

86825-5

FILED
DEC 10 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUP. CT. NO. _____
COA NO. 38600-3-II

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY MEREDITH,

Petitioner.

PETITION FOR REVIEW

James E. Lobsenz
Attorney for Petitioner

FILED
COURT OF APPEALS
DIVISION II
11 DEC -8 PM 4: 26
STATE OF WASHINGTON
BY DEPUTY

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>DECISION BELOW</u>	1
C. <u>ISSUES PRESENTED</u>	1
D. <u>STATEMENT OF THE CASE</u>	3
1. TRIAL COURT RULINGS	3
2. COURT OF APPEALS' DECISION BELOW	6
E. <u>REASONS WHY REVIEW SHOULD BE GRANTED</u>	9

Jury Selection Issues

1. THE EQUAL PROTECTION AND RACE DISCRIMINATION ISSUES POSED BY THIS CASE ARE SIGNIFICANT QUESTIONS OF LAW UNDER THE CONSTITUTION, AND THEY ARE ISSUES OF SUBSTANTIAL PUBLIC INTEREST WHICH SHOULD BE DETERMINED BY THIS COURT. RAP 13.4(b)(3) & (4)	9
2. THE ISSUE REGARDING FRUSTRATION OF THE STATE CONSTITUTIONAL RIGHT TO AN APPEAL IN CRIMINAL CASES BY REFUSING TO REQUIRE ANY EXPLANATION WHEN THE SOLE AFRICAN-AMERICAN JUROR IS REMOVED FROM THE JURY IS BOTH A SIGNIFICANT CONSTITUTIONAL QUESTION AND A QUESTION OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(b)(3) and (4).	10

	<u>Page</u>
3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.....	10
4. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).	10
a. <u>The Status of The Rhone Bright-Line Rule Advocated by Justice Alexander Should Be Settled By This Court.</u>	10
b. <u>The Scope of the Rhone Bright-Line Rule Should be Settled by this Court.</u>	11
c. <u>The Majority’s Holding That the Rhone Bright-Line Rule Only Applies when the Defendant and the Excluded Juror are of the Same Race Conflicts with Decisions of Both the U.S. Supreme Court and This Court.</u>	11
d. <u>Whether a Same Race Limitation on the Rhone Bright-Line Rule Would Itself Be a Violation of the Equal Protection Clause is a Question Which Should Be Decided By This Court.</u>	11
e. <u>The Majority’s Holding That It Is Constitutionally Permissible to Purposefully Remove One Minority Juror from The Jury because of His or Her Race, So Long as Some Other Juror of Some Other Minority Race Remains on the Jury, Conflicts With the U.S. Supreme Court’s Decision in Batson.</u>	12
f. <u>Assuming, Arguendo, The Validity of The Majority’s Ruling That the Existence of At Least One Other Person Who is A Member of Some Other Cognizable Minority Race Prevents Application of the Rhone Bright-Line Rule, This Court Should Grant Review to Decide if “Southern Europeans” Are A Cognizable Racial Group</u>	13

- g. This Court Should Grant Review to Decide The Important Constitutional Question of Whether The State Constitutional Right to an Appeal in a Criminal Case Requires Prosecutors to Articulate a Race Neutral Reason on the Record Whenever a Batson Challenge is Made. 14
- h. When a Trial Judge Violates the Rule of Batson and Hicks And Fails to Understand That She Has the Power to Find That a Prima Facie Case of Race Discrimination Has Been Established, How Can An Appellate Court Proclaim Such an Error Harmless By Purporting to Know That If The Trial Judge Had Understood That She Did Have That Power She Would Not Have Found A Prima Facie Case..... 16

Other Constitutional Errors and the Proper Harmless Error Test

- 5. WHETHER THE OVERWHELMING UNTAINTED EVIDENCE TEST FOR HARMLESS ERROR CONFLICTS WITH THE CONTRIBUTION TEST MANDATED BY THE U.S. SUPREME COURT IS A CONSTITUTIONAL QUESTION AND AN ISSUE OF PUBLIC IMPORTANCE THAT SHOULD BE DECIDED BY THIS COURT. RAP 13.4(b)(3) AND (b)(4). 17
- 6. WHETHER THE “CONTRIBUTION” TEST, RATHER THAN THE “OVERWHELMING UNTAINTED EVIDENCE” TEST, IS THE PROPER HARMLESS ERROR RULE APPLICABLE TO FEDERAL CONSTITUTIONAL ERRORS, IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH THIS COURT SHOULD DECIDE. RAP 13.4(b)(3) AND (b)(4). 17

	<u>Page</u>
a. <u>The “Overwhelming Untainted Evidence” Test Conflicts With the Supreme Court’s Decision in <i>van Arsdall</i></u>	17
b. <u>Since There is Never any “Tainted” Evidence When Proper Cross-Examination is Prohibited, The Overwhelming Untainted Evidence Test Permits The Routine Violation of the Sixth Amendment Right of Confrontation</u>	19
F. <u>CONCLUSION</u>	20

Page

TABLE OF AUTHORITIES

Page

State v. Davis,
154 Wn.2d 291, 111 P.3d 844 (2005)18, 19

State v. Guloy,
104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475
U.S. 1020 (1986)19

State v. Hicks,
163 Wn.2d 477, 181 P.3d 831 (2008) 2, 16-17

State v. Meredith,
163 Wn. App. 75, ___ P.3d ___ (2011) 1, 7-9, 12

State v. Rhone,
169 Wn.2d 645, 229 P.3d 752 (2010) 1, 2, 6-15

State v. Sweet,
90 Wn.2d 282, 581 P.2d 579 (1978)14

State v. Tilton,
149 Wn.2d 775, 72 P.3d 735 (2003)15

FEDERAL CASES

Batson v. Kentucky,
476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)...2, 6, 9, 11, 13, 15

Chapman v. California,
386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....18

Delaware v. van Arsdall,
475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)..... 17-19

Halbert v. Michigan,
545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005).....14

	<u>Page</u>
<i>Johnson v. California</i> 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).....	12
<i>Loving v. Virginia</i> , 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)	12
<i>Powers v. Ohio</i> , 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)	9, 11

OTHER AUTHORITIES

D. Sweeney, “An Analysis of Harmless Error in Washington: A Principled Process,” 31 <i>Gonz. L. Rev.</i> 277, 287 (1995)	18
--	----

A. IDENTITY OF PETITIONER

Petitioner, Gary Meredith, seeks the relief designated below.

B. DECISION BELOW

Petitioner seeks review of the split decision issued below by Division Two of the Court of Appeals. The initial decision was issued on August 9, 2011 in *State v. Meredith*, 163 Wn. App. 75, ____ P.3d ____ (2011). The published portion of the decision is attached as Appendix A. The complete opinion, including the unpublished portion, is attached as Appendix B. A timely reconsideration motion was filed, and on November 9, 2011, the majority issued an *Order Granting Reconsideration in Part and Amending Opinion*. (Appendix C) (hereafter the “*Order*”). The dissenting judge acknowledged the majority’s amendments and adhered to her dissenting opinion. (Appendix C).

C. ISSUES PRESENTED FOR REVIEW

1. Is there a bright-line rule in this State that the removal of the sole remaining African-American juror from the jury venire by means of a peremptory challenge necessarily establishes a prima facie case of race discrimination in violation of the Equal Protection Clause?
2. In *State v. Rhone*,¹ did this Court *prospectively* adopt this bright-line rule advocated by Justice Alexander?
3. The majority below reasoned that the future of the bright-line rule of *Rhone* was “uncertain now that a new justice has joined our Supreme Court.” Is it error to refuse to follow Supreme Court precedent established by a 5-4 margin simply because a new justice has joined the Court?

¹ 169 Wn.2d 645, 229 P.3d 752 (2010), *cert. denied*, 131 S.Ct. 522 (2010).

4. Assuming that the *Rhone* decision *did* prospectively adopt the bright-line rule advocated by Justice Alexander, must the defendant be of the same racial group as the peremptorily challenged minority juror in order to benefit from the rule's automatic establishment of a prima facie case of race discrimination?
5. Assuming, *arguendo*, that the bright-line rule of *Rhone* can only be asserted by a party who is of the same race as the excluded juror, does such a rule itself violate the Equal Protection Clause by making the establishment of a prima facie case turn upon the race of the party?
6. When the prosecution responds to a *Batson*² equal protection objection to the removal of a juror of one race by claiming that the jury still includes at least one other juror who "appears" to be a member of some *other* racial minority, does such a response (a) remove the case from the scope of the bright-line rule of *Rhone*, or (b) does such a response simply reinforce the conclusion that a prima facie case of purposeful race discrimination has been established?
7. Is there such a thing as a cognizable racial group of "southern Europeans," and assuming, *arguendo*, that there is such a cognizable racial group, is the purposeful removal of an African-American juror because of her race rendered constitutionally acceptable so long as another person who was a "southern European, or perhaps even Middle Eastern," remained on the jury?
8. Assuming, *arguendo*, that this Court did not prospectively adopt the bright-line rule advocated by Justice Alexander in *Rhone*, should it adopt such a rule now?
9. Is adoption of the bright-line rule of *Rhone* required by art. I, § 22 of the Washington Constitution, because without such a rule a criminal defendant is denied his right to effective appellate review?
10. Assuming, *arguendo*, that this Court did not prospectively adopt the bright line rule advocated by Justice Alexander in *Rhone*, did the trial court err by ruling, contrary to *State v. Hicks*,³ that a single peremptory challenge of an African-American juror could never establish a prima facie case of race discrimination because a "pattern" of such challenges was required?

² *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

³ 163 Wn.2d 477, 181 P.3d 831 (2008).

11. Did the majority judges below err when they concluded that the trial judge's ruling, refusing to find a prima facie case of race discrimination because there was no "pattern" of removal of African-American jurors, was harmless error?
12. Are appellate courts constitutionally required to employ the contribution test, rather than the overwhelming untainted evidence test, when constitutional error resulting in the erroneous preclusion of proper cross-examination, or proper closing argument, has been committed?

D. STATEMENT OF THE CASE

1. TRIAL COURT RULINGS

Petitioner was convicted of Rape of a Child 2 and Communicating With a Minor for Immoral Purposes. CP 1, 108-111. At his trial, his trial counsel objected when the prosecutor exercised a peremptory challenge and thereby removed Alice Currie, the sole African-American juror (Juror 4) from the jury. RP III, 106.⁴ No one ever disagreed with defense counsel's assertion that she was the only African-American on the jury. Defense counsel noted that there was nothing in Ms. Currie's answers to indicate "that she was in any way confused, evasive, or said anything that might lead one to believe that there would be a proper basis for removing the juror." RP III, 107. "The only belief can be that she was removed because of her minority status . . . : *Id.* Counsel asked the trial judge to find a prima facie case of race discrimination and to require the prosecutor to explain his reason for removing the juror.

⁴ "Your Honor, during the peremptory challenges, Mr. Schacht exercised a peremptory challenge on Juror No. 4, Alice Currie. That was the first peremptory challenge. Ms. Currie, the Court may have noticed, was African-American. She was the only African-American on this particular jury panel."

The prosecutor responded that the defense had failed to establish a prima facie case of discrimination, and argued that even if he had removed the only African-American person from the jury, that didn't matter because he thought he had left "other racial minorities" on the jury:

That [removal of the only African-American] doesn't exclude other racial minorities who did appear on the panel, at least one woman from the back row who made [sic] be of Southern European descent, whatever race, or perhaps even Middle Eastern.

RP III, 109 (emphasis added). The prosecutor also argued that since the defendant was white, he could not complain about the purposeful removal of an African-American juror:

The other half of the *Batson* challenge, *the Defendant himself is not a racial minority*. That's half of their burden is that the Defendant be of the same race as the excluded race in the challenge. That's not been shown either.

The defendant, the record should reflect, is a white male. The defense having failed to meet their challenge, *I urge the Court not to require me to state for the record what my reasons are for excluding Ms. Currie*, and suffice it to say that the defense has failed to meet their burden of going forward.

RP III, 109-110 (emphasis added). Defense counsel replied that it was irrelevant whether Meredith was the same race as Currie, and again stated that "[t]here was no basis, other than her race . . . to exclude her," since her voir dire answers did not favor either party. RP III, 110-111.

The trial judge agreed with the State that the defendant had failed to carry his burden of proof because he had not proved that the peremptory challenge was racially motivated and because there was no showing of any pattern of removing African-American jurors:

THE COURT: At this point in time, the Court finds that the burden of proof is on the defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason. Defense has failed in that proof, one, as to whether or not the Prosecuting Attorney's Office here in Pierce County exercises challenges in a racially biased or discriminatory manner, or two, that Mr. Schacht, as he states, as prosecutor in this case has done so. There is no evidence of racial bias in challenging juror No. 4 on either basis.

The fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie pattern of exclusion. This is under *Batson* and under *State v. Ashcroft*, even though from appearance she was the only African-American juror on the panel. There being no other evidence, the Court denies the motion.

RP III, 111 (emphasis added).

Over the course of the trial, the trial judge also made several rulings prohibiting defense counsel from cross-examining prosecution witnesses on various topics, allowing the State to present hearsay testimony, and prohibiting defense counsel from making certain arguments during closing argument. *See Slip Opinion*, at 11-16, 18-19.⁵

⁵ Over defense objection the State was allowed to have one witness testify to the contents of a lab report which stated that a vaginal sample taken from the alleged rape victim contained non-motile human sperm. RP I, 40-41. Despite the fact that the testifying witness was *not* the person who had performed the lab analysis, the trial court allowed the witness to relate the findings of the lab analyst who had done the analysis.

The trial judge also refused to permit the defense to cross-examine the alleged victim about her laughing and giggling behavior which she exhibited during a court recess taken in the middle of her trial testimony, after she had testified in a manner that suggested that she was very traumatized by the ordeal of having to testify.

The trial judge prohibited Meredith from cross-examining (1) the hospital nurse about the significance of the absence of any semen on the outside of the alleged victim's body; or from asking (2) two prosecution witnesses whether one of the purposes of taking vaginal swabs was to enable the authorities to conduct DNA testing which could reveal the identity of the male who deposited the semen found in the sample.

On appeal the Court below held, or assumed, that all four of these rulings violated the Sixth Amendment, but held that all four constitutional errors were harmless beyond a reasonable doubt. *See Slip Opinion*, at 11-12 (contents of lab report); at 12-13 (behavior during court recess); at 13-14 (absence of semen on outside of the body); and at 14-15 (one purpose of taking vaginal swabs is to make DNA testing possible). The Court

2. COURT OF APPEALS' DECISION BELOW

On appeal, a majority of a divided panel affirmed Meredith's convictions. The majority held that even though the trial judge had erred by applying the wrong legal standard to Meredith's *Batson* challenge, nevertheless Meredith had failed to establish a prima facie case of race discrimination in the removal of Juror 4.

The dissenting judge opined that without even reaching the question of whether the bright-line rule of *Rhone* had been adopted and was applicable to Meredith, the trial judge's ruling was clearly erroneous because "*Batson* . . . does not require a pattern of racial discrimination." 163 Wn. App. at ¶ 54 (Johanson, dissenting).

As to my first reason, the record shows that the trial court clearly applied the wrong standard articulated in *Batson*, 476 U.S. at 95, 106 S.Ct. 1712. Under *Batson*, "a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" [Quoting *Batson*, at 95] . . .

Under these rules, the trial court's ruling here is clearly erroneous. The trial court held that "[t]he fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie *pattern of exclusion*." 3 Verbatim Report of Proceedings (VRP) at 111 (emphasis added). But as Justice Alexander noted in his dissent in *Rhone*, "it is clearly inappropriate for a trial court to consider whether the jury selection process involves *systematic exclusion* of venire members based on a discriminatory purpose. *Rhone*, 168 Wn.2d at 660 (citing *Batson*, 476 U.S. at 95). Instead, "a single invidiously discriminatory governmental act" is insufficient to warrant reversal of a conviction." *Rhone*, 168

below also assumed that it was constitutional error to limit defense counsel's closing argument by prohibiting argument about the absence of DNA tests. *Id.* at 18-19.

Wn.2d at 660 (quoting *Batson*, 476 U.S. at 95) (Alexander, J., dissenting)). Here, the trial court required Meredith to show systematic discrimination by showing a “pattern of exclusion.” 3 VRP at 111. In so doing, the court applied the incorrect standard and, thus, its ruling was clearly erroneous.

Meredith, 163 Wn. App. at ¶55-56.

The majority *agreed* with Judge Johanson that the trial judge had applied the wrong standard:

[W]e agree with the dissent that a defendant may rely on “[a] single invidiously discriminatory government act” to establish a prima facie case of purposeful discrimination. Dissent at 1 (quoting *Batson*, 476 U.S. at 95). We agree, therefore, that the trial court applied the wrong legal standard when it concluded that Meredith had to demonstrate “a pattern of exclusion” in order to establish a prima facie case of discrimination. III RP at 111.

Meredith, 163 Wn. App. at ¶ 19.

Nevertheless, the majority judges held that the trial court’s error was harmless because in its view, Meredith had failed to establish a prima facie case. Reasoning that the record did not demonstrate a discriminatory motive, the majority held that the trial judge had reached the correct result, albeit for the wrong reason:

Without “something more” than “a peremptory challenge against a member of a racially cognizable group,” a court will not ascribe discriminatory motives to the challenge. *Rhone*, 168 Wn.2d at 656. We recognize that there are a host of other factors, any one of which may determine a trial attorney’s choice to remove a venire member, including the tone and inflections in a venire member’s voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members’ responses, et cetera. In sum, ***the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold the trial court did not err*** by concluding that Meredith did not meet his burden to show a prima facie case of purposeful discrimination.

Meredith, ¶ 3 of new text provided by the *Order* (emphasis added).

The majority also rejected Meredith's contention that under the bright-line rule of *Rhone* he had automatically established a prima facie case of race discrimination because the prosecutor had removed the sole African-American juror from the jury. The majority reasoned that the future of the *Rhone* bright-line rule was "uncertain now that a new justice has joined our Supreme Court." *Id.* at ¶ ¶ 15.

In addition, the majority further reasoned that even if the bright-line rule was the law in this State, Meredith could not invoke it because he was not an African American:

A[though the challenged venire member in this case was African American, Meredith is not. Thus, under the first prong of the minority/possible future majority's bright-line rule, Meredith's claim falls short because the peremptorily challenged juror was not a "member of the *defendant's* constitutionally cognizable racial group."

Meredith, 163 Wn. App. at ¶ 16, quoting *Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting) (emphasis added by the *Meredith* majority).

Finally, the *Meredith* majority reasoned that even if juror 4 was the last *African-American* minority member of the jury, the *Rhone* bright-line rule would not apply if a person who was a member of some *other* racial minority group remained on the jury. According to the majority:

Meredith fails again" to fit his case within the *Rhone* bright-line rule, "because the record does not clarify whether juror 4 was, in fact, the last remaining minority member of the venire. [Citation] For instance, the prosecutor pointed out that at least one of the remaining venire members appeared to be a racial minority.

Meredith, 163 Wn. App. at ¶ 16.

In her dissent, Judge Johanson disagreed with the majority on both counts. First, she pointed out that long ago the Supreme Court rejected the idea that a party had to be the same race as an excluded juror in order to raise an Equal Protection Clause challenge to the removal of that juror:

It is well settled that a defendant can object to a peremptorily challenged juror even though they do not share the same race. *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Limiting a defendant's right to object "conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law." *Powers*, 499 U.S. at 406, 111 S.Ct. 1364; *accord Rhone*, 168 Wn.2d at 651 n.2, 229 P.3d 752 ("The United States Supreme Court has expanded the scope of *Batson's* basic constitutional rule" to the use of peremptories by prosecutors "where the defendant and the excluded juror are of different races.").

Meredith, 163 Wn. App. at ¶ 59 (Johanson, J., dissenting).

Second, she noted that regardless of whether the *Rhone* bright-line rule applied to this case, "the record shows that the trial judge clearly applied the wrong standard . . . [because] [u]nder *Batson* a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause." *Id.* at ¶ 55.

E. REASONS WHY REVIEW SHOULD BE GRANTED

Jury Selection Issues

- 1. THE EQUAL PROTECTION AND RACE DISCRIMINATION ISSUES POSED BY THIS CASE ARE SIGNIFICANT QUESTIONS OF LAW UNDER THE CONSTITUTION, AND THEY ARE ISSUES OF SUBSTANTIAL PUBLIC INTEREST WHICH SHOULD BE DETERMINED BY THIS COURT. RAP 13.4(b)(3) & (4).**

2. **THE ISSUE REGARDING FRUSTRATION OF THE STATE CONSTITUTIONAL RIGHT TO AN APPEAL IN CRIMINAL CASES BY REFUSING TO REQUIRE ANY EXPLANATION WHEN THE SOLE AFRICAN-AMERICAN JUROR IS REMOVED FROM THE JURY IS BOTH A SIGNIFICANT CONSTITUTIONAL QUESTION AND A QUESTION OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(b)(3) and (4).**
3. **THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.**
4. **THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).**
 - a. **The Status of The *Rhone* Bright-Line Rule Advocated By Justice Alexander Should Be Settled By This Court.**

In *Rhone* a total of five justices of this Court agreed that *prospectively* the courts of this State would apply a bright-line rule and would recognize the establishment of a prima facie case of race discrimination whenever the sole African-American juror was removed from a jury by means of a peremptory challenge. Five justices agreed that henceforth,⁶ whenever this situation presented itself, a trial judge should proceed to step two of the *Batson* procedure and require the party that exercised the challenge to give a race neutral explanation for having done so. However, the majority judges below opined that the future of this bright-line rule was “uncertain,” because after *Rhone* was decided one of the justices endorsing the bright-line rule had been replaced by a new justice. Since the bright-line rule was favored (prospectively) by a bare majority of five

⁶ Justice Madsen joined the four justice plurality that declined to apply the bright-line rule to defendant *Rhone*, but also opined that in all future cases she would apply the bright line rule advocated by Justice Alexander in his opinion for the remaining four justices.

justices, the majority judges below suggested that the *Rhone* rule might not be adhered to.

Petitioner submits that there is no support for the notion that a change in the composition of this Court allows the Court of Appeals to disregard 5-4 decisions of this Court. This Court should grant review to reaffirm the existence of the bright-line rule of *Rhone*.

b. The Scope of the *Rhone* Bright-Line Rule Should be Settled by this Court.

The majority below held that the *Rhone* bright-line rule applies only if the defendant and the excluded juror are of the same race. The dissenting judge and the Petitioner respectfully disagree. This Court should grant review to decide this important question of constitutional law.

c. The Majority's Holding That the *Rhone* Bright-Line Rule Only Applies When the Defendant and the Excluded Juror are of the Same Race Conflicts with Decisions of Both the U.S. Supreme Court and This Court.

The “same race” restriction placed on the *Rhone* bright-line rule by the majority judges below conflicts with *Powers v. Ohio, supra*, a U.S. Supreme Court which holds directly to the contrary. *Powers*, 499 U.S. at 406. It also directly conflicts with the observation made by this Court in *Rhone* that there is no “same race” restriction on standing to make a *Batson* challenge. *Rhone*, 168 Wn.2d at 651 n.2.

d. Whether a Same Race Limitation on the *Rhone* Bright-Line Rule Would Itself Be a Violation of the Equal Protection Clause is a Question Which Should Be Decided By This Court.

Under the “same race” limitation adopted by the majority in the Court

below, if Meredith were African-American he could establish a prima facie case of race discrimination under *Rhone*, but because he is white, he cannot. Thus, the color of Meredith's skin determines that he cannot raise an issue which a black defendant can raise. The U.S. Supreme Court has held that *all* racial classifications are constitutionally suspect and trigger strict scrutiny. *Johnson v. California*, 543 U.S. 499, 506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). Nor can it be argued that the "same race" limitation is "equal" because it equally precludes blacks from complaining about the exclusion of white jurors and whites from complaining about the exclusion of black jurors. See *Loving v. Virginia*, 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Petitioner submits that this Court should grant review to decide whether the majority's "same race" limitation of the *Rhone* bright-line rule itself violates the Equal Protection Clause.

e. **The Majority's Holding That It Is Constitutionally Permissible to Purposefully Remove One Minority Juror from The Jury Because of His or Her Race, So Long as Some Other Juror of Some Other Minority Race Remains on the Jury, Conflicts With the U.S. Supreme Court's Decision in *Batson*.**

The majority opinion below places another limitation on the scope of the *Rhone* bright-line rule which conflicts with the seminal decision in *Batson* itself. The majority holds that it is constitutionally permissible to use a peremptory challenge to remove the last African American juror from a jury, and to do so *because* the juror is African-American, so long as at least one other juror remains on the jury who is a member of some other cognizable minority group. *Meredith*, 163 Wn. App. at ¶ 16. Thus,

according to the majority, the presence of an Asian-American on the jury would immunize a prosecutor from a *Batson* challenge to his deliberate removal of the sole African-American juror. So long as there is more than one kind of minority person on the jury, this ruling gives the prosecutor one “free bite” at the race discrimination apple. According to the majority, deliberate removal of an African-American juror like Ms. Currie, simply because she is black, is constitutionally *permissible* so long as there remains on the jury someone *else* who is of the “Southern European” race. This is directly contrary to the express holding of *Batson* that “a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.” *Batson*, 476 U.S. at 95 (internal quotation marks omitted).

f. **Assuming, Arguendo, The Validity of The Majority’s Ruling That the Existence of At Least One Other Person Who is A Member of Some Other Cognizable Minority Race Prevents Application of the Rhone Bright-Line Rule, This Court Should Grant Review to Decide if “Southern Europeans” Are A Cognizable Racial Group.**

The majority’s holding that the *Rhone* bright line rule does not apply when there remains a minority member of some cognizable racial group *other* than the minority group to which the excluded juror belongs, raises a host of new questions about which groups of people are cognizable racial groups. The majority seems to treat “southern Europeans” as a cognizable group. This Court should decide whether that proposition is sound, and if it is, how one would go about deciding if other groups, such as “east

Africans,” or “eastern Europeans,” are also cognizable minority groups.

g. **This Court Should Grant Review to Decide The Important Constitutional Question of Whether The State Constitutional Right to an Appeal in A Criminal Case Requires Prosecutors to Articulate a Race Neutral Reason on the Record Whenever a *Batson* Challenge is Made.**

There is no federal constitutional right to an appeal in a criminal case. *Halbert v. Michigan*, 545 U.S. 605, 610, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005). The Washington Constitution, however, explicitly guarantees such a right, and that right “is to be accorded the highest respect.” *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978). In order to review a claim of purposeful race discrimination in the removal of a minority person from a jury, it is important for an appellate court to know what the alleged race neutral reason was for removing the juror, in order to decide whether the proffered reason is actually just a pretext. In his opinion in *Rhone*, Justice Alexander noted that “one of the strongest reasons” for adopting the bright-line rule that removal of the sole remaining member of a minority group establishes a prima facie case of race discrimination is that it has the benefit of “ensuring an adequate appellate record . . .” 168 Wn.2d at 661. (Opinion of Justice Alexander).

Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a *Batson* challenge.

Rhone, 168 Wn.2d at 662.

In the court below Petitioner argued that the *Rhone* bright-line rule is

not merely desirable for this reason, but is also constitutionally required by the *state* constitution because a complete record is not merely helpful, it is essential if the art. I, ¶ 22 right to an appeal in a criminal case is to have meaning. “A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective review of his or her claims.” *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003).

In the court below, the majority initially ignored this state constitutional claim altogether. Then, in a footnote in its amended opinion, the majority stated that Meredith “had no legal right” to an appellate record that contained a prosecutorial explanation for the State’s exercise of a peremptory challenge against the minority juror. *Meredith, Order*, new footnote 9. In support of this holding, the majority simply cited to that portion of *Rhone* which held that a defendant has no right to prosecutorial articulation of a race neutral reason unless and until he establishes a prima facie case of race discrimination. *Id.* But this begs the question. It is no answer to a claim that the absence of a prosecutorial explanation violates art. I, § 22 to say that the absence of such an explanation does not violate equal protection. In *Rhone* no one raised an art. I, § 22 claim of denial of the right to effective appellate review. The fact that the *Rhone* 4-justice plurality opinion rejected an *equal protection claim* says nothing at all about how this Court would rule on a claim predicated on that *independent state constitutional right*. Review should be granted to decide this important state constitutional question.

h. When a Trial Judge Violates *Batson* and *Hicks* And Fails to Understand That She Has the Power to Find That a Prima Facie Case of Race Discrimination Has Been Established, How Can An Appellate Court Proclaim Such an Error Harmless By Purporting to Know That If The Trial Judge *Had* Understood That She *Did* Have That Power She Would Not Have Found A Prima Facie Case.

The majority opinion *concedes* that the trial judge applied the wrong legal standard to the first step of the *Batson* analysis. 163 Wn. App. at ¶ 19. Both the majority and the dissent agree that by ruling that a “pattern of exclusion” was required to establish a prima facie case, the trial judge ignored the holding of *State v. Hicks, supra*, which expressly held that such a pattern is *not* required, and that a single discriminatory peremptory challenge may provide the basis for a prima facie case of race discrimination. But the majority opinion holds that the error is harmless because “the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives.” *Paragraph 3* of new text provided by the *Order*. But if “the record” had to contain evidence that excluded the existence of every potential non-discriminatory reason then the exercise of a single peremptory challenge against a minority juror would *never* establish a prima facie case. The majority opinion expressly recognizes that there is a host of “non-verbal cues” such as “eye contact” and “body gestures,” which can give rise to an inference of race discrimination. *Id.*

Thus, when the prosecutor stated that he had apparently left a minority member of the “southern European” race on the jury panel, the

prosecutor's speaking tone, his lack of eye contact with the judge, or other bodily gestures, might provide an additional basis for inferring that the real motive for exercising the peremptory challenge was race discrimination. If the trial judge had realized that she *did* have the power to find a prima facie case based on the removal of a minority juror coupled with such non-verbal cues, she might have ruled that a prima facie had been established. But the majority asserts that since these non verbal cues never appear in the record, it is clear that a prima facie case was not established. This reasoning effectively negates the rule of *Hicks* by making it impossible to establish a prima facie case based on one peremptory challenge, even though *Hicks* holds that that *is* permissible.

Other Constitutional Errors and The Proper Harmless Error Test

5. **WHETHER THE OVERWHELMING UNTAINTED EVIDENCE TEST FOR HARMLESS ERROR CONFLICTS WITH THE CONTRIBUTION TEST MANDATED BY THE U.S. SUPREME COURT IS A CONSTITUTIONAL QUESTION AND AN ISSUE OF PUBLIC IMPORTANCE THAT SHOULD BE DECIDED BY THIS COURT. RAP 13.4(b)(3) AND (b)(4).**
6. **WHETHER THE "CONTRIBUTION" TEST, RATHER THAN THE "OVERWHELMING UNTAINTED EVIDENCE" TEST, IS THE PROPER HARMLESS ERROR RULE APPLICABLE TO FEDERAL CONSTITUTIONAL ERRORS, IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH THIS COURT SHOULD DECIDE. RAP 13.4(b)(3) AND (b)(4).**
 - a. **The "Overwhelming Untainted Evidence" Test Conflicts With the Supreme Court's Decision in *van Arsdall*.**

The Court below held, or assumed, that five constitutional errors were

committed by the trial judge; four of these were violations of the Sixth Amendment right of cross-examination and the fifth was a violation of the due process clause by prohibiting defense counsel from making an argument in closing about reasonable doubt arising from the lack of certain evidence. With respect to each error (and without analyzing their *cumulative* effect), the Court below applied the following harmless error test: “we look only at the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt.” *Slip Opinion*, at 11, citing *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005). See also *Slip Opinion* at 13, 14, 16 & 18-19.

But the U.S. Supreme Court has explicitly held that when assessing whether denial of the Sixth Amendment right of cross-examination was harmless an appellate court must consider whether the prosecution can show “beyond a reasonable doubt that the error complained of *did not contribute* to the verdict obtained.” *Delaware v. van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (emphasis added).

As Judge Sweeney of Division Three has noted, the contribution test is generally viewed as a stricter test than the overwhelming untainted evidence test. D. Sweeney, “An Analysis of Harmless Error in Washington: A Principled Process,” 31 *Gonz. L. Rev.* 277, 287 (1995). Judge Sweeney notes that the contribution test was rejected by this Court

in *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). *Sweeney, supra*, at 287. But *Guloy* was decided in 1985, one year *before* the Supreme Court's decision in *van Arsdall*.

b. Since There is Never any "Tainted" Evidence When Proper Cross-Examination is Prohibited, The Overwhelming Untainted Evidence Test Permits The Routine Violation of the Sixth Amendment Right of Confrontation.

In cases such as *Davis* and *Guloy*, hearsay evidence was improperly *admitted*, and thus the defendants were denied any opportunity to cross-examine the declarants who made the hearsay statements. In this situation, there is "tainted" evidence, and logically it is possible to ask the question of whether the untainted evidence overwhelmingly established the defendant's guilt so that a reviewing court can say that it is clear beyond a reasonable doubt that the defendant would have been convicted anyway, even if the tainted evidence has not been admitted.

But this kind of analysis is simply inapplicable to Confrontation Clause errors where evidence is improperly *excluded*. When evidence is excluded in violation of the Constitution, the proper inquiry is what would have happened if the evidence has *not* been excluded. As the Court held in *van Arsdall*, the inquiry is "whether, assuming the damaging potential of the cross-examination were fully realized," an appellate court would nevertheless conclude that the error was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684. In the present case, the Court below failed to consider this question, and never asked what would have

happened had Petitioner been allowed to question the three witnesses on the topics which the trial judge precluded him from asking.

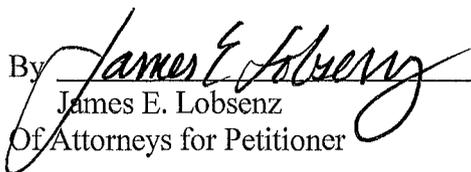
Since the formulation of the proper harmless error rule for constitutional error is itself a question of federal constitutional law, *Chapman*, 386 U.S. at 21, all Washington courts are required to follow and apply the rule adopted by the U.S. Supreme Court. Accordingly, Petitioner respectfully submits that Washington appellate courts in general, and the Court below in this case, did not apply the constitutionally mandated contribution test for harmless error. Petitioner submits that this Court should grant review to resolve the important constitutional question of whether Washington state courts must apply the contribution test when deciding whether federal constitutional error was harmless.

F. CONCLUSION

For these reasons, petitioner asks this Court to grant review of the decision below.

DATED this 7th day of December, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By  _____
James E. Lobsenz
Of Attorneys for Petitioner

APPENDIX A

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Gary D. MEREDITH, Appellant.

No. 38600–3–II.
Aug. 9, 2011.

Background: Defendant was convicted by jury in the Superior Court, Pierce County, Vicki Hogan, J., of second degree child rape and communicating with a minor for immoral purposes. Defendant appealed.

Holdings: The Court of Appeals, Penoyar, C.J., held that:

- (1) defendant's mere assertion that prosecutor's exercise of peremptory challenge against sole African American venire member evidenced purposeful discrimination, without something more, did not establish purposeful discrimination, for *Batson* purposes, and
- (2) trial court error in applying wrong legal standard in analyzing defendant's *Batson* challenge did not require reversal of convictions.

Affirmed.

Johanson, J., dissented, with opinion.

West Headnotes

[1] **Jury 230** ⚡33(5.15)

230 Jury

- 230II Right to Trial by Jury
 - 230k30 Denial or Infringement of Right
 - 230k33 Constitution and Selection of Jury
 - 230k33(5) Challenges and Objections
 - 230k33(5.15) k. Peremptory challenges. Most Cited Cases
 - Defendant's mere assertion that prosecutor's ex-

ercise of peremptory challenge against sole African American venire member evidenced purposeful discrimination, without something more, did not establish purposeful discrimination, for *Batson* purposes; juror was not a member of the defendant's constitutionally cognizable racial group, in that defendant was Caucasian, record did not specify whether juror was, in fact, the last remaining minority member of the venire, and record did not reflect any discriminatory motive on part of the state in removing juror, nor did record exclude the existence of many potential non-discriminatory motives for state's removal of juror.

[2] **Jury 230** ⚡33(5.15)

230 Jury

- 230II Right to Trial by Jury
 - 230k30 Denial or Infringement of Right
 - 230k33 Constitution and Selection of Jury
 - 230k33(5) Challenges and Objections
 - 230k33(5.15) k. Peremptory challenges. Most Cited Cases

Defendant asserting a *Batson* claim must first establish a prima facie case of purposeful discrimination by providing evidence of any relevant circumstances that raise an inference that a peremptory challenge was used to exclude a venire member from the jury on account of his race; if defendant establishes this prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for challenging the venire member, after which the trial court must determine whether defendant has established purposeful discrimination.

[3] **Criminal Law 110** ⚡1152.2(2)

110 Criminal Law

- 110XXIV Review
 - 110XXIV(N) Discretion of Lower Court
 - 110k1152 Conduct of Trial in General
 - 110k1152.2 Jury
 - 110k1152.2(2) k. Selection and im-

paneling. Most Cited Cases

In reviewing a trial court's ruling on a *Batson* challenge, the determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous.

[4] Jury 230 ⚡33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory chal-

lenges. Most Cited Cases

Some factors to consider in determining whether there was discrimination, for *Batson* purposes, when the state exercised a peremptory challenge against a member of a racially cognizable group include: (1) striking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against a group, (3) the level of a group's representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

[5] Criminal Law 110 ⚡1158.17

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.17 k. Jury selection. Most Cited

Cases

Trial court's error, in denying defendant's *Batson* challenge to state's removal of the sole African American juror from the venire, of requiring defendant to demonstrate a pattern of exclusion in order to establish a prima facie case of purposeful

discrimination, when defendant could rely on a single invidiously discriminatory governmental act to establish his prima facie case, did not warrant reversal of defendant's convictions for second degree child rape and communicating with a minor for immoral purposes, where defendant failed to establish a prima facie case of purposeful discrimination.

[6] Jury 230 ⚡33(5.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(5) Challenges and Objections

230k33(5.15) k. Peremptory chal-

lenges. Most Cited Cases

Defendant asserting a *Batson* challenge may rely on a single invidiously discriminatory governmental act to establish a prima facie case of purposeful discrimination.

*325 James Elliot Lobsenz, Carney Badley Spellman, Seattle, WA, for Appellant.

Kathleen Proctor, Pierce County Prosecuting Atty. Ofc., Tacoma, WA, for Respondent.

OPINION PUBLISHED IN PART

PENOYAR, C.J.

¶ 1 Gary D. Meredith appeals his convictions for second degree child rape and communicating with a minor for immoral purposes. His primary contention is that the prosecutor's peremptory challenge of the sole African American venire member constituted a prima facie case of purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the published part of this opinion, we review the facts relevant to his *Batson* claim and hold that a defendant does not establish a prima facie case of purposeful discrimination under *Batson* by showing only that the prosecutor peremptorily challenged the sole venire member of a cognizable racial group that is different from the defendant's racial group.

We also conclude that Meredith failed to establish a prima facie case of purposeful discrimination here.

¶ 2 Meredith also argues that (1) the trial court violated his rights to confrontation and cross-examination, (2) insufficient evidence supports his communication with a minor for immoral purposes conviction, and (3) the trial *326 court improperly prohibited him from arguing about the absence of DNA^{FN1} evidence during closing argument. In the unpublished portion of this opinion, we discuss the facts relevant to these claims, each of which we reject. Accordingly, we affirm on both counts.

FN1. Deoxyribonucleic acid.

PUBLISHED FACTS

¶ 3 In 1996, Meredith was preparing to stand trial on one count of second degree child rape^{FN2} and one count of communication with a minor for immoral purposes.^{FN3} During voir dire, the prosecutor peremptorily challenged juror 4, the sole African American on the venire. Meredith, who is Caucasian, objected, arguing that the State did not give a basis for challenging juror 4 and, thus, the “only belief can be that she was removed because of her minority status.” III Report of Proceedings (RP) at 107.

FN2. RCW 9A.44.076.

FN3. Former RCW 9.68A.090 (1989).

¶ 4 The prosecutor responded that Meredith had failed to meet his burden under *Batson* to show purposeful discrimination because he failed to present any evidence for this claim other than that juror 4 was African American. Additionally, the prosecutor maintained that he did not strike other racial minorities on the venire, including one woman who appeared to be of “Southern European descent ... or perhaps even Middle Eastern.” III RP at 109. He observed that the juror questionnaires did not include information on the venire members' race, “so it's difficult to know who is and is not a racial minority.” III RP at 109. The prosecutor fur-

ther argued that, as the “other half of the *Batson* challenge” requires, Meredith failed to meet his burden of proof that he was of the same race as the excluded venire member. III RP at 109.

¶ 5 The trial court agreed with the prosecutor that removing the sole African American venire member was insufficient to establish a prima facie case of purposeful discrimination under *Batson*:

At this point in time, the Court finds that the burden of proof is on the Defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason. Defense has failed in that proof, one, as to whether or not the Prosecuting Attorney's Office here in Pierce County exercises challenges in a racially biased or discriminatory manner, or two, that ... [the] prosecutor in this case has done so. There is no evidence of racial bias in challenging Juror No. 4 on either of those two bas[es].

The fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case pattern of exclusion. This is under *Batson* and under *State v. Ashcroft* [*Ashcraft*],^{FN4} even though from appearances she was the only black or African American juror on the panel. There being no other evidence, the Court denies the motion.

FN4. The trial court may have been referring to *State v. Ashcraft*, 71 Wash.App. 444, 859 P.2d 60 (1993).

III RP at 111. Accordingly, the trial court did not require the prosecutor to provide a race-neutral reason for challenging juror 4.

¶ 6 The jury convicted Meredith on both counts. He appeals.

PUBLISHED ANALYSIS

Batson Challenge

[1] ¶ 7 We must decide whether Meredith established a prima facie case of purposeful discrim-

163 Wash.App. 75, 259 P.3d 324

(Cite as: 163 Wash.App. 75, 259 P.3d 324)

ination under *Batson* by showing that the prosecutor removed the only African American venire member. We hold that he did not.

[2] ¶ 8 In *Batson*, the United States Supreme Court recognized that the Fourteenth Amendment's equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85–86, 106 S.Ct. 1712 (citing *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497 (1906)). *Batson* articulated a three-part analysis to determine whether discriminatory *327 criteria were used to peremptorily challenge a venire member. 476 U.S. at 96–98, 106 S.Ct. 1712. First, the defendant must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712. To establish a prima facie case, the defendant must provide evidence of any relevant circumstances that raise an inference that a peremptory challenge was used to exclude a venire member from the jury on account of his or her race. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712. Second, if the defendant establishes this prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for challenging the venire member. *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. Finally, the trial court must determine whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712.

[3] ¶ 9 "In reviewing a trial court's ruling on a *Batson* challenge, [t]he determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous." *State v. Hicks*, 163 Wash.2d 477, 486, 181 P.3d 831 (2008) (internal quotation marks omitted) (quoting *State v. Luvene*, 127 Wash.2d 690, 699, 903 P.2d 960 (1995)).

¶ 10 Meredith argues that our Supreme Court's recent decision in *State v. Rhone*, 168 Wash.2d 645, 229 P.3d 752 (2010), *cert. denied*, — U.S. —, 131 S.Ct. 522, 178 L.Ed.2d 385 (2010), created a bright-line rule in Washington that a defendant establishes a prima facie case of purposeful discrim-

ination when the record shows that the prosecutor exercised a peremptory challenge against the sole remaining venire member of a constitutionally cognizable racial group. Because the prosecutor challenged the only African American venire member in the present case, Meredith concludes that he established a prima facie case of purposeful discrimination. He asserts that the trial court erred in determining otherwise, and he asks us to reverse his convictions and remand for a new trial.

¶ 11 In *Rhone*, there were two African Americans in the venire. 168 Wash.2d at 648, 229 P.3d 752. One was challenged for cause per the parties' agreement, and the other was removed by one of the prosecutor's peremptory challenges without an objection by the defense. *Rhone*, 168 Wash.2d at 648, 229 P.3d 752. After the jury was sworn in, the defendant, an African American, raised a *Batson* challenge. *Rhone*, 168 Wash.2d at 648–49, 229 P.3d 752. The trial court ruled that the defendant had failed to establish a prima facie case of purposeful discrimination. *Rhone*, 168 Wash.2d at 650, 229 P.3d 752.

¶ 12 In *Rhone*'s lead opinion, four justices^{FN5} rejected a bright-line rule that a prima facie case of discrimination is always established whenever the prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group. 168 Wash.2d at 652–53, 229 P.3d 752. They noted that *Batson* involved a three-part analysis, in which the first part directs a trial court "to determine whether 'something more' exists than a peremptory challenge of a member of a racially cognizable group." *Rhone*, 168 Wash.2d at 653, 229 P.3d 752. Consequently, they explained:

FN5. Justices Charles Johnson (writing), Susan Owens, James Johnson, and Debra Stephens.

Adopting a bright-line rule would negate this first part of the analysis and require a prosecutor to provide an explanation every time a member of a racially cognizable group is peremptorily chal-

lenged. Such a rule is beyond the intended scope of *Batson*, transforming a shield against discrimination into a sword cutting against the purpose of a peremptory challenge.

Rhone, 168 Wash.2d at 653–54, 229 P.3d 752.

¶ 13 Chief Justice Madsen wrote a separate concurrence, stating, “I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent.” *Rhone*, 168 Wash.2d at 658, 229 P.3d 752 (Madsen, C.J., concurring).

¶ 14 The dissent, which Justice Alexander^{FN6} authored, advocated “a bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged.” *328*Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). The dissenters recognized that, under an earlier precedent,^{FN7} a trial court has discretion to find a prima facie case of purposeful discrimination where the only venire member from a constitutionally cognizable group is peremptorily challenged; however, the dissenters were persuaded to depart from this precedent because “the benefits of [a bright-line rule] far outweigh the State's minimal burden to provide a race-neutral explanation for its challenge during venire.” *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). Some of these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venires, and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial. *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting).

FN6. Justices Richard Sanders, Tom Chambers, and Mary Fairhurst joined.

FN7. *State v. Thomas*, 166 Wash.2d 380, 397, 208 P.3d 1107 (2009).

¶ 15 *Rhone's* future is uncertain now that a new justice has joined our Supreme Court. Other *Batson* cases in the future will present different facts, different challenges, and different results. In any case, we need not consider the reach of the bright-line rule advocated by *Rhone's* minority/possible future majority because the record here is inadequately developed to tell us with any certainty whether this case even falls within that rule.

¶ 16 First, although the challenged venire member in this case was African American, Meredith is not. Thus, under the first prong of the minority/possible future majority's bright-line rule, Meredith's claim falls short because the peremptorily challenged juror was not a “member of the *defendant's* constitutionally cognizable racial group.” See *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting) (emphasis added). And under the minority/possible future majority's second prong, Meredith fails again because the record does not clarify whether juror 4 was, in fact, the last remaining minority member of the venire. See *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). For instance, the prosecutor pointed out that at least one of the remaining venire members appeared to be a racial minority.

[4] ¶ 17 Turning to *Rhone's* majority/possible future minority opinion, we conclude that it also does not support Meredith's claim that he established a prima facie case of purposeful discrimination. Under that opinion's analysis, to determine whether a defendant has established a prima facie claim of purposeful discrimination, the trial court must look to see whether the record reflects “something more” than “a peremptory challenge against a member of a racially cognizable group.” *Rhone*, 168 Wash.2d at 656, 229 P.3d 752. Some factors to consider in determining whether there was purposeful discrimination include:

- (1) [S]triking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportional

tionate use of strikes against a group, (3) the level of a group's representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

Rhone, 168 Wash.2d at 656, 229 P.3d 752.

¶ 18 Although this is not an exhaustive list of factors that a court may consider in deciding whether “something more” exists, Meredith did not argue to the trial court that any of these factors were present. Instead, he argued that nothing in juror 4's answers indicated “that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror.” III RP at 107. We hold that this alone is not “something more” under *Rhone*. And without this “something more” a court will not ascribe discriminatory motives to the challenge. We recognize that there are a host of other factors, any one of *329 which may determine a trial attorney's choice to remove a venire member, including the tone and inflections in a venire member's voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members' responses, et cetera. In sum, the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold that the trial court did not err by concluding that Meredith did not meet his burden to show a prima facie case of purposeful discrimination.

[5][6] ¶ 19 Finally, we agree with the dissent that a defendant may rely on “[a] single invidiously discriminatory governmental act” to establish a prima facie case of purposeful discrimination. Dissent at 1 (quoting *Batson*, 476 U.S. at 95, 106 S.Ct. 1712). We agree, therefore, that the trial court ap-

plied the wrong legal standard when it concluded that Meredith had to demonstrate “a pattern of exclusion” in order to establish a prima facie case of purposeful discrimination. III RP at 111. But this error does not warrant reversal of Meredith's convictions because, as we explain in the preceding paragraphs, Meredith failed to establish a prima facie case of purposeful discrimination under both the *Rhone* majority's “something more” standard and the *Rhone* minority's bright-line rule. Accordingly, although the trial court applied an incorrect legal standard, its determination with regard to Meredith's *Batson* challenge was not clearly erroneous.

¶ 20 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

UNPUBLISHED FACTS

¶ 21 At trial, the State presented testimony from four teenage girls regarding their contact with Meredith. The State alleged that BL was the rape victim and that AB was the victim of communication with a minor for immoral purposes.

¶ 22 About two weeks before BL (age 12)^{FN8} was raped, AB (age 13) met Meredith. During those two weeks, Meredith talked daily with AB by phone. Meredith told AB that he was 17 years old, when in reality he was 24 years old. At one point, Meredith told AB that he liked her, but AB reported that she did not think much of his feelings because, as she had told him, she already had a boyfriend.

FN8. We state the ages of the girls at the time of the incident in October 1994.

¶ 23 On the night of October 28, 1994, AB, BL, and ST (age 13) stayed the night at MJ's (age 13) house. AB spoke to Meredith. Meredith said that he wanted to meet AB's friends.

¶ 24 The next day, the four girls met Meredith and his friend, Jason Gross, and the group went to

the mall. Afterward, Gross and Meredith dropped the girls off near MJ's house. AB arranged to meet Meredith again that same evening. AB and the three other girls met Meredith and Gross near BL's house that evening, and Gross drove everyone to Meredith's apartment, stopping on the way to buy some alcohol.

¶ 25 Once inside Meredith's apartment, all four girls consumed varying amounts of alcohol. MJ and BL reported that they felt intoxicated. BL started feeling sick, so she went into a bedroom to lie down. Meredith followed her into the bedroom and closed the door.

¶ 26 MJ testified that at some point after BL and Meredith went into the bedroom, ST opened the bedroom door and MJ saw Meredith lying on top of BL. According to MJ, both were naked and "it looked like [Meredith] was on top of [BL] and they were both moving." III RP at 152. AB also testified that, on a separate occasion, she opened the door and saw Meredith on top of BL, who was naked. They had a sheet on top of them and Meredith was moving around "[a] little bit." V RP at 388.

¶ 27 BL testified that she did not remember Meredith entering the room with her, but she did remember waking up with him lying next to her in the bed. BL testified that Meredith took her clothes off and asked her if she wanted to have sex. She pushed him away and said that she needed to sleep. Meredith then took his clothes off and got on top of BL. BL was "halfway passed out" and again tried pushing him away, but Meredith began having vaginal intercourse with her. IV RP at 279.

¶ 28 When BL saw her mother later that evening, her mother sensed that something was wrong, and she asked BL if someone had nonconsensual sex with her. BL said yes. BL's mother then drove BL to MJ's house; MJ's mother called the police to report the incident.

¶ 29 BL's mother took BL to the hospital where

staff conducted a sexual assault examination. Michelle Russell, a registered nurse, inspected BL's skin with a blue light to look for secretions but did not find anything. Dr. Bobbi Sipes inspected BL's vagina, noting a "pooling of secretions" consistent with semen in the back portion of her vagina. VI RP at 498. She also saw redness on BL's thigh and a superficial laceration in the area between BL's vagina and anus. Dr. Sipes testified that the redness and laceration were inflicted within 24 hours of BL's exam. The pooled secretions, redness, and laceration were consistent with "non-specific findings for intercourse." VI RP at 500. BL told Dr. Sipes that, before having sexual intercourse with Meredith, the last time she had sexual intercourse was in July.

¶ 30 Dr. Sipes also took swabs from BL's vagina and sent them to the hospital lab. Dr. Sipes testified that the hospital lab report stated that the secretion in BL's vagina contained semen with non-motile sperm. Dr. Sipes testified that the presence of semen supported the conclusion that BL had intercourse within three days of her examination.

UNPUBLISHED ANALYSIS

I. Right to Confrontation

¶ 31 Meredith argues that the trial court violated his right to confrontation when it allowed Dr. Sipes to testify about the contents of a lab report that she did not author. Before trial, Meredith moved in limine to preclude this testimony. He argues, as he did below, that Dr. Sipes's testimony that the report found semen with nonmotile sperm violated his right to confrontation because she did not conduct the lab analysis that identified the semen.

¶ 32 Under the Sixth Amendment's confrontation clause, an accused has a right to confront witnesses against him. U.S. Const. amend. VI; *see also Crawford v. Washington*, 541 U.S. 36, 42, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admis-

sion of the witness's "testimonial" statements when that witness does not take the stand at trial. *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354.

¶ 33 A confrontation clause error may be harmless. *State v. Mason*, 160 Wash.2d 910, 927, 162 P.3d 396 (2007). To determine whether such an error is harmless, we apply the "overwhelming untainted evidence" test. *Mason*, 160 Wash.2d at 927, 162 P.3d 396 (quoting *State v. Davis*, 154 Wash.2d 291, 305, 111 P.3d 844 (2005)). Under this test, we look only at the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. *Davis*, 154 Wash.2d at 305, 111 P.3d 844.

¶ 34 Assuming, without deciding, that the lab report was "testimonial," we conclude that the error was harmless. Excluding the lab report's statement that BL's vagina contained semen with nonmotile sperm, the untainted evidence against Meredith included Dr. Sipes's conclusion that BL had recently had intercourse (including her personal observation of secretions that appeared to be semen in BL's vagina) and testimony from BL and other eyewitnesses that Meredith had sexual intercourse with BL.

¶ 35 Specifically, Dr. Sipes testified that her observations from BL's sexual assault exam were consistent with "non-specific findings for intercourse." VI RP at 500. These observations included redness on BL's thigh and a superficial laceration in the area between BL's vagina and anus, both of which, according to Dr. Sipes, were inflicted within 24 hours of BL's exam. Further, Dr. Sipes testified that she found a pooling of secretions consistent with semen inside the back portion of BL's vagina. According to Dr. Sipes, the presence of what appeared to be semen supported the conclusion that BL had intercourse within three days of her examination.

¶ 36 Three of the four girls who went to Meredith's apartment testified that BL and Meredith were alone in his bedroom for a period of time. AB

and MJ both testified that they saw Meredith on top of BL, who was naked, engaging in what looked like sexual intercourse. BL also testified that Meredith climbed on top of her and had sexual intercourse with her.

¶ 37 Accordingly, the record contains overwhelming untainted evidence supporting the jury's verdict of guilt beyond a reasonable doubt with respect to the second degree child rape charge. Even without the lab report findings that BL's vagina contained semen with nonmotile sperm, the evidence that Meredith had sexual intercourse with BL is so overwhelming that it necessarily leads to a finding of guilt.

II. Trial Court's Limitation of Scope of Cross-Examination

A. B.L.'s Behavior During a Court Recess

¶ 38 Meredith next argues that the trial court violated his Sixth Amendment right to cross-examination when it prohibited him from asking BL about her laughing and giggling during a court recess.^{FN9} He maintains that the purpose of such testimony would have been to cast doubt on the veracity of BL—who appeared teary and distraught while testifying—and to suggest that her courtroom testimony was fabricated.

FN9. After a short recess during BL's testimony, the prosecutor told the trial court that, as BL exited the courtroom, she "ran a virtual gauntlet of the defendant's friends and other supporters which there is a certain amount of name calling, laughing, that sort of activities in the hallway." IV RP at 287. Meredith responded that he had not seen what the prosecutor was describing but had "heard reports exactly opposite ... [that BL] and members of her family and other friends ... are doing these shenanigans." IV RP at 287. When Meredith began his cross-examination of BL, the following exchange took place:

[Meredith]: [BL], at the break the Court just took, were you laughing and giggling outside the courtroom?

[BL]: Yes.

[Prosecutor]: Objection. Relevance.

THE COURT: Sustained. The jury is instructed to disregard the answer.

IV RP at 299.

¶ 39 We agree with Meredith that cross-examining BL about her recess behavior would have had some tendency to make her testimony less credible. *See* ER 401. The State argues that BL's recess behavior "[was] not necessarily indicative of lying while under oath" but that misapprehends the relevancy standard. Br. of Resp't at 24. We hold that the trial court erred by limiting Meredith's cross-examination into BL's behavior. Nonetheless, as the analysis in the previous section demonstrates, this error was harmless beyond a reasonable doubt.

B. Blue Light Tests

¶ 40 Meredith next argues that the trial court violated his right to cross-examination when it prohibited him from asking Russell, the registered nurse who conducted the blue light tests, whether secretions are usually present on the outside of the victim's body in sexual assault cases.^{FN10} Assuming, without deciding, that the trial court erred by disallowing this testimony, we hold that such error was harmless. As discussed above, there was overwhelming evidence of rape, including strong evidence of bodily secretions and eyewitness reports of the sexual encounter.

FN10. The following exchange took place when Meredith cross-examined Russell:

[Meredith]: [Ms.] Russell, with respect to the blue light exam is that for purposes of detecting if there is secretions on the external body?

[Russell]: Uh-huh (affirmative)

[Meredith]: You stated there was no finding of that?

[Russell]: Uh-huh (affirmative)

[Meredith]: Is it not true often times in a sexual assault exam there will be secretions on the outside of the body?

[Prosecutor]: Objection. Relevance, not confined to the facts of this case.

THE COURT: Sustained.

V RP at 433.

C. Purpose Behind Collecting Vaginal Swabs

¶ 41 Relying on *State v. Gefeller*, 76 Wash.2d 449, 458 P.2d 17 (1969), Meredith next argues that the trial court erred by prohibiting him from asking Russell and Dr. Sipes whether the purpose of the vaginal swabs was to conduct a DNA analysis.^{FN11}

FN11. The following exchange took place when Meredith cross-examined Russell:

[Meredith]: Are the swabs taken for purposes of making DNA analysis?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Meredith]: Are you aware as to whether or not [the swabs collected] were taken for purposes of DNA analysis?
[Prosecutor]: [O]bjection. THE COURT: Sustained.

V RP at 437–38. The trial court also granted the State's motion to strike Dr. Sipes's testimony that she took the swabs for DNA purposes.

¶ 42 In *Gefeller*, the defendant asked a police

officer on cross-examination whether the defendant had taken a lie detector test and whether the defendant had been cooperative during the test. 76 Wash.2d at 454, 458 P.2d 17. After the officer responded “yes” to both questions, the defendant asked about the test results. *Gefeller*, 76 Wash.2d at 454, 458 P.2d 17. The officer responded that the results were inconclusive. *Gefeller*, 76 Wash.2d at 454, 458 P.2d 17. On redirect, the State asked the officer what he meant by inconclusive results, and, on re-cross, the defendant asked about the officer's experience and education with lie detector tests. *Gefeller*, 76 Wash.2d at 454–55, 458 P.2d 17. On appeal, the defendant argued that the trial court improperly admitted evidence that he had taken a lie detector test and that the results had been inconclusive. *Gefeller*, 76 Wash.2d at 454, 458 P.2d 17. Our Supreme Court rejected this argument, noting that the defendant had opened the door to this testimony by “first asking whether [a lie detector test] had been given and whether the defendant had been cooperative concerning it.” *Gefeller*, 76 Wash.2d at 455, 458 P.2d 17. As the *Gefeller* court explained, “[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” *Gefeller*, 76 Wash.2d at 455, 458 P.2d 17. The court further explained, “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” *Gefeller*, 76 Wash.2d at 455, 458 P.2d 17.

¶ 43 Meredith contends that the State wanted to elicit evidence showing that the lab found evidence consistent with his guilt—semen with nonmotile sperm—when it examined the vaginal swabs, but it “did not want the defense to be able to elicit testimony that an additional exam—DNA testing—could have resolved whether the sperm was the defendant's or someone else's.” Br. of App. at

48. He maintains that this is exactly the type of unfairness that *Gefeller* was trying to prevent, i.e. allowing one party to bring up a subject and bar the other party from inquiring about it.

¶ 44 Meredith's argument assumes that the lab report's only purpose was DNA related. The lab report, however, supports the conclusion that BL had sexual intercourse, whereas a DNA analysis would address the *identity* of the person with whom BL had sexual intercourse. The trial court did not prohibit Meredith from asking questions about the lab report's finding of semen. Instead, the trial court limited Meredith from opening a *new door* about why the State did not have DNA evidence. But even if the trial court erred in prohibiting testimony about the purpose of the vaginal swabs, the error was harmless beyond a reasonable doubt, as we explained above.

III. Sufficiency of Evidence Regarding Communication with a Minor for Immoral Purposes

¶ 45 Meredith next argues that insufficient evidence supported his conviction of communication with a minor for immoral purposes. In a sufficiency challenge, we review the evidence in the light most favorable to the State. *State v. Drum*, 168 Wash.2d 23, 34, 225 P.3d 237 (2010). We ask “‘whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.’” *Drum*, 168 Wash.2d at 34–35, 225 P.3d 237 (quoting *State v. Wentz*, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)). An appellant claiming insufficient evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wash.2d at 35, 225 P.3d 237. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980).

¶ 46 Meredith argues that the statute criminalizing communication with a minor for immoral purposes has a temporal component such that the defendant's immoral sexual purpose must be present at the time that the defendant makes the prohibited

communication. At the time of Meredith's offense, the statute stated in relevant part:

A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor.

Former RCW 9.68A.090 (1989).

¶ 47 Meredith contends that the State used evidence of him having sex with BL to show that his earlier communication with AB—which did not include any specific words or conduct referring to sex—was for an immoral purpose. He asserts that talking, walking, eating, drinking, and partying with AB was not sufficient evidence to show that his communication with her was for an immoral purpose; the purpose to have sex with BL, Meredith contends, may not have developed until the girls were at his apartment and BL decided to go into his bedroom.

¶ 48 Meredith, a 24-year-old man, communicated daily with AB, a 13-year-old girl; told her that he was 17 years old; expressed interest in AB by saying that he liked her; asked to meet her friends; transported AB and her friends to his apartment; purchased alcohol and allowed the underage girls to consume it in his apartment; and, finally, followed BL into his bedroom when she was intoxicated and had sexual intercourse with her. Although a man does not necessarily intend to have sex with every girl he dines and drinks with, the facts here are anything but innocuous. Based on this evidence, the jury could have reasonably inferred that Meredith's purpose in communicating with AB was immoral even if his decision to have sexual intercourse with BL did not arise until after his communications with AB.

IV. Closing Argument

¶ 49 The last question is whether the trial court improperly prohibited Meredith from arguing the lack of DNA evidence during closing argument. At trial, the State moved to prohibit Meredith from mentioning the absence of DNA testing in his clos-

ing argument, and the trial court granted the motion. The State concedes error but maintains that the error was harmless.

¶ 50 During closing argument, a criminal defendant has a final opportunity to “persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.” *State v. Perez–Cervantes*, 141 Wash.2d 468, 474, 6 P.3d 1160 (2000) (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The defendant must be afforded “ ‘the utmost freedom in the argument of the case’ ” and “ ‘some latitude in the discussion of [his or her] causes before the jury.’ ” *Perez–Cervantes*, 141 Wash.2d at 474, 6 P.3d 1160 (quoting *Sears v. Seattle Consol. St. Ry. Co.*, 6 Wash. 227, 232–33, 33 P. 1081 (1893)). Trial courts “ ‘cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical.’ ” *State v. Frost*, 160 Wash.2d 765, 772, 161 P.3d 361 (2007) (quoting *City of Seattle v. Arensmeyer*, 6 Wash.App. 116, 121, 491 P.2d 1305 (1971)).

¶ 51 Nonetheless, the trial court possesses broad discretionary powers over the scope of the defendant's closing argument. *Frost*, 160 Wash.2d at 771–72, 161 P.3d 361. The defendant must restrict argument to the facts in evidence and the applicable law; otherwise the jury may be confused or misled. *Perez–Cervantes*, 141 Wash.2d at 474, 6 P.3d 1160. We review rulings to restrict the scope of closing arguments for abuse of discretion. *Perez–Cervantes*, 141 Wash.2d at 475, 6 P.3d 1160.

¶ 52 Although it is possible that the trial court erred in limiting the scope of Meredith's closing argument, we conclude that the error was harmless under the “overwhelming untainted evidence” test. *See Frost*, 160 Wash.2d at 782, 161 P.3d 361 (applying this test to trial court's erroneous limitation of the scope of the defense's closing argument).

¶ 53 We hold that the defendant did not establish a prima facie case of discrimination under *Batson* and *Rhone*. Furthermore, despite any perceived

shortcomings in the proceedings below, we hold that any errors related to Meredith's other claims were harmless beyond a reasonable doubt. We affirm.

We concur: HUNT, J.

JOHANSON, J. (dissenting).

¶ 54 I respectfully dissent for two reasons. First, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), does not require a pattern of racial discrimination. And, second, I agree with Justice Alexander's conclusion in his dissent in *State v. Rhone*, 168 Wash.2d 645, 659, 229 P.3d 752, cert. denied, — U.S. —, 131 S.Ct. 522, 178 L.Ed.2d 385 (2010) (Alexander, J., dissenting), that there should be a bright-line rule “that a defendant establishes a prima facie case of discrimination when, as here, the record shows that the State exercised a peremptory challenge against the sole remaining venire member” of a specific racial group.

¶ 55 As to my first reason, the record shows that the trial court clearly applied the wrong standard articulated in *Batson*, 476 U.S. at 95, 106 S.Ct. 1712. Under *Batson*, “ ‘a consistent pattern of official racial discrimination’ is not ‘a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable decisions.’ ” *Batson*, 476 U.S. at 95, 106 S.Ct. 1712 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). *Batson* replaced the previous “threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation.” *Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

¶ 56 Under these rules, the trial court's ruling here is clearly erroneous. The trial court held that “[t]he fact that there has been an exclusion of a

single black juror is insufficient to establish a prima facie case *pattern of exclusion*.” 3 Verbatim Report of Proceedings (VRP) at 111 (emphasis added). But as Justice Alexander noted in his dissent in *Rhone*, “it is clearly inappropriate for a trial court to consider whether the jury selection process involves *systematic exclusion* of venire members based on a discriminatory purpose.” *Rhone*, 168 Wash.2d at 660, 229 P.3d 752 (citing *Batson*, 476 U.S. at 95, 106 S.Ct. 1712). Instead, “a ‘single invidiously discriminatory governmental act’ is sufficient to warrant reversal of a conviction.” *Rhone*, 168 Wash.2d at 660, 229 P.3d 752 (quoting *Batson*, 476 U.S. at 95, 106 S.Ct. 1712) (Alexander, J., dissenting). Here, the trial court *330 required Meredith to show systematic discrimination by showing a “pattern of exclusion.” 3 VRP at 111. In so doing, the court applied the incorrect standard and, thus, its ruling was clearly erroneous.

¶ 57 My second reason for dissenting is that I would follow Justice Alexander's bright-line rule in *Rhone*: “a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged.” FN12 *Rhone*, 168 Wash.2d at 661, 229 P.3d 752 (Alexander, J., dissenting). I agree with Justice Alexander that:

FN12. Justice Madsen did not adopt this bright-line rule in *Rhone*, but she stated that “going forward, [she] agree[d] with the rule advocated by [J. Alexander].” *Rhone*, 168 Wash.2d at 658, 229 P.3d 752 (Madsen, C.J., concurring).

Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a *Batson* challenge.

... A bright line rule would provide clarity and

163 Wash.App. 75, 259 P.3d 324

(Cite as: 163 Wash.App. 75, 259 P.3d 324)

certainty concerning the State's obligations in future cases and would simultaneously engender greater fidelity to *Batson* and its equal protection guaranty.

Rhone, 168 Wash.2d at 661–62, 229 P.3d 752 (Alexander, J., dissenting).

¶ 58 I recognize that Justice Alexander's proposed rule suggests that the dismissed juror must be of the same racial group as the defendant and that the majority here emphasizes this aspect of the rule. But in my view, the majority here reads this rule too narrowly by requiring the defendant and struck venire person to share the same race.

¶ 59 It is well settled that a defendant can object to a peremptorily challenged juror even though they do not share the same race. *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Limiting a defendant's right to object “conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law.” *Powers*, 499 U.S. at 406, 111 S.Ct. 1364; *accord Rhone*, 168 Wash.2d at 651 n. 2, 229 P.3d 752 (“The United States Supreme Court has expanded the scope of *Batson*'s basic constitutional rule” to the use of peremptories by prosecutors “where the defendant and the excluded juror are of different races.”).

¶ 60 Additionally, “*Batson* ‘was designed “to serve multiple ends,” ’ only one of which was to protect individual defendants from discrimination in the selection of jurors.” *Powers*, 499 U.S. at 406, 111 S.Ct. 1364 (quoting *Allen v. Hardy*, 478 U.S. 255, 259, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986)). “The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.” *Powers*, 499 U.S. at 406, 111 S.Ct. 1364; *see also Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970) (“Whether jury service be

deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.”).

¶ 61 I believe that a bright-line rule should not be limited to situations where the defendant and the peremptorily challenged juror share the same race. Limiting a bright-line rule in such a manner ignores the realities of the defendant obtaining a cross-section of his community. It also hinders the members of that community from equally participating in our legal system.

¶ 62 The benefit of giving each member of a racially cognizable group a fair opportunity to serve justice far exceeds the State's minimal burden in offering a race-neutral reason. Ensuring that justice is blind to race in selecting a jury pool is the ultimate goal, and a bright-line rule addressing the first prong of the *Batson* analysis should be crafted without considering the defendant's race against the peremptorily challenged juror's race.

*331 ¶ 63 The trial court applied the wrong standard by requiring the defendant to show a pattern of discrimination to establish a prima facie case. Alternatively, I would apply Justice Alexander's proposed bright-line rule to situations like this case, in which the defendant does not share the same race as the peremptorily challenged juror.

¶ 64 Based on my disagreement of the majority's *Batson* analysis, I would reverse the convictions.

Wash.App. Div. 2, 2011.
State v. Meredith
163 Wash.App. 75, 259 P.3d 324

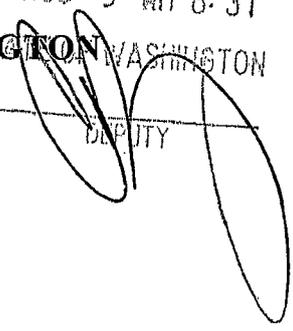
END OF DOCUMENT

APPENDIX B

FILED
COURT OF APPEALS
DIVISION II
11 AUG -9 AM 8:31

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY  DEPUTY

STATE OF WASHINGTON,
Respondent,

No. 38600-3-II

v.

GARY D. MEREDITH,
Appellant.

OPINION PUBLISHED IN PART

PENoyer, C.J. — Gary D. Meredith appeals his convictions for second degree child rape and communicating with a minor for immoral purposes. His primary contention is that the prosecutor's peremptory challenge of the sole African American venire member constituted a prima facie case of purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In the published part of this opinion, we review the facts relevant to his *Batson* claim and hold that a defendant does not establish a prima facie case of purposeful discrimination under *Batson* by showing only that the prosecutor peremptorily challenged the sole venire member of a cognizable racial group that is different from the defendant's racial group. We also conclude that Meredith failed to establish a prima facie case of purposeful discrimination here.

Meredith also argues that (1) the trial court violated his rights to confrontation and cross-examination, (2) insufficient evidence supports his communication with a minor for immoral purposes conviction, and (3) the trial court improperly prohibited him from arguing about the absence of DNA¹ evidence during closing argument. In the unpublished portion of this opinion,

¹ Deoxyribonucleic acid.

we discuss the facts relevant to these claims, each of which we reject. Accordingly, we affirm on both counts.

PUBLISHED FACTS

In 1996, Meredith was preparing to stand trial on one count of second degree child rape² and one count of communication with a minor for immoral purposes.³ During voir dire, the prosecutor peremptorily challenged juror 4, the sole African American on the venire. Meredith, who is Caucasian, objected, arguing that the State did not give a basis for challenging juror 4 and, thus, the “only belief can be that she was removed because of her minority status.” III Report of Proceedings (RP) at 107.

The prosecutor responded that Meredith had failed to meet his burden under *Batson* to show purposeful discrimination because he failed to present any evidence for this claim other than that juror 4 was African American. Additionally, the prosecutor maintained that he did not strike other racial minorities on the venire, including one woman who appeared to be of “Southern European descent . . . or perhaps even Middle Eastern.” III RP at 109. He observed that the juror questionnaires did not include information on the venire members’ race, “so it’s difficult to know who is and is not a racial minority.” III RP at 109. The prosecutor further argued that, as the “other half of the *Batson* challenge” requires, Meredith failed to meet his burden of proof that he was of the same race as the excluded venire member. III RP at 109.

The trial court agreed with the prosecutor that removing the sole African American venire member was insufficient to establish a prima facie case of purposeful discrimination under *Batson*:

² RCW 9A.44.076.

³ Former RCW 9.68A.090 (1989).

At this point in time, the Court finds that the burden of proof is on the Defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason. Defense has failed in that proof, one, as to whether or not the Prosecuting Attorney's Office here in Pierce County exercises challenges in a racially biased or discriminatory manner, or two, that . . . [the] prosecutor in this case has done so. There is no evidence of racial bias in challenging Juror No. 4 on either of those two bas[es].

The fact that there has been an exclusion of a single black juror is insufficient to establish a *prima facie* case pattern of exclusion. This is under *Batson* and under *State v. Ashcroft*,^[4] even though from appearances she was the only black or African American juror on the panel. There being no other evidence, the Court denies the motion.

III RP at 111. Accordingly, the trial court did not require the prosecutor to provide a race-neutral reason for challenging juror 4.

The jury convicted Meredith on both counts. He appeals.

PUBLISHED ANALYSIS

BATSON CHALLENGE

We must decide whether Meredith established a *prima facie* case of purposeful discrimination under *Batson* by showing that the prosecutor removed the only African American venire member. We hold that he did not.

In *Batson*, the United States Supreme Court recognized that the Fourteenth Amendment's equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85-86 (citing *Martin v. Texas*, 200 U.S. 316, 321, 26 S. Ct. 338, 50 L. Ed. 497 (1906)). *Batson* articulated a three-part analysis to determine whether discriminatory criteria were used to peremptorily challenge a venire member. 476 U.S. at 96-98. First, the defendant must establish a *prima facie* case of purposeful discrimination.

⁴ The trial court may have been referring to *State v. Ashcroft*, 71 Wn. App. 444, 859 P.2d 60 (1993).

Batson, 476 U.S. at 96-97. To establish a prima facie case, the defendant must provide evidence of any relevant circumstances that raise an inference that a peremptory challenge was used to exclude a venire member from the jury on account of his or her race. *Batson*, 476 U.S. at 96-97. Second, if the defendant establishes this prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for challenging the venire member. *Batson*, 476 U.S. at 97. Finally, the trial court must determine whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98.

“In reviewing a trial court’s ruling on a *Batson* challenge, [t]he determination of the trial judge is accorded great deference on appeal, and will be upheld unless clearly erroneous.” *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (internal quotation marks omitted) (quoting *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995)).

Meredith argues that our Supreme Court’s recent decision in *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010), *cert. denied*, 131 S. Ct. 522 (2010), created a bright-line rule in Washington that a defendant establishes a prima facie case of purposeful discrimination when the record shows that the prosecutor exercised a peremptory challenge against the sole remaining venire member of a constitutionally cognizable racial group. Because the prosecutor challenged the only African American venire member in the present case, Meredith concludes that he established a prima facie case of purposeful discrimination. He asserts that the trial court erred in determining otherwise, and he asks us to reverse his convictions and remand for a new trial.

In *Rhone*, there were two African Americans in the venire. 168 Wn.2d at 648. One was challenged for cause per the parties’ agreement, and the other was removed by one of the prosecutor’s peremptory challenges without an objection by the defense. *Rhone*, 168 Wn.2d at 648. After the jury was sworn in, the defendant, an African American, raised a *Batson*

challenge. *Rhone*, 168 Wn.2d at 648-49. The trial court ruled that the defendant had failed to establish a prima facie case of purposeful discrimination. *Rhone*, 168 Wn.2d at 650.

In *Rhone*'s lead opinion, four justices⁵ rejected a bright-line rule that a prima facie case of discrimination is always established whenever the prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group. 168 Wn.2d at 652-53. They noted that *Batson* involved a three-part analysis, in which the first part directs a trial court "to determine whether 'something more' exists than a peremptory challenge of a member of a racially cognizable group." *Rhone*, 168 Wn.2d at 653. Consequently, they explained:

Adopting a bright-line rule would negate this first part of the analysis and require a prosecutor to provide an explanation every time a member of a racially cognizable group is peremptorily challenged. Such a rule is beyond the intended scope of *Batson*, transforming a shield against discrimination into a sword cutting against the purpose of a peremptory challenge.

Rhone, 168 Wn.2d at 653-54.

Chief Justice Madsen wrote a separate concurrence, stating, "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent." *Rhone*, 168 Wn.2d at 658 (Madsen, C.J, concurring).

The dissent, which Justice Alexander⁶ authored, advocated "a bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant's constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged." *Rhone*, 168 Wn.2d at 661 (Alexander, J.,

⁵ Justices Charles Johnson (writing), Susan Owens, James Johnson, and Debra Stephens.

⁶ Justices Richard Sanders, Tom Chambers, and Mary Fairhurst joined.

dissenting). The dissenters recognized that, under an earlier precedent,⁷ a trial court has discretion to find a prima facie case of purposeful discrimination where the only venire member from a constitutionally cognizable group is peremptorily challenged; however, the dissenters were persuaded to depart from this precedent because “the benefits of [a bright-line rule] far outweigh the State’s minimal burden to provide a race-neutral explanation for its challenge during venire.” *Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting). Some of these benefits include ensuring an adequate record for appellate review, accounting for the realities of the demographic composition of Washington venires, and effectuating the Washington Constitution’s elevated protection of the right to a fair jury trial. *Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting).

Rhone’s future is uncertain now that a new justice has joined our Supreme Court. Other *Batson* cases in the future will present different facts, different challenges, and different results. In any case, we need not consider the reach of the bright-line rule advocated by *Rhone*’s minority/possible future majority because the record here is inadequately developed to tell us with any certainty whether this case even falls within that rule.

First, although the challenged venire member in this case was African American, Meredith is not. Thus, under the first prong of the minority/possible future majority’s bright-line rule, Meredith’s claim falls short because the peremptorily challenged juror was not a “member of the *defendant’s* constitutionally cognizable racial group.” See *Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting) (emphasis added). And under the minority/possible future majority’s second prong, Meredith fails again because the record does not clarify whether juror 4 was, in fact, the last remaining minority member of the venire. See *Rhone*, 168 Wn.2d at 661

⁷ *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009).

(Alexander, J., dissenting). For instance, the prosecutor pointed out that at least one of the remaining venire members appeared to be a racial minority.

Turning to *Rhone*'s majority/possible future minority opinion, we conclude that it also does not support Meredith's claim that he established a prima facie case of purposeful discrimination. Under that opinion's analysis, to determine whether a defendant has established a prima facie claim of purposeful discrimination, the trial court must look to see whether the record reflects "something more" than "a peremptory challenge against a member of a racially cognizable group." *Rhone*, 168 Wn.2d at 656. Some factors to consider in determining whether there was purposeful discrimination include:

(1) [S]triking a group of otherwise heterogeneous venire members who have race as their only common characteristic, (2) exercising a disproportionate use of strikes against a group, (3) the level of a group's representation in the venire as compared to the jury, (4) the race of the defendant and the victim, (5) past discriminatory use of peremptory challenges by the prosecuting attorney, (6) the type and manner of the prosecuting attorney's questions during voir dire, (7) disparate impact of using all or most of the challenges to remove minorities from the jury, and (8) similarities between those individuals who remain on the jury and those who have been struck.

Rhone, 168 Wn.2d at 656.

Although this is not an exhaustive list of factors that a court may consider in deciding whether "something more" exists, Meredith did not argue to the trial court that any of these factors were present. Instead, he argued that nothing in juror 4's answers indicated "that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror." III RP at 107. We hold that this alone is not "something more" under *Rhone*. And without this "something more" a court will not ascribe discriminatory motives to the challenge. We recognize that there are a host of other factors, any one of which may determine a trial attorney's choice to remove a venire member, including the tone and

inflections in a venire member's voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members' responses, et cetera. In sum, the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold that the trial court did not err by concluding that Meredith did not meet his burden to show a prima facie case of purposeful discrimination.

Finally, we agree with the dissent that a defendant may rely on "[a] single invidiously discriminatory governmental act" to establish a prima facie case of purposeful discrimination. Dissent at 1 (quoting *Batson*, 476 U.S. at 95). We agree, therefore, that the trial court applied the wrong legal standard when it concluded that Meredith had to demonstrate "a pattern of exclusion" in order to establish a prima facie case of purposeful discrimination. III RP at 111. But this error does not warrant reversal of Meredith's convictions because, as we explain in the preceding paragraphs, Meredith failed to establish a prima facie case of purposeful discrimination under both the *Rhone* majority's "something more" standard and the *Rhone* minority's bright-line rule. Accordingly, although the trial court applied an incorrect legal standard, its determination with regard to Meredith's *Batson* challenge was not clearly erroneous.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

UNPUBLISHED FACTS

At trial, the State presented testimony from four teenage girls regarding their contact with Meredith. The State alleged that BL was the rape victim and that AB was the victim of communication with a minor for immoral purposes.

About two weeks before BL (age 12)⁸ was raped, AB (age 13) met Meredith. During those two weeks, Meredith talked daily with AB by phone. Meredith told AB that he was 17 years old, when in reality he was 24 years old. At one point, Meredith told AB that he liked her, but AB reported that she did not think much of his feelings because, as she had told him, she already had a boyfriend.

On the night of October 28, 1994, AB, BL, and ST (age 13) stayed the night at MJ's (age 13) house. AB spoke to Meredith. Meredith said that he wanted to meet AB's friends.

The next day, the four girls met Meredith and his friend, Jason Gross, and the group went to the mall. Afterward, Gross and Meredith dropped the girls off near MJ's house. AB arranged to meet Meredith again that same evening. AB and the three other girls met Meredith and Gross near BL's house that evening, and Gross drove everyone to Meredith's apartment, stopping on the way to buy some alcohol.

Once inside Meredith's apartment, all four girls consumed varying amounts of alcohol. MJ and BL reported that they felt intoxicated. BL started feeling sick, so she went into a bedroom to lie down. Meredith followed her into the bedroom and closed the door.

MJ testified that at some point after BL and Meredith went into the bedroom, ST opened the bedroom door and MJ saw Meredith lying on top of BL. According to MJ, both were naked and "it looked like [Meredith] was on top of [BL] and they were both moving." III RP at 152. AB also testified that, on a separate occasion, she opened the door and saw Meredith on top of BL, who was naked. They had a sheet on top of them and Meredith was moving around "[a] little bit." V RP at 388.

⁸ We state the ages of the girls at the time of the incident in October 1994.

BL testified that she did not remember Meredith entering the room with her, but she did remember waking up with him lying next to her in the bed. BL testified that Meredith took her clothes off and asked her if she wanted to have sex. She pushed him away and said that she needed to sleep. Meredith then took his clothes off and got on top of BL. BL was "halfway passed out" and again tried pushing him away, but Meredith began having vaginal intercourse with her. IV RP at 279.

When BL saw her mother later that evening, her mother sensed that something was wrong, and she asked BL if someone had nonconsensual sex with her. BL said yes. BL's mother then drove BL to MJ's house; MJ's mother called the police to report the incident.

BL's mother took BL to the hospital where staff conducted a sexual assault examination. Michelle Russell, a registered nurse, inspected BL's skin with a blue light to look for secretions but did not find anything. Dr. Bobbi Sipes inspected BL's vagina, noting a "pooling of secretions" consistent with semen in the back portion of her vagina. VI RP at 498. She also saw redness on BL's thigh and a superficial laceration in the area between BL's vagina and anus. Dr. Sipes testified that the redness and laceration were inflicted within 24 hours of BL's exam. The pooled secretions, redness, and laceration were consistent with "non-specific findings for intercourse." VI RP at 500. BL told Dr. Sipes that, before having sexual intercourse with Meredith, the last time she had sexual intercourse was in July.

Dr. Sipes also took swabs from BL's vagina and sent them to the hospital lab. Dr. Sipes testified that the hospital lab report stated that the secretion in BL's vagina contained semen with nonmotile sperm. Dr. Sipes testified that the presence of semen supported the conclusion that BL had intercourse within three days of her examination.

UNPUBLISHED ANALYSIS

I. RIGHT TO CONFRONTATION

Meredith argues that the trial court violated his right to confrontation when it allowed Dr. Sipes to testify about the contents of a lab report that she did not author. Before trial, Meredith moved in limine to preclude this testimony. He argues, as he did below, that Dr. Sipes's testimony that the report found semen with nonmotile sperm violated his right to confrontation because she did not conduct the lab analysis that identified the semen.

Under the Sixth Amendment's confrontation clause, an accused has a right to confront witnesses against him. U.S. CONST. amend. VI; *see also Crawford v. Washington*, 541 U.S. 36, 42, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of the witness's "testimonial" statements when that witness does not take the stand at trial. *Crawford*, 541 U.S. at 59.

A confrontation clause error may be harmless. *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007). To determine whether such an error is harmless, we apply the "overwhelming untainted evidence" test. *Mason*, 160 Wn.2d at 927 (quoting *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005)). Under this test, we look only at the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. *Davis*, 154 Wn.2d at 305.

Assuming, without deciding, that the lab report was "testimonial," we conclude that the error was harmless. Excluding the lab report's statement that BL's vagina contained semen with nonmotile sperm, the untainted evidence against Meredith included Dr. Sipes's conclusion that BL had recently had intercourse (including her personal observation of secretions that appeared

38600-3-II

to be semen in BL's vagina) and testimony from BL and other eyewitnesses that Meredith had sexual intercourse with BL.

Specifically, Dr. Sipes testified that her observations from BL's sexual assault exam were consistent with "non-specific findings for intercourse." VI RP at 500. These observations included redness on BL's thigh and a superficial laceration in the area between BL's vagina and anus, both of which, according to Dr. Sipes, were inflicted within 24 hours of BL's exam. Further, Dr. Sipes testified that she found a pooling of secretions consistent with semen inside the back portion of BL's vagina. According to Dr. Sipes, the presence of what appeared to be semen supported the conclusion that BL had intercourse within three days of her examination.

Three of the four girls who went to Meredith's apartment testified that BL and Meredith were alone in his bedroom for a period of time. AB and MJ both testified that they saw Meredith on top of BL, who was naked, engaging in what looked like sexual intercourse. BL also testified that Meredith climbed on top of her and had sexual intercourse with her.

Accordingly, the record contains overwhelming untainted evidence supporting the jury's verdict of guilt beyond a reasonable doubt with respect to the second degree child rape charge. Even without the lab report findings that BL's vagina contained semen with nonmotile sperm, the evidence that Meredith had sexual intercourse with BL is so overwhelming that it necessarily leads to a finding of guilt.

II. TRIAL COURT'S LIMITATION OF SCOPE OF CROSS-EXAMINATION

A. B.L.'s BEHAVIOR DURING A COURT RECESS

Meredith next argues that the trial court violated his Sixth Amendment right to cross-examination when it prohibited him from asking BL about her laughing and giggling during a

court recess.⁹ He maintains that the purpose of such testimony would have been to cast doubt on the veracity of BL—who appeared teary and distraught while testifying—and to suggest that her courtroom testimony was fabricated.

We agree with Meredith that cross-examining BL about her recess behavior would have had some tendency to make her testimony less credible. *See* ER 401. The State argues that BL’s recess behavior “[was] not necessarily indicative of lying while under oath” but that misapprehends the relevancy standard. Br. of Resp’t at 24. We hold that the trial court erred by limiting Meredith’s cross-examination into BL’s behavior. Nonetheless, as the analysis in the previous section demonstrates, this error was harmless beyond a reasonable doubt.

B. BLUE LIGHT TESTS

Meredith next argues that the trial court violated his right to cross-examination when it prohibited him from asking Russell, the registered nurse who conducted the blue light tests, whether secretions are usually present on the outside of the victim’s body in sexual assault

⁹ After a short recess during BL’s testimony, the prosecutor told the trial court that, as BL exited the courtroom, she “ran a virtual gauntlet of the defendant’s friends and other supporters which there is a certain amount of name calling, laughing, that sort of activities in the hallway.” IV RP at 287. Meredith responded that he had not seen what the prosecutor was describing but had “heard reports exactly opposite . . . [that BL] and members of her family and other friends . . . are doing these shenanigans.” IV RP at 287. When Meredith began his cross-examination of BL, the following exchange took place:

[Meredith]: [BL], at the break the Court just took, were you laughing and giggling outside the courtroom?

[BL]: Yes.

[Prosecutor]: Objection. Relevance.

THE COURT: Sustained. The jury is instructed to disregard the answer.

IV RP at 299.

cases.¹⁰ Assuming, without deciding, that the trial court erred by disallowing this testimony, we hold that such error was harmless. As discussed above, there was overwhelming evidence of rape, including strong evidence of bodily secretions and eyewitness reports of the sexual encounter.

C. PURPOSE BEHIND COLLECTING VAGINAL SWABS

Relying on *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), Meredith next argues that the trial court erred by prohibiting him from asking Russell and Dr. Sipes whether the purpose of the vaginal swabs was to conduct a DNA analysis.¹¹

¹⁰ The following exchange took place when Meredith cross-examined Russell:

[Meredith]: [Ms.] Russell, with respect to the blue light exam is that for purposes of detecting if there is secretions on the external body?

[Russell]: Uh-huh (affirmative)

[Meredith]: You stated there was no finding of that?

[Russell]: Uh-huh (affirmative)

[Meredith]: Is it not true often times in a sexual assault exam there will be secretions on the outside of the body?

[Prosecutor]: Objection. Relevance, not confined to the facts of this case.

THE COURT: Sustained.

V RP at 433.

¹¹ The following exchange took place when Meredith cross-examined Russell:

[Meredith]: Are the swabs taken for purposes of making DNA analysis?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Meredith]: Are you aware as to whether or not [the swabs collected] were taken for purposes of DNA analysis?

[Prosecutor]: [O]bjection.

THE COURT: Sustained.

V RP at 437-38. The trial court also granted the State's motion to strike Dr. Sipes's testimony that she took the swabs for DNA purposes.

In *Gefeller*, the defendant asked a police officer on cross-examination whether the defendant had taken a lie detector test and whether the defendant had been cooperative during the test. 76 Wn.2d at 454. After the officer responded “yes” to both questions, the defendant asked about the test results. *Gefeller*, 76 Wn.2d at 454. The officer responded that the results were inconclusive. *Gefeller*, 76 Wn.2d at 454. On redirect, the State asked the officer what he meant by inconclusive results, and, on re-cross, the defendant asked about the officer’s experience and education with lie detector tests. *Gefeller*, 76 Wn.2d at 454-55. On appeal, the defendant argued that the trial court improperly admitted evidence that he had taken a lie detector test and that the results had been inconclusive. *Gefeller*, 76 Wn.2d at 454. Our Supreme Court rejected this argument, noting that the defendant had opened the door to this testimony by “first asking whether [a lie detector test] had been given and whether the defendant had been cooperative concerning it.” *Gefeller*, 76 Wn.2d at 455. As the *Gefeller* court explained, “[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” *Gefeller*, 76 Wn.2d at 455. The court further explained, “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” *Gefeller*, 76 Wn.2d at 455.

Meredith contends that the State wanted to elicit evidence showing that the lab found evidence consistent with his guilt—semen with nonmotile sperm—when it examined the vaginal swabs, but it “did not want the defense to be able to elicit testimony that an additional exam—DNA testing—could have resolved whether the sperm was the defendant’s or someone else’s.”

Br. of App. at 48. He maintains that this is exactly the type of unfairness that *Gefeller* was trying to prevent, i.e. allowing one party to bring up a subject and bar the other party from inquiring about it.

Meredith's argument assumes that the lab report's only purpose was DNA related. The lab report, however, supports the conclusion that BL had sexual intercourse, whereas a DNA analysis would address the *identity* of the person with whom BL had sexual intercourse. The trial court did not prohibit Meredith from asking questions about the lab report's finding of semen. Instead, the trial court limited Meredith from opening a *new door* about why the State did not have DNA evidence. But even if the trial court erred in prohibiting testimony about the purpose of the vaginal swabs, the error was harmless beyond a reasonable doubt, as we explained above.

III. SUFFICIENCY OF EVIDENCE REGARDING COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES

Meredith next argues that insufficient evidence supported his conviction of communication with a minor for immoral purposes. In a sufficiency challenge, we review the evidence in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). We ask “whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant claiming insufficient evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wn.2d at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

38600-3-II

Meredith argues that the statute criminalizing communication with a minor for immoral purposes has a temporal component such that the defendant's immoral sexual purpose must be present at the time that the defendant makes the prohibited communication. At the time of Meredith's offense, the statute stated in relevant part:

A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor.

Former RCW 9.68A.090 (1989).

Meredith contends that the State used evidence of him having sex with BL to show that his earlier communication with AB—which did not include any specific words or conduct referring to sex—was for an immoral purpose. He asserts that talking, walking, eating, drinking, and partying with AB was not sufficient evidence to show that his communication with her was for an immoral purpose; the purpose to have sex with BL, Meredith contends, may not have developed until the girls were at his apartment and BL decided to go into his bedroom.

Meredith, a 24-year-old man, communicated daily with AB, a 13-year-old girl; told her that he was 17 years old; expressed interest in AB by saying that he liked her; asked to meet her friends; transported AB and her friends to his apartment; purchased alcohol and allowed the underage girls to consume it in his apartment; and, finally, followed BL into his bedroom when she was intoxicated and had sexual intercourse with her. Although a man does not necessarily intend to have sex with every girl he dines and drinks with, the facts here are anything but innocuous. Based on this evidence, the jury could have reasonably inferred that Meredith's purpose in communicating with AB was immoral even if his decision to have sexual intercourse with BL did not arise until after his communications with AB.

IV. CLOSING ARGUMENT

The last question is whether the trial court improperly prohibited Meredith from arguing the lack of DNA evidence during closing argument. At trial, the State moved to prohibit Meredith from mentioning the absence of DNA testing in his closing argument, and the trial court granted the motion. The State concedes error but maintains that the error was harmless.

During closing argument, a criminal defendant has a final opportunity to “persuade the trier of fact that there may be reasonable doubt of the defendant’s guilt.” *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000) (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)). The defendant must be afforded “the utmost freedom in the argument of the case” and “some latitude in the discussion of [his or her] causes before the jury.” *Perez-Cervantes*, 141 Wn.2d at 474 (quoting *Sears v. Seattle Consol. St. Ry. Co.*, 6 Wash. 227, 232-33, 33 P. 1081 (1893)). Trial courts “cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical.” *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007) (quoting *City of Seattle v. Arensmeyer*, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971)).

Nonetheless, the trial court possesses broad discretionary powers over the scope of the defendant’s closing argument. *Frost*, 160 Wn.2d at 771-72. The defendant must restrict argument to the facts in evidence and the applicable law; otherwise the jury may be confused or misled. *Perez-Cervantes*, 141 Wn.2d at 474. We review rulings to restrict the scope of closing arguments for abuse of discretion. *Perez-Cervantes*, 141 Wn.2d at 475.

Although it is possible that the trial court erred in limiting the scope of Meredith’s closing argument, we conclude that the error was harmless under the “overwhelming untainted

38600-3-II

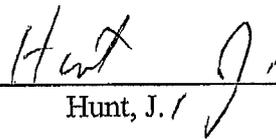
evidence” test. *See Frost*, 160 Wn.2d at 782 (applying this test to trial court’s erroneous limitation of the scope of the defense’s closing argument).

We hold that the defendant did not establish a prima facie case of discrimination under *Batson* and *Rhone*. Furthermore, despite any perceived shortcomings in the proceedings below, we hold that any errors related to Meredith’s other claims were harmless beyond a reasonable doubt. We affirm.



Penoyar, C.J.

We concur:



Hunt, J.

JOHANSON, J. (dissenting) — I respectfully dissent for two reasons. First, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), does not require a pattern of racial discrimination. And, second, I agree with Justice Alexander’s conclusion in his dissent in *State v. Rhone*, 168 Wn.2d 645, 659, 229 P.3d 752, cert. denied, 131 S. Ct. 522 (2010) (Alexander, J., dissenting), that there should be a bright-line rule “that a defendant establishes a prima facie case of discrimination when, as here, the record shows that the State exercised a peremptory challenge against the sole remaining venire member” of a specific racial group.

As to my first reason, the record shows that the trial court clearly applied the wrong standard articulated in *Batson*, 476 U.S. at 95. Under *Batson*, “‘a consistent pattern of official racial discrimination’ is not ‘a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable decisions.’” *Batson*, 476 U.S. at 95 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). *Batson* replaced the previous “threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant’s jury sufficed to establish the constitutional violation.” *Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

Under these rules, the trial court’s ruling here is clearly erroneous. The trial court held that “[t]he fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case *pattern of exclusion*.” 3 Verbatim Report of Proceedings (VRP) at 111 (emphasis added). But as Justice Alexander noted in his dissent in *Rhone*, “it is clearly inappropriate for a trial court to consider whether the jury selection process involves *systematic exclusion* of venire members based on a discriminatory purpose.” *Rhone*, 168 Wn.2d at 660

(citing *Batson*, 476 U.S. at 95). Instead, “a ‘single invidiously discriminatory governmental act’ is sufficient to warrant reversal of a conviction.” *Rhone*, 168 Wn.2d at 660 (quoting *Batson*, 476 U.S. at 95) (Alexander, J., dissenting)). Here, the trial court required Meredith to show systematic discrimination by showing a “pattern of exclusion.” 3 VRP at 111. In so doing, the court applied the incorrect standard and, thus, its ruling was clearly erroneous.

My second reason for dissenting is that I would follow Justice Alexander’s bright-line rule in *Rhone*: “a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of the defendant’s constitutionally cognizable racial group or the last remaining minority member of the venire is peremptorily challenged.”¹² *Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting). I agree with Justice Alexander that:

Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a *Batson* challenge. . . . A bright line rule would provide clarity and certainty concerning the State’s obligations in future cases and would simultaneously engender greater fidelity to *Batson* and its equal protection guaranty.

Rhone, 168 Wn.2d at 661-62 (Alexander, J., dissenting).

I recognize that Justice Alexander’s proposed rule suggests that the dismissed juror must be of the same racial group as the defendant and that the majority here emphasizes this aspect of the rule. But in my view, the majority here reads this rule too narrowly by requiring the defendant and struck venire person to share the same race.

It is well settled that a defendant can object to a peremptorily challenged juror even though they do not share the same race. *Powers v. Ohio*, 499 U.S. 400, 406, 111 S. Ct. 1364,

¹² Justice Madsen did not adopt this bright-line rule in *Rhone*, but she stated that “going forward, [she] agree[d] with the rule advocated by [J. Alexander].” *Rhone*, 168 Wn.2d at 658 (Madsen, C.J., concurring).

113 L. Ed. 2d 411 (1991). Limiting a defendant's right to object "conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law." *Powers*, 499 U.S. at 406; *accord Rhone*, 168 Wn.2d at 651 n.2 ("The United States Supreme Court has expanded the scope of *Batson*'s basic constitutional rule" to the use of peremptories by prosecutors "where the defendant and the excluded juror are of different races.").

Additionally, "*Batson* 'was designed "to serve multiple ends,"" only one of which was to protect individual defendants from discrimination in the selection of jurors." *Powers*, 499 U.S. at 406 (quoting *Allen v. Hardy*, 478 U.S. 255, 259, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986)). "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." *Powers*, 499 U.S. at 406; *see also Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970) ("Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.").

I believe that a bright-line rule should not be limited to situations where the defendant and the peremptorily challenged juror share the same race. Limiting a bright-line rule in such a manner ignores the realities of the defendant obtaining a cross-section of his community. It also hinders the members of that community from equally participating in our legal system.

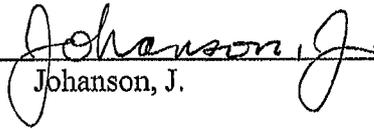
The benefit of giving each member of a racially cognizable group a fair opportunity to serve justice far exceeds the State's minimal burden in offering a race-neutral reason. Ensuring that justice is blind to race in selecting a jury pool is the ultimate goal, and a bright-line rule

38600-3-II

addressing the first prong of the *Batson* analysis should be crafted without considering the defendant's race against the peremptorily challenged juror's race.

The trial court applied the wrong standard by requiring the defendant to show a pattern of discrimination to establish a prima facie case. Alternatively, I would apply Justice Alexander's proposed bright-line rule to situations like this case, in which the defendant does not share the same race as the peremptorily challenged juror.

Based on my disagreement of the majority's *Batson* analysis, I would reverse the convictions.


Johanson, J.

APPENDIX C

FILED
COURT OF APPEALS
DIVISION II

11 NOV -9 AM 9:23

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 38600-3-II

Respondent,

v.

GARY D. MEREDITH,

ORDER GRANTING RECONSIDERATION
IN PART AND AMENDING OPINION

Appellant.

The opinion published in part was filed on August 9, 2011. Appellant filed a motion for reconsideration and we grant the reconsideration in part.

This opinion is hereby amended as follows:

The last paragraph of page 7 that continues to page 8 that reads:

Although this is not an exhaustive list of factors that a court may consider in deciding whether “something more” exists, Meredith did not argue to the trial court that any of these factors were present. Instead, he argued that nothing in juror 4’s answers indicated “that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror.” III RP at 107. We hold that this alone is not “something more” under *Rhone*. And without this “something more,” a court will not ascribe discriminatory motives to the challenge. We recognize that there are a host of other factors, any one of which may determine a trial attorney’s choice to remove a venire member, including the tone and inflections in a venire member’s voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members’ responses, et cetera. In sum, the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold that the trial court did not err by concluding that Meredith did not meet his burden to show a prima facie case of purposeful discrimination.

is deleted. The following paragraphs are inserted in its place:

Although this is not an exhaustive list of factors that a court may consider in deciding whether “something more” exists, Meredith did not argue to the trial court that any of these factors were present. Instead, his trial counsel argued to the trial court that juror 4’s answers “were beneficial to both the State and to the defense under some circumstances”⁸ and that nothing in her answers indicated

“that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror.” III RP at 107, 110. We hold that these circumstances do not amount to “something more” under *Rhone*.

Additionally, on appeal, Meredith asserts that the prosecutor’s comment that a woman of “Southern European descent . . . or perhaps even Middle Eastern” remained on the panel suggested that “race was on [the prosecutor’s] mind at the time the defense questioned his exercise of a peremptory challenge against [juror 4].” III RP at 109; Appellant’s Br. at 20. We hold that this comment, whether considered in isolation or together with Meredith’s arguments in the previous paragraph, also does not amount to “something more” under *Rhone*. The prosecutor made this comment in response to an argument by Meredith’s counsel that “[t]he only belief can be that [juror 4] was removed because of her minority status.” III RP at 107. It does not raise an inference that the prosecutor removed juror 4 from the venire on account of her race.

Without “something more” than “a peremptory challenge against a member of a racially cognizable group,” a court will not ascribe discriminatory motives to the challenge. *Rhone*, 168 Wn.2d at 656. We recognize that there are a host of other factors, any one of which may determine a trial attorney’s choice to remove a venire member, including the tone and inflections in a venire member’s voice, as well as non-verbal cues, including eye contact, body gestures, reactions to other venire members’ responses, et cetera. In sum, the record does not reflect any discriminatory motive in removing juror 4, nor does it exclude the existence of many potential non-discriminatory motives. Thus, we hold that the trial court did not err by concluding that Meredith did not meet his burden to show a *prima facie* case of purposeful discrimination.

Newly inserted footnote 8 should read:

In his motion for reconsideration, Meredith asserts that his trial counsel’s argument that juror 4 “gave . . . answers that were beneficial to both the State and to the defense under some circumstances” was, in essence, an argument that the eighth factor in *Rhone*’s non-exclusive list—“similarities between those individuals who remain on the jury and those who have been struck”—was present. Mot. for Recons. at 6-7 (quoting III RP at 110); *Rhone*, 168 Wn.2d at 656. We disagree with this characterization. Meredith’s “beneficial answers” argument referred only to juror 4’s responses and made no reference whatsoever to venire members who were either selected for the jury or peremptorily challenged.

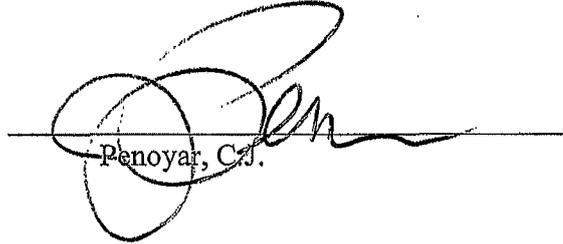
The following language should be inserted as footnote 9 after the sentence, “Accordingly, although the trial court applied an incorrect legal standard, its determination with regard to

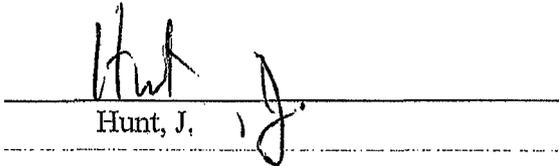
Meredith's *Batson* challenge was not clearly erroneous" at the end of the first full paragraph on page 8:

We also reject Meredith's argument that the trial court violated his article I, section 22 right to an appeal under the state constitution when it did not require the prosecutor to explain his reason for peremptorily challenging juror 4. Meredith had no legal right to this explanation because he did not meet his initial burden to establish a prima facie case of purposeful discrimination. *See Rhone*, 168 Wn.2d at 651 (emphasis added) ("[I]f a prima facie case is established, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member.").

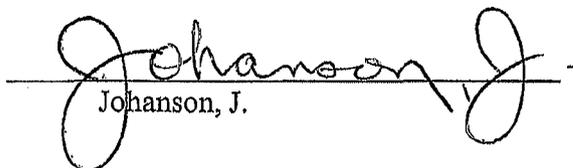
IT IS SO ORDERED.

DATED this 9TH day of NOVEMBER 2011.


Penoyar, C.J.


Hunt, J.

I acknowledge the majority's amendments and stand with my previously filed dissent:


Johanson, J.