned to Coleman Dock in Seattle. 3RP 52. He was walking through the Bremerton waiting area on the night of the incident when he noticed TLM sitting on the bench. 3RP 53. She was alone and looked like she might be intoxicated. 3RP 53. As the boat was loading he saw her bump into the turnstile. 3RP 53. Sizemore told her she needed a ticket, but she did not respond at all. 3RP 53. He was trying to explain that she needed a ticket when Powell came running up, saying "I have the tickets." 3RP 53. Sizemore looked at Powell, who said he had the ticket. 3RP 53. Sizemore told TLM, "Here is your ticket." 3RP 53. Powell said he was Russian and that his wife did not speak English. 3RP 53. Sizemore had no reason to disbelieve him, so he told they needed to get on board because it was the last boat of the evening. 3RP 53.

They went through the turnstiles and onto boat. 3RP 54. Sizemore never had a conversation with TLM. 3RP 54.

Powell testified at trial that at the time of the incident he lived in a studio apartment in Bremerton. 3RP 77. He lived with his sister and nephew and the sister's boyfriend. 3RP 78. On the day of the incident, he went to Seattle around 7:00 p.m. 3RP 78. Powell went to a place where Russians congregated. 3RP 78. He was not himself Russian, just interested in their culture. 3RP 78-79. He stayed at Contour, the bar where the Russians hung out, until around 12:30, and then left to catch the 12:50 ferry, which was the last one of the evening. 3RP 80. He had four pints of Bud Light. 3RP 82.

At the terminal he bought a ticket and went into the waiting area. 3RP 83. He saw three troopers converge on TLM. 3RP 84. He did not know her. 3RP 84. They were concerned because she seemed intoxicated. 3RP 85. He "made a bad call" and tried to be a good Samaritan so she would not be sent to detox. 3RP 85. He said his wife did not speak English, and TLM "caught the hint." 3RP 86. She looked at him and grinned. 3RP 86. She nodded her head "yes." 3RP 86. The officers said they could board. 3RP 86. But they said she would need a ticket, so he went back and bought a second one. 3RP 87. He just assumed she was intoxicated because she was young and it was late and people go to Seattle to enjoy the nightlife. 3RP 87. He did not see or hear anything to make him think she was intoxicated. 3RP 88.

At that point he was not expecting any kind of romantic encounter with TLM. 3RP 88.

They boarded the boat, and he was amazed when she followed him and then sat next to him. 3RP 88-89. He napped until the loudspeaker announce the arrival in Bremerton. 3RP 89. He was surprised to find she was still there when he awoke on arrival in Bremerton. 3RP 89.

They proceeded off the boat and he offered to share a cab with her. 3RP 90. Powell and TLM got in the back and another male got in the front. 3RP 90. The driver dropped him off first around Callow Avenue. 3RP 90. Then they proceeded to the Dunes. 3RP 90. He told her she was welcome to join him. 3RP 91. He was worried they would think she was a prostitute. 3RP 92. That was why he told the clerk that she was his wife. 3RP 93. He told her they had just arrived in Seattle from Moscow and were waiting for friends to pick them up in the morning. 3RP 93. He nevertheless gave the clerk his Washington State ID card showing his Bremerton address. 3RP 93.

He still did not know TLM's name at this point. 3RP 94. They had not had any conversation. 3RP 94. She did not seem intoxicated. 3RP 94. He did not have any idea she had been drinking or had smoked marijuana or used methamphetamine that evening. 3RP 94. They went "happily" upstairs because there had not been any arguments on the boat or in the cab. 3RP 95.

They went into the room. 3RP 95.

They took off their shoes and he stripped to his T-shirt and shorts to sleep. 3RP 95. He took off his ring, watch and dog tags. 3RP 96. After they had been laying on the bed for two minutes, he told her he would like to “massage her, you know.” She said “Okay,” and they took off her pants and panties. 3RP 96. He began to “give her oral sex.” 3RP 96. There was no kissing or touching beforehand. 3RP 96. She seemed to enjoy it. 3RP 97. The position was uncomfortable, so he asked her to move to the edge of the bed. 3RP 97. They put one pillow under buttocks and another under her back. 3RP 97. Then he got on his knees at the edge of the bed and they were both more comfortable. 3RP 97. She appeared to be enjoying it; her vagina was becoming more lubricated. 3RP 98. It went on for about 30 minutes. 3RP 99. Then he pretended that his tongue slipped down to her anal area. 3RP 99. She did not protest, and seemed to be enjoying it. 3RP 99. She was making “orgasmic sounds.” 3RP 99. She asked him to put his fingers in her vagina but he refused because he thought it was disgusting because fingers were unhygienic. 3RP 100. He thought he would insert his penis instead, but realized he did not have an erection. 3RP 101. He asked her to help by having him lie on his back while she assisted by sticking him in her. 3RP 102. She complied. 3RP 102. He did not notice anything that suggested she was having any difficulty or was too impaired to participate. 3RP 102. He

did not ejaculate. 3RP 103. The lights were on. 3RP 103. There was nothing in here reaction that suggested that she did not want to participate. 3RP 104. He would have stopped if she had asked. 3RP 104.

Eventually she said that ice would make the sex more stimulating. 3RP 104. Powell went and got ice. 3RP 106. She was gone when he returned. 3RP 106. Powell denied telling Butler the night of the incident that he thought TLM was very incapacitated. 3RP 107. TLM did not do anything in his presence that made him think that she was so intoxicated or impaired that she could not make a decision about whether or not to have sex. 3RP 108.

III. ARGUMENT

A. POWELL'S COUNSEL MADE A REASONABLE STRATEGIC DECISION TO MAKE THE STATE PROVE ALL THE ELEMENTS OF THE CASE RATHER THAN HAVE POWELL ASSUME THE BURDEN OF PROVING THE ELEMENTS OF AN AFFIRMATIVE DEFENSE.

Powell argues that counsel was ineffective for not requesting an instruction on the affirmative defense that Powell did not know TLM was incapacitated. This claim is without merit because counsel made a reasonable strategic decision to make the State prove all the elements of the case rather than have Powell assume the burden of proving the elements of an affirmative defense.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466

U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Powell fails to meet his burden of showing either deficient performance or prejudice. Under the evidence presented below, counsel was not deficient by opting to hold the State to its burden of proving incapacity to consent rather than assuming the burden of proving the affirmative defense that Powell did not know she was incapacitated. Nor can he show prejudice where the jury clearly did not accept his theory that TLM was not incapacitated.

WPIC 19.03 provides in pertinent part:¹

It is a defense to a charge of rape in the second degree that at the time of the offense the defendant reasonably believed that _____ was not mentally incapacitated or physically helpless.

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.

The jury in this case was instructed, however, that the *State* had to prove beyond a reasonable doubt that TLM was incapacitated or physically helpless.

CP 31.

This latter burden was the focus of the defense case. Counsel argued that no evidence TLM was physically helpless – she could walk, took her pants off, etc. 3RP 137.

Instead, he argued the big issue was whether she was mentally incapacitated. 3RP 137. Counsel then quoted the instructional definition of mentally incapacitated. 3RP 138.

Counsel digressed briefly to discuss the lesser charge of third-degree rape. He pointed out the salient element of clearly expressed lack of consent. 3RP 138. He correctly emphasized that there was no evidence at all of lack of consent clearly expressed. 3RP 139.

Having disposed of the lesser offense, counsel returned to the primary issue, the second-degree rape charge based on the victim's lack of capacity to consent. He maintained that TLM's testimony did not resolve the issue. 3RP 139. He submitted that based on the toxicologist's testimony about alcohol "burning off" TLM's drunkest moment would have been when she encountered the cadet at the ferry terminal. 3RP 140. However, the cadet did not think that she seemed that intoxicated. 3RP 141. Nor, counsel argued, did the motel clerk think TLM seemed drunk. 3RP 142. He also plausibly

¹ See also RCW 9A.44.030(1).

argued, that "incapacitated" which Detective Butler attributed to Powell, was not, based on his general demeanor when he testified, a word that Powell would have used. 3RP 142.

Counsel then framed the entire case from the defense perspective:

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."

She went with him, and she walked. She -- who knows. The talking is kind of odd that she doesn't speak, but they are both, frankly, drunk and don't talk a lot. All signs pointed towards, yes, she was interested. Nothing that she did or said that anyone has told you, including [TLM], nothing that she did or said indicated she did not want to have a sexual encounter until she comes out of this fog.

3RP 142. Counsel continued and noted that TLM still did not communicate "no" to Powell, even after she "came out of the fog." 3RP 143. He pointed out that her eyes were open and awake in the lobby of the ferry dock. 3RP 144. The trooper thought she was okay. 3RP 144. TLM did not say anything, but did not appear to be drunk at the motel. 3RP 144.

Counsel wound up his argument with a return to the theme that the State had simply failed to meet its burden of presenting evidence to support the element of incapacity: TLM admitted she did not remember what happened. 3RP 145. Counsel concluded that the jury should find Powell "not guilty of Rape in the Second Degree because she certainly had the

capacity to understand what she was doing, even if she doesn't remember today." 3RP 145.

The element that the victim lacked capacity to consent and the defense that the defendant believed the victim had the capacity to consent are separate issues in the abstract. In the context of the present case, however, they are virtually indistinguishable. Because TLM testified that she did not recall what had occurred, the evidence tending to show whether she was or was not incapable of consent was essentially the same as the evidence tending to show whether Powell should or should not have *realized* she was incapable of consent.

Thus, if the jury concluded it showed that TLM was capable of consent, it would likely also conclude that Powell acted reasonably in assuming consent. On the other hand, if it concluded that she was incapable of consent, it is highly likely that it would also conclude that no reasonable person would have believed that she was not mentally incapacitated. Given the evidence before the jury, counsel did not act unreasonably in holding the State to its burden rather than assuming the burden itself.

Likewise, under these circumstances, Powell cannot prove prejudice. The jury was clearly concluded that TLM was unable to consent at the time the sexual encounter between her and Powell took place. Given his

meandering and sometimes bizarre testimony, and given the other evidence before the jury, including the fact that TLM was a lesbian, and her extremely distraught behavior when she escaped from the room (which was not explained by any cause other than a lack of consent), it is highly unlikely that the jury would find that Powell had met his burden of proof had counsel assumed it. Powell fails to show ineffectiveness.

Powell's reliance on *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003), is thus misplaced. There intent (or the lack thereof) was the "focus of the defense." *Kruger*, 116 Wn. App. at 693. It follows that it was ineffective assistance to not request an instruction on voluntary intoxication. Voluntary intoxication is *not* an "true" affirmative defense, however, and the instruction would merely inform the jury that it consider intoxication in weighing whether the *State* had proved the element of intent. *Kruger*, 116 Wn. App. at 691-92. Thus in *Kruger* there was no downside to requesting the instruction, and counsel's performance was deficient. Here, on the other hand, requesting the instruction would have imposed a burden of proof on the defense. Counsel could properly and competently determine that it was better to leave the burden on the State, especially in light of the weakness of the State's evidence. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), is also a voluntary intoxication case and is unhelpful for the same reason as *Kruger*.

State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), on which Powell also relies is doubly inapposite. There at issue was the failure to request an instruction on a lesser offense, which, again, would impose no burden of proof on the defense. And further counsel was deficient because there was no justifiable tactical reason for not requesting the instruction. *Ward*, 125 Wn. App. 249-50. As noted, here, Powell would have had the negative consequence of assuming the burden of proof, and counsel thus had a valid tactical reason for not requesting the instruction.

Finally, Powell's attempt to rely on *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978), fails to withstand scrutiny. There, the "record ... clearly demonstrate[d] that counsel made virtually no factual investigation of the events leading to defendant's arrest, nor did he properly support either his motion for continuance or motion for new trial with any affidavits. Counsel admits he was unprepared for trial." *Jury* had nothing to do with defense instructions. Moreover, nothing in this record suggests that counsel's decision to hold the State to its burden rather than assuming it for the defense was based on a failure to be familiar with the case. This contention should be rejected.

B. THE TRIAL COURT PROPERLY GRANTED A BRIEF CONTINUANCE AFTER IT WAS DETERMINED THAT THE VICTIM HAD METHAMPHETAMINE IN HER URINE.

Powell next claims that the trial court's granting of a continuance to allow both parties to review surprising results from the victim's toxicology screen was an abuse of discretion. This claim, and Powell's cursory related contention that his constitutional right to speedy trial was violated are without merit.

1. Powell withdrew his objection to the continuance

Preliminarily, contrary to Powell's claim in his brief, he did not preserve this issue for review by objecting to the continuance. To the contrary, he withdrew his initial objection and conceded that the discovery of methamphetamine in the victim's blood test justified continuing the trial.

The case came on for trial on October 2, 2007. RP (10/2) 2. However, there were no judges available. RP (10/2) 2. Rather than just setting the matter over to the following week, the State asked for a slightly longer continuance. RP (10/2) 2. Just that morning the State had received the results from the victim's urine screen via fax from the toxicology lab. RP (10/2) 2. The State therefore asked for a continuance until October 29. RP (10/2) 2.

The purpose of the continuance was to give the State time to recontact

the victim about the results and to subpoena some of the lab personnel who tested the urine. RP (10/2) 2. Powell objected to the continuance, arguing that the State had had the urine in its possession since the date of the offense, about two months, and that the results, a 0.13 blood alcohol level, was consistent with the victim's statements to the police and to the defense investigator. RP (10/2) 3. The State responded that the alcohol level was not the issue; it was that she tested positive for several other substances that the State was concerned about. RP (10/2) 3. The other substances were illegal drugs. RP (10/2) 4. This came as a surprise to the State.

Defense counsel² then conceded that he had overlooked the positive drug results in the fax, which he had just received. RP (10/2) 4. The defense conceded that the presence of drugs came as a surprise, but maintained that it still wanted to proceed as quickly as possible. RP (10/2) 4. The court asked if Powell wanted additional time to reinterview. RP (10/2) 4. Powell responded that he would want to reinterview (presumably the complaining witness) and to subpoena a toxicology expert to talk about what the results could mean. The court responded that all that could take some time:

THE COURT: Well, I was going to say two weeks, but knowing how the lab works and subpoenas, that could take time. So I will grant the continuance based on the lengthy time it takes to subpoena the toxicologist, rather than the

² The statement is attributed to the prosecutor, but both its content and the fact that it directly follows her previous statement make it clear that it was actually defense counsel speaking.

victim, and you could interview her almost immediately. And so that is what the –

RP (10/2) 5. The State responded “The 29th of October.” RP (10/2) 5. The court observed that that would continue the time for trial period to November 28. RP (10/2) 5. The trial court also announced that it would be continuing the companion probation violation case, and defense counsel responded “That is fine.” RP (10/2) 5.

Powell did object subsequently, when on October 24, the matter was continued again, but within the time-for-trial period. RP (10/24) 2. The State explained that it filed its motion to continue on October 9, upon learning that two witnesses would be unavailable. RP (10/24) 3. The prosecutor noted the motion for October 24 because she had discussed the matter with the defense and was not expecting an objection. RP (10/24) 3-4. Powell gives the impression in his brief that the trial court was piqued with the State for its handling of the case in general. Brief of Appellant at 16-17. A review of the transcript makes it clear, however, that the trial court was dismayed due only to the delay between the filing of the motion and the date it was set to be heard. Notably, however, because it concluded that the request was within the time for trial and the reasons were valid, the court granted the second continuance. RP (10/24) 7. .

CrR 3.3(d) expressly provides that a party must object within 10 days

after notice of the trial date, and “[a] party who fails, for any reason, to make such a motion shall lose the right to object.” CrR 3.3(d)(3). Thus, even if the trial date is not within the time-frame prescribed in CrR 3.3, absent a timely objection, the trial date set by the trial court becomes the last allowable trial date (subject to certain exceptions, which are not at issue here). *See* CrR 3.3(d)(4); *see also State v. Harris*, 130 Wn.2d 35, 44-45, 921 P.2d 1052 (1996) (if a defendant does not timely object, his speedy trial rights under the court rules are deemed waived). *State v. Farnsworth*, 133 Wn. App. 1, 12-13, 130 P.3d 389 (2006), *review granted and remanded on other grounds*, 159 Wn.2d 1004 (2007). Because Powell did not object to the trial court’s setting of the trial date, he may not now raise the issue on appeal.

2. *Even were it preserved for appeal, the trial court properly continued the trial*

This Court reviews a trial court’s decision to continue a trial for an abuse of discretion. *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986). Allowing counsel time to prepare for trial is a valid basis for continuance. *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). Powell nonetheless argues that trial court improperly only made perfunctory inquiry into the State’s request. To the extent that claim is true it arises directly from the fact that Powell did not object to the continuance once he realized that report revealed methamphetamine in the victims. Indeed, he

himself asserted that he wanted to “[r]einterview [the victim] and give us time to subpoena the lab, a toxicology expert, to talk about what these results could mean.” Having concurred in the continuance, Powell cannot now claim that the trial court’s scrutiny of it was inadequate.

3. *The trial court’s selection of a timely trial date upon granting of a proper continuance is generally not reviewable.*

“[O]nce a valid continuance is granted, ... the wise discretion of the trial court may be used in exceptional circumstances to set cases beyond the 60-day limit of CrR 3.3.” *Flinn*, 154 Wn.2d at 200 (*quoting State v. Perez*, 16 Wn. App. 154, 156, 553 P.2d 1107 (1976)) (editing the Court’s). Once the trial court finds good cause for a continuance this Court “will not second-guess the trial judge’s discretion in placing the trial on the court’s calendar.”

Yet that is precisely the thrust of Powell’s primary argument – not that there was no valid basis for a continuance, but that the new date set by the trial court was unreasonable, and that it improperly took judicial notice of how long it would take to subpoena lab personnel, and that the State failed to clear all possible trial dates with its witnesses beforehand.

Here, the trial court set the trial for October 29, only two weeks after the original 60 days expired. The reset day after the second continuance was only a week after that and well within the new time-for-trial period.

Moreover, Powell cites no relevant authority supporting his contentions that the trial court abused its discretion. As noted above, Powell acquiesced in the continuance and cannot seriously contend that a two-week continuance was unreasonable to interview two witnesses and possibly consult an expert.

As for his contention regarding the State's scheduling of witnesses, he misreads the case he cites. *State v. Iniguez*, 143 Wn. App. 845, 180 P.3d 855 (2008), does not hold that the State must make sure all of its witnesses are available before requesting a new trial date. Instead it holds that a continuance should not be granted on account of an unavailable witness unless the State properly took steps to secure the witness's attendance at trial.

Moreover, such a requirement would be an impermissible judicial expansion of the requirements of CrR 3.3, *see* CrR 3.3(a)(4), and in any event supposes that the trial prosecutor, not the court "sets" trial dates. Powell fails to show that State failed to act with any purported duty of diligence and fails to show any deprivation of his rights under CrR 3.3

4. *Powell fails to show his constitutional right to speedy trial was violated.*

Powell asserts in a single sentence that his constitutional right to speedy trial was also violated. He wholly fails to support this argument with citation to authority and it should be rejected for that reason alone. Moreover, it is utterly without merit.

Constitutional speedy-trial provisions require that defendants be brought to trial within a “reasonable time” and does not mandate a fixed time limit. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997); *State v. Higley*, 78 Wn. App. 172, 184-85, 902 P.2d 659 (1995). The threshold for a constitutional violation is much higher than that for a violation of the superior court rules. *State v. Whelchel*, 97 Wn. App. 813, 823, 988 P.2d 20 (1999), *review denied*, 140 Wn.2d 1024 (2000).

At the threshold, a defendant who makes a speedy trial argument must show that the State failed to prosecute the case with customary promptness. *State v. Corrado*, 94 Wn. App. 228, 233, 972 P.2d 515, *review denied*, 138 Wn.2d 1011 (1999) (*citing Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). If the defendant makes this showing, only then does the Court consider the extent of the delay. *Corrado*, 94 Wn. App. at 233, *citing Doggett*, 505 U.S. at 652; *see also Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Delays greater than eight months have been held “presumptively prejudicial.” *Corrado*, 94 Wn. App. at 233-34. Shorter delays have been held not to implicate the constitutional right to speedy trial. *State v. Fladebo*, 113 Wn.2d 388, 394, 779 P.2d 707 (1989). Here, Powell was brought to trial in 85 days, less than three months, and has thus failed to meet his threshold burden, and the claim should be rejected.

Even if the defendant meets this threshold inquiry, the length of the delay is only one factor to be considered in determining whether he was brought to trial within a constitutionally reasonable time. *Corrado*, 94 Wn. App. at 234. Whether a particular delay is reasonable depends on the specific circumstances of a case, including (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay prejudiced the defendant. *Fladebo*, 113 Wn.2d at 393. Here, the length, and the reasons were reasonable. Of the delay, Powell objected to only one week of it. Finally, he fails to identify any actual prejudice to his defense. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Powell's conviction and sentence should be affirmed.

DATED October 14, 2008.

Respectfully submitted,

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