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Court of Appeals  
Division III  
State of Washington  
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COA No. 36087-3-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MILFORD L. BUTCHER,

Appellant.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ARGUMENT .....1  
II. CONCLUSION.....3

TABLE OF CONTENTS

Table of Cases

*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712,  
90 L. Ed.2d 69 (1986).....1, 2, 3  
*State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018).....2, 3

Rule

GR 37.....1, 2

## I. ARGUMENT

As for the *Batson* challenge, the State argues the three struck minority jurors were not the only minorities on the panel. To show minority jurors were empaneled, it points to the deputy prosecutor's observation that there were persons who looked like minorities and were not struck. (Resp. brief at 14). This is not only offensive, but also has no place in our justice system. The argument that "if it looks like one, it must be one" has no support in the law or human decency. The record speaks for itself that three prospective jurors identified as minority. And they were struck. The deputy prosecutor's self-professed ability to spot minorities by looking at them neither makes it so nor does it change the record that three self-identified minority jurors were struck. The court followed the State's lead and noted a juror had an ethnic name and another "appeared to be of some Asian descent" so they were likely minorities. (1/3/18 RP 262). The only three jurors identifying as minority were struck. Mr. Butcher established a prima facie case giving rise to an inference of discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986).

The State argues GR 37 applies to this case. It does not as Mr. Butcher's jury selection and trial predated the adoption of GR

37. *State v. Jefferson*, 192 Wn.2d 225, 243-49, 429 P.3d 467 (2018). The law that applies is the law in effect at the time of Mr. Butcher's trial. *Id.* at 248. *Jefferson* also applied a new "objective observer" inquiry to the third step in the traditional *Batson* challenge. *Id.* at 249. The State contends it should apply here as a new rule of criminal procedure. (Resp. brief at 18). But whether the modified inquiry does or does not apply makes no difference. Because Mr. Butcher showed "purposeful discrimination" in any event, *a fortiori* he also established an "objective observer" could indeed view race or ethnicity as a factor in the use of peremptory challenges by the State as all prospective minority jurors were struck. *Id.* at 250-51.

The words of the deputy prosecutor and the judge herself show at minimum unconscious discrimination, which can be both extrinsic and intrinsic. *Jefferson*, 192 Wn.2d at 250-51. The judge here, as in *Jefferson*, found neutral, but nebulous, reasons for the State's strikes. (1/13/18 RP 245, 250,255). Those nebulous reasons are insufficient and "cannot serve as a valid, race-neutral justification for a peremptory strike." *Id.* at 251.

In the context of this case, it bears repeating that whether

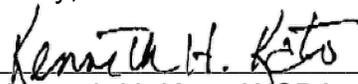
the third step in *Batson* of “purposeful discrimination” or the *Jefferson* modification to the “objective observer” standard applies is a distinction without a difference. Since Mr. Butcher showed purposeful discrimination, it follows that the objective observer inquiry was also met and his *Batson* challenge should have been sustained. *Jefferson, supra*.

With respect to the remainder of the State’s responses, Mr. Butcher rests on the arguments made in his opening brief.

## II. CONCLUSION

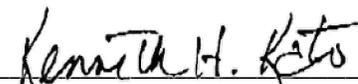
Based on the foregoing facts and authorities, Mr. Butcher respectfully urges this court to reverse his convictions and dismiss the charges or remand for new trial.

DATED this 16<sup>th</sup> day of February, 2020.

  
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## CERTIFICATE OF SERVICE

I certify that on February 16, 2020, I served the reply brief of appellant by USPS on Milford Butcher, # 405098, PO Box 769, Connell, WA 99326, and through the eFiling portal on Gretchen Verhoef at her email address.

  
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