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STATE OF WASHINGTON
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NO. 38600-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GARY MEREDITH,

Appellant.

BRIEF OF APPELLANT

James E. Lobsenz
Attorney for Appellant

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

ORIGINAL

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A. ASSIGNMENTS OF ERROR

Appellant Gary Meredith assigns error to the trial court's:

1. Refusal to make a *Batson* inquiry into the prosecutor's reason for removing the sole African-American juror from the jury panel.
2. Decision to allow the prosecution to remove the only African-American juror from the jury with the use of a peremptory challenge.
3. Admission of hearsay testimony as to the results of a laboratory examination of vaginal swab samples taken from the alleged victim.
4. Refusal to dismiss Count I, Communication with a Minor for Immoral Purposes, for insufficient evidence.
5. Refusal to permit cross-examination of the alleged victim about whether she had been laughing and giggling during a court recess.
6. Refusal to permit cross-examination of the ER nurse about the incidence of positive blue light tests for the presence of bodily secretions in sexual assault cases.
7. Refusal to permit cross-examination of the State's physician regarding the purpose for which vaginal swabs had been taken.
8. Order prohibiting defense counsel from making any closing argument about the absence of DNA testing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the prosecutor removes the sole African-American juror from the jury panel, does this suffice under *Batson* to trigger the requirement that the trial judge ask the prosecutor to disclose his reason for removing the juror?
2. If the prosecutor deliberately removes the sole African-American juror from the jury panel due to her race, but leaves on other jurors who are, or who appear to him to be, minority persons of some other "race", is a violation of the Equal Protection Clause avoided or excused?

3. Is a new trial required for violation of the Equal Protection Clause when the defendant establishes a prima facie case of race discrimination in jury selection and the trial judge fails to conduct a *Batson* inquiry, thereby depriving the appellate court of any record regarding the prosecutor's reason for his removal of the only African-American juror? Does refusal to make a record effectively deny the defendant his art. 1, § 22 state constitutional right to an appeal?
4. Does allowing a doctor to testify to the results of someone else's laboratory analysis of vaginal swabs taken from an alleged rape victim violate the defendant's Sixth Amendment right to confrontation?
5. To prove the crime of communication with a minor for immoral purposes, must there be proof that the defendant was motivated by an immoral purpose *at the time the communication was made*? Is the evidence sufficient to support a conviction where it shows that the defendant committed an immoral act several hours after making a communication to a minor, but there is no evidence that shows the existence of an immoral purpose at that time?
6. Did the refusal to permit cross examination of the alleged victim in a rape case regarding her laughing and giggling outside the courtroom during a court recess violate the defendant's Sixth Amendment right to cross-examination?
7. Did the refusal to permit cross-examination of a nurse regarding the frequency of positive findings of bodily secretions in sexual assault cases after the State had elicited testimony about such an examination violate the defendant's Sixth Amendment right to cross-examination?
8. Did the refusal to permit defense counsel to ask a nurse and a doctor whether the purpose for taking vaginal swabs included collecting samples for DNA testing violate the defendant's Sixth Amendment right to cross-examination?
9. The trial judge prohibited defense counsel from arguing in closing that the absence of DNA test results constituted a "lack of evidence" which supported a reasonable doubt. Did this violate either the defendant's Sixth Amendment right to effective assistance of counsel or his Fourteenth Amendment due process right to proof of every element of the charge?

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Gary Meredith was charged, tried, and convicted of Rape of a Child 2 and Communicating with a Minor for Immoral Purposes. CP 1, 108-111, 30, 31. When he failed to appear for sentencing and a bench warrant was issued. CP 184. He was subsequently apprehended and returned to Washington for sentencing, and received concurrent sentences of 198 months and 60 months. CP 70-80. This appeal followed. CP 103.

2. STATEMENT OF FACTS

a. Overview of Evidence Presented by Prosecution

The State presented testimony from four teenage girls regarding their contact with Meredith. Amanda Bevacqua was 13 when she first met him. RP V, 362, 365.¹ She was introduced to him by her friend Heather, who was 14, and she spent a couple of hours with him that day. RP V, 366. Bevacqua got Meredith's pager number from Heather and for the next several weeks she talked to Meredith on the phone probably once a day. RP V, 368. She would page him and he would call her back. RP V, 368. They talked about where she went to school, what she did, and "stuff like that." RP V, 369. Bevacqua said Meredith told her that he was 17.

On the evening of October 28th Bevacqua says Meredith expressed an interest in meeting her friends, and her friends wanted to meet him. RP

¹ There are currently eight volumes of trial transcripts which are referred to herein as follows: RP I – May 1, 1996; RP II – May 2, 1996; RP III – May 6, 1996; RP IV – May 7, 1996; RP V – May 8, 1996; RP VI – May 9, 1996; RP VII – Nov. 21, 2008. Appellant has recently ordered transcription of the jury voir dire and a supplemental volume of transcript will be filed with the Court as soon as it is done.

V, 371. When asked, "Why?" Bevacqua replied simply that it was "something to do." RP V, 371. Meredith spoke over the phone to Bevacqua's friends Bobbi Lopic (age 12) and Melissa Jacovus (age 14). RP IV, 244; RP III, 123. Lopic told Bevacqua that Meredith sounded cute over the phone and she wanted to meet him. RP V, 372.

The next day Bevacqua paged Meredith, he called her back, and at Lopic's suggestion he agreed to meet them at a Safeway in Puyallup near the Jacovus home where Bevacqua, Lopic, and another girl named Shyanne Thompson (age 13), had spent the previous night. RP III, 128, 188, 194; RP IV, 303; RP V, 373. Meredith showed up at the Safeway in a car driven by Jason Gross. RP III, 1291-130, 194; RP IV, 252-253.

Gross drove everyone to a nearby mall where Thompson, Lopic and Jacovus spent some time walking around while Meredith and Jason went somewhere else. RP III, 131, 195. Eventually the girls got something to eat at a Burger King. RP III, 131. The girls met up with the boys again, and then Gross drove all the girls back to Jacovus' house and dropped them off there. RP III, 132, 195-96; RP IV, 256. Plans were made to get together again later that evening to go to a party. RP IV, 258, 262; RP V, 376; RP VI, 523. They made arrangements to meet where Lopic's parents would not see the girls meeting the boys. RP IV, 262.

After watching TV, the four girls went to Lopic's house. RP III, 133, 197; RP IV, 256. They told Lopic's mother that they were going skating at a nearby rink, but instead of going there they met Meredith and Gross again and agreed to go with them to a party. RP III, 134-136, 197.

All of them knew that if their parents found out what they were doing they would be in trouble. RP III, 167. Gross drove to a liquor store somewhere in Tacoma where Meredith bought some wine and beer. RP III, 138, 200; RP IV, 264. From the liquor store Gross drove to Meredith's apartment in Tacoma. RP III, 139; RP IV, 265; RP V, 527.

Inside the apartment all of the girls consumed alcohol. Although Thompson said she only took a "sip," the other three girls all got pretty "wasted." RP III, 141, 174, 214. Lopic, who was later described by police as "slightly drunk," got intoxicated and left the living room and went into a bedroom. RP III, 146; RP IV, 239. Meredith went with her. RP III, 146. Ten or fifteen minutes later, Thompson opened the door to the bedroom and Jacovus claimed that she saw Meredith and Lopic, both naked, with Meredith lying on top of Lopic. RP III, 150. Jacovus then shut the door. RP III, 153. At some other point in time, Bevacqua said she opened the door to the room and saw Meredith on top of Lopic. RP V, 386. According to Bevacqua, Lopic then got dressed and left the bedroom, and Meredith followed her out. RP V, 389-390.

According to Lopic, inside the bedroom Meredith took her clothes off and asked her if she wanted to have sex with him. RP IV, 279. She was "halfway passed out" and pushed him away. RP IV, 279. According to Lopic, Meredith then had intercourse with her. RP IV, 280. Afterwards Lopic says she "went back to sleep." RP IV, 282. On cross-examination Lopic said passed out as a result of drinking alcohol. RP IV, 304-05.

Sometime later Lopic says she woke up and Meredith was gone, so

she dressed, left the room, and told Gross that she wanted to go home. RP IV, 283. Gross then drove the girls to a gas station in Puyallup. RP III, 155-156, 158. There the girls got a ride to the rink where they had told Lopic's mother they were going. RP III, 159-160, 210. Lopic says she sobered up on the ride to the skating rink. RP IV, 293.

The girls' parents were waiting for them at the rink, and they were upset and angry because their daughters had lied to them. RP III, 160, 211, 218; RP V, 394. Bevacqua said as soon as they saw the parents they knew they were caught. RP V, 393. Thompson got in trouble for what she did that night. RP III, 212. Lopic said her mother was angry at her, and her mother admitted yelling at her. RP IV, 294; RP V, 342.

The parents took their daughters to Jacovus' house. RP III, 161. During the car ride there, Lopic's mother asked Lopic if she had had sex with anyone and Lopic told her she had. RP IV, 295. When they arrived at Jacovus' house, Lopic's mother called the police and reported the incident. RP IV, 296. The responding officers took Lopic to a nearby hospital where she was examined by Dr. Bobbie Sipes. RP IV, 296.

b. Unsuccessful Defense Motion to Preclude Hearsay Testimony About Lab Report Regarding Sperm.

Prior to trial, Meredith's counsel moved in limine to preclude Dr. Sipes from testifying about a hospital lab report which stated that an examination of vaginal swabs taken from Lopic revealed the presence of nonmotile sperm. CP 126-127. Defense counsel noted in his motion that no DNA testing had been done to determine whether the sperm DNA

matched the defendant's DNA. CP 127. Moreover, although "Dr. Sipes did not conduct the microscopic examination . . . the State has indicated that they will offer the laboratory findings into evidence." CP 127.

In a prosecution for Rape of a Child sexual intercourse must be proved as an element of the charge. The lab report stated that sperm was found in the vaginal samples thereby proving the element of intercourse. Defense counsel argued that admission of this evidence through the doctor would "den[y] [Meredith] his due process rights set forth within the Fifth [sic] Amendment's Confrontation Clause" because it would "not provide an opportunity . . . to confront the individual who conducted the laboratory analysis." CP 129. In response, the prosecution argued that under existing case law it was entirely proper for Dr. Sipes, the doctor who did the physical examination of Lopic, to testify to the information that was contained in the hospital lab report, even though Dr. Sipes did not do the laboratory examination. RP I, 33. The trial court denied the defense motion to preclude Dr. Sipes from relaying such hearsay information, and ruled that she would be permitted to testify to the medical record created by the lab examiner because it qualified as a business record. RP I, 40-41.

Defense counsel then noted that "under the business records exception . . . certain criteria need to be established before the testimony may be or testimony should be allowed." RP I, 41. He asked the Court to require the State to make a proffer to establish that the report met the criteria for application of the business record exception to the hearsay rule and to give him a chance to voir dire Dr. Sipes on that foundational issue.

RP 41-42. The court declined to grant this request. RP I, 43.

c. Admission of Hearsay Testimony Regarding Hospital Lab Report Showing Presence of Human Semen.

During trial Dr. Sipes testified that she collected samples of vaginal secretions which she submitted to the hospital lab, and that she later “receive[d] a report back from the lab” about them. RP VI, 494-95, 501. When Dr. Sipes was asked if there “[w]ere there any significant findings from the lab report with respect to the samples?” she replied, “Semen was found in the secretion.” RP VI, 501. Dr. Sipes did not testify whether the report was made in the regular course of business, whether it was made at or near the time of the examination of the samples, who performed the exam, or whether that person was qualified.

On cross-examination Dr. Sipes testified that since semen can be found in “the vaginal vault up to three days following intercourse,” the presence of sperm could mean that intercourse had occurred as much as three days earlier. RP VI, 503. Defense counsel elicited the fact that the lab report indicated that the sperm cells seen were non-motile. RP VI, 503. Dr. Sipes acknowledged that she could not tell with “reasonable medical certainty” when this particular intercourse happened. RP VI, 503. Lopic told Dr. Sipes she *had* been previously sexually active. RP VI, 502.

d. Defense Theory of the Case

Meredith did not testify at trial but his roommate Jason Gross did. Gross denied that the purpose of the party that he brought the teenage girls to was to become romantically involved with them. RP VI, 533. Meredith

never expressed any interest in any of the girls to him; Gross never saw Meredith acting like he had any such interest; and Meredith never told him that he had had sex with Lopic. RP VI, 536-37, 539, 541.

The defense argued that Lopic and her friends were not telling the truth, and that Meredith never had any sexual contact with Lopic. Defense counsel argued that all of the girls had a motive to lie. RP VI, 576. They all knew they were in trouble with their parents because they had consumed alcohol, lied about where they were going and had gone off to party with two strange men in direct violation of the rules their parents had laid down for them. RP VI, 577-79.

The defense argued that the testimony given by the girls was not consistent. RP VI, 580, 583. For example, he noted that at one point Jacovus said that when she saw Meredith and Lopic in the bedroom, Meredith was on top of Lopic, but at another point she said Lopic was on top of Meredith. RP VI, 586. In addition, the defense noted that on the day in question all of the girls had lied to their parents and thus by their own admission acknowledged that they had been untruthful. RP VI, 591.

Defense counsel also noted that the hospital exam found non-motile sperm, and he argued that this was significant:

On cross-examination the doctor testified that well, this [sperm] can be expected under certain circumstances to live for up to 72 hours[.] [B]ased upon the report that we have from the doctor there is a question as to whether or not the report that Bobbi [Lopic] had made is something about engaging in sexual intercourse at this point in time. Or if backing it up sometime before that at some other point in time. We know that based upon the doctor's testimony she has been sexually active in the past and we also know that at this point in time when the examination is occurring

that Bobbi's mother is standing there or sitting there observing all of this. And I would expect that it might have been a bit of an embarrassment to her to acknowledge there had been some sexual activity whenever that might have occurred.

RP VI, 589.

Defense counsel suggested that Bobbi Lopic was trying to protect someone else with whom she had had intercourse:

[B]ased upon the witnesses['] testimony, that indeed there was the motive, that if Bobbi did engage in sexual intercourse that it wasn't with Gary Meredith. It wasn't as she testified on the stand. It was a situation to where perhaps she is trying to protect a party or whatever it might be.

RP VI, 595.

e. Prosecutor's Removal of Sole African-American Juror and Trial Judge's Refusal to Inquire as to Reason for Removal.

Jury voir dire took place on May 2, 3 and 6. CP 175-176. As noted in the Clerk's Journal entries, the parties exercised their peremptory challenges on the morning of May 6. CP 176. A morning recess was taken and when Court reconvened defense counsel Brett Purtzer made a *Batson* motion regarding the prosecutor's removal of 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.***

RP III, 106 (bold italics added) & CP 176. Purtzer argued that there was nothing in Currie's voir dire answers which 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." RP III, 107. "The only belief can be that she was removed because of her minority status . .

.” *Id.* He challenged the basis for the State’s use of a peremptory against Currie and moved for a mistrial. *Id.* at 108.

The prosecutor immediately responded that the defense had failed to make out a prima facie case of race discrimination, although he conceded that by removing Currie he appeared to have removed the only African-American from the jury panel:

MR. SCHACHT: ***Defense has completely failed to satisfy their burden of proof in a challenge.*** In my review of the case law, what they are required to prove is either A, that my office, the Pierce County Prosecutor’s Office, exercises peremptory challenges in a racially biased manner. Or B, that I, as a prosecutor in this case, have exercised a peremptory challenge in a racially biased manner. They, therefore, failed to show on either count where that’s the case. That is over and apart of the second inquiry as to whether I have reasons for excusing the juror over and apart from her race, and that’s the second half of the inquiry.

If the Court gets that far, that it finds that the defense has satisfied their burden of proof on that issue, ***the defense has not*** presented any evidence with respect to racial bias in the exercise of peremptory challenges by my office, nor have they ***presented any evidence other than to indicate that Ms. Currie appears to be African American, and he indicates that she appears to be the only African American in the panel.***

RP III, 108(bold italics added).

The prosecutor argues that even if he had removed the only African-American person from the jury, he had left “other racial minorities” on the panel, including a woman whom he said might be of “Southern European descent” or perhaps of “Middle Eastern” race:

That doesn’t exclude other racial minorities who did appear in 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. Frankly, we don’t have any information on the jury questionnaire as to the race of any of the jurors, so it’s

difficult to know who is and is not a racial minority.

RP III, 109 (bold italics added).

Finally, the prosecutor argued that since the defendant was not an African-American, and was not even a minority person, he could not make a *Batson* claim and thus the Court should not require the prosecutor to explain why he challenged Currie:

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

This 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 (bold italics added).

Defense counsel responded that whether the defendant was of the same race as Currie was irrelevant. RP III, 110. He noted that Currie was African-American and that “[t]here was no basis, other than her race . . . to exclude her,” since her voir dire answers did not indicate any tendency to favor either party. RP III, 110-111.

The trial judge agreed with the prosecutor that the removal of the sole African-American juror was not sufficient to establish a *prima facie* case of discrimination, and she did not require the prosecutor to disclose his reason for removing Currie with a peremptory challenge:

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 face case pattern of exclusion. This is under *Batson* and under *State v. Ashcroft*, even though from appearance she was the only black or African American juror on the panel. There being no other evidence, the Court denies the motion.

RP III, 111 (bold italics added).

D. ARGUMENT

1. THE REMOVAL OF THE ONLY AFRICAN-AMERICAN JUROR FROM THE PANEL ESTABLISHES A PRIMA FACIE CASE OF DISCRIMINATION. THE TRIAL JUDGE ERRED BY NOT REQUIRING DISCLOSURE OF THE REASON FOR THE CHALLENGE.

a. Hicks Holds That The Exclusion of One Minority Juror Can Make Out a Prima Facie Case of Discrimination.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court outlined a three step process for dealing with claims of race discrimination in jury selection. First, the challenger must “make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Id.* at 93-94. Second, “the burden shifts to the State to come forward with a neutral explanation” for its challenge. *Id.* at 97. Third, “[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.” *Id.* at 98. *Accord State v. Hicks*, 163 Wn.2d 477, 489, 181 P.3d 831 (2008). This case involves the first step of that process.

The *Hicks* Court analyzed three prior Court of Appeals' decisions

which “addressed whether excusing the only remaining African-American in the jury venire is sufficient to make out a prima facie case of discrimination.” *Id.* at 490. The Court found that the three cases were consistent with each other:

[A] closer look at these three cases shows that they actually articulate the same standard: trial courts are not required to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, ***but they may in their discretion, recognize a prima facie case in such instances.***

Hicks, 163 Wn.2d at 490 (bold italics added).

In *Hicks* the trial judge ruled “out of an abundance of caution, I find a prima facie case of discrimination,” and then elicited from the trial prosecutor an explanation as to why he removed the only remaining African-American juror from the venire. *Id.* at 484. In Meredith’s case trial judge *refused* to demand an explanation from the prosecutor because she concluded that as a matter of law the removal of one African-American from the venire could not meet the prima facie standard:

The fact that there has been an exclusion of a single black juror is insufficient to establish a prima face case pattern of exclusion.

RP III, 111. Thus the trial judge expressed her view that the law required a pattern of racially motivated peremptory challenges and that such a pattern necessarily required removal of more than one black juror.

This ruling is in direct conflict with *Hicks* which holds that the exclusion of a single African-American juror *may* be sufficient to satisfy the first step of the *Batson* inquiry. It is also in conflict with *Batson*’s express recognition that even “[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 *Arlington Heights v. Metro Housing Development*, 429 U.S. 252, 266 n. 14 (1977).

b. Several Courts Have Held That Whenever The Sole Remaining Minority Person is Removed From the Jury, A Prima Facie Case is Always Established.

Although the State removed only *one* African-American juror, she was the *only* African-American juror on the panel. The trial court judge failed to note this fact. Several courts have held that if the State removes the only minority juror, or the last minority juror on the panel, that alone is sufficient to make a prima facie case of discrimination.²

c. A Defendant Need Not Show That Purposeful Discrimination is More Likely Than Not.

In *Johnson v. California*, 545 U.S. 162 (2005) the Court clarified that the threshold level for establishing a prima facie case of race

² See, e.g., *Hollamon v. State*, 312 Ark. 48, 53, 846 S.W.2d 663 (1993)(defendant "clearly did" make prima facie showing "when he pointed to a peremptory strike by the state dismissing the sole black person on the jury"); *People v. Portley*, 857 P.2d 459, 464 (Colo. App. 1993)("we disagree with the trial court's implicit determination that *Batson* requires challenges be exercised against more than one prospective juror"); *Reynolds v. State*, 576 So.2d 1300 (Fla. 1991)("trial court erred in not asking the state to account for its peremptory strike of the only minority venire member. The act of eliminating all minority venire members, even if their number totals only one, shifts the burden to the state to justify the excusal upon a p[roper] defense motion."); *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004)(the removal of the only African-American juror on the panel standing alone establishes a prima facie case); *Commonwealth v. Harris*, 409 Mass. 461, 567 N.E.2d 899 (1991)("The defendant made a prima facie showing that the challenge was improper by pointing out that the challenged person was the only black person on the venire"); *State v. Henderson*, 94 Or. App. 87, 89, 764 P.2d 602 (1988)(same); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987)(prima facie case established "even though we are here concerned with only a single juror").

discrimination is quite low. *Johnson* rejected California’s rule that in order to establish a prima facie case the accused must show that it was “more likely than not” that the prosecutor’s peremptory challenges were racially motivated holding this was not “an inappropriate yardstick by which to measure the sufficiency of a prima facie case.” *Id.* at 168. “[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives ‘rise to an inference of discriminatory purpose.’” *Id.* at 169.

The three step *Batson* framework “is designed to produce actual answers to *suspicious and inferences* that discrimination may have infected the jury selection process.” *Id.* at 172 (bold italics added). When the prosecutor removes the sole African-American juror from the panel, and the juror’s voir dire answers do not furnish any apparent reason other than race for objecting to the juror, a reasonable inference of race discrimination exists and a prima facie case has been made. Meredith’s trial judge erred when she concluded that the defense had not carried its burden because it had not “proved” the State’s challenge was racially motivated. At this first stage the defense merely had to identify circumstances which supported an “inference” of race discrimination.

d. The Defendant Need Not Be The Same Race as The Excluded Juror. Racial Discrimination In Jury Selection Harms the Excluded Juror and the Community At Large.

The prosecutor’s statement that the defendant must be of the same race as the excluded juror is simply wrong. In *Powers v. Ohio*, 499 U.S.

400 (1991), the Court rejected the “same-race” argument:

Because Powers is white, the State argues he cannot object to the exclusion of black prospective jurors. This limitation on a defendant’s right to object conforms neither with out 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 406.³

Both a white defendant and the community at large are harmed when racial discrimination infects the process of jury selection. *Powers*, 443 U.S. at 411.⁴ *Accord Batson*, 476 U.S. at 87. *Powers* expressly rejected the “must-be-of-the-same race” argument so Meredith had standing to make a *Batson* challenge.⁵

e. Prosecutors Often Volunteer Their Reasons For a Challenge Before the Trial Judge Orders Them to Explain. In This Case, The Prosecutor Immediately Asserted That He Should Not Have to Disclose His Reason.

³ *Accord Campbell v. Louisiana*, 523 U.S. 392, 397-402 (1998)(white defendant has standing to challenge racial exclusion of African-Americans from grand jury). The *Powers* Court noted that *Batson* “was designed to serve ‘multiple ends’ only one of which was to protect individual defendants from discrimination in the selection of jurors.” *Id.* quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986). “*Batson* recognized that a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors and the community at large.” *Powers*, 499 U.S. at 406.

⁴ “The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. [Citation]. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather it is because racial discrimination in the selection of jurors “casts doubt on the integrity of the judicial process,” [Citation], and places the fairness of a criminal proceeding in doubt.”

⁵ In *Georgia v. McCollum*, 505 U.S. 42, 56 (1992), the Court held that the prosecution had standing to complain that a criminal defendant was using his peremptories in a discriminatory manner to remove black jurors. The State has standing to assert the rights of the improperly excluded jurors even though “the State” is not a natural person and not a member of *any* race.

When a prosecutor is required to disclose his reasons for challenging a juror, he seldom gives up much of any strategic or tactical importance. For example, if the true reason for a challenge is that the juror was a teacher or a socialworker, what loss has the prosecutor suffered by being required to disclose this fact?⁶

Prosecutors frequently volunteer their race-neutral reasons *before* the trial judge has made any ruling on whether a prima facie case of race discrimination has been established. For example, in *Hernandez v. New York*, 500 U.S. 352 (1991), after the defense raised its *Batson* objection “the prosecutor did not wait for a ruling on whether petitioner had established a prima facie case of racial discrimination. Instead, the prosecutor volunteered his reasons for striking the jurors in question.” *Id.* at 356. The Court noted that in concluding that the prosecutor had a legitimate race-neutral reason for his challenges, the trial judge may have properly relied in part upon the fact “that the prosecutor defended his use of the peremptory challenges without being asked to do so.” *Id.* at 369.

In the present case, the converse is true. The fact that the prosecutor strenuously urged the trial judge *not* to require him to disclose the reason for his challenge⁷ strongly suggests that he *did* have a

⁶ These were the race neutral reasons offered by the State in *Hicks*. The *Hicks* trial judge immediately remarked that he had a book on jury selection on his shelf that endorsed the view expressed by the prosecutor that educators and social workers make bad jurors for the prosecution. *Hicks*, 163 Wn.2d at 485. Since this kind of generalized statement about the proclivities of certain types of people to favor one side or the other in criminal cases are well known to attorneys and judges, requiring the prosecutor to disclose his reason for challenging the juror seldom imposes any real cost on the prosecution.

⁷ “I urge the Court not to require me to state for the record what my reasons are for excluding Ms. Currie . . .” RP III, 110.

discriminatory purpose and did not want to have to come up with a pretextual race neutral explanation.

As the Court noted in *Johnson*, the *Batson* process is designed to *produce an actual record* so that courts do not have to engage in speculation as to what legitimate race-neutral reason the prosecutor might have had. It is easy to avoid this problem by simply demanding that a race-neutral reason be articulated. Demanding that some reason be given also prevents the fostering of public distrust of the criminal justice system.

f. The Prosecutor's Comment That He Left a Juror of "Southern European" or "Middle Eastern" "Descent" On the Jury Shows a Perverse Focus on Skin Color.

In the present case, although the prosecutor declined to volunteer any reason for having removed the sole African-American juror, he did make a strange statement which demonstrates that the matter of race was clearly on his mind. He told the trial judge that he left "other racial minorities" on the panel, and in support of this assertion he identified a woman in the back row who appeared to be "of Southern European descent, whatever race, or perhaps even Middle Eastern." RP III, 209.⁸

⁸ Race is an artificial concept created by culture; it is not a biological reality. "As a biological rather than a social construct, "race" has ceased to be seen as a fundamental reality characterizing the human species." R.C. Lewontin, "Confusion About Human Races," (June 7, 2006) <http://raceandgenomics.ssrc.org/Lewontin/>. See also the American Association of Anthropologists, Statement on Race (May 17, 1998): "[I]t has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups." <http://www.aaanet.org/stmts/racepp.htm>.

Culturally, however, human beings have been classified under various labels. Sometimes these labels use "color" (e.g., white, black, yellow), sometimes they use pseudo-scientific terms (Caucasian, Negroid, Mongolian), and sometimes they use geographic terms (African-American, Asian-American, European-American).

It is not clear what kind of people fit within the prosecutor's conceptual category of "southern Europeans. As defined by the United Nations the term includes Italians, Greeks, Spaniards, Portuguese, Serbians, and people living in the countries that border the Adriatic Sea. http://en.wikipedia.org/wiki/Southern_Europe.

The "Middle East" is a geographic term that refers to "a region that spans southwestern Asia, southeastern Europe, and northeastern Africa. It has no clear boundaries, often used as a synonym to Near East, in opposition to Far East." http://en.wikipedia.org/wiki/Middle_East. Thus, it is somewhat bizarre to refer to a person from the "Middle East" as a "racial minority," but apparently the prosecutor considered "Middle Easterners" to be a racial group.

The prosecutor's strange comments demonstrate that the concept of race was on his mind at the time the defense questioned his exercise of a peremptory challenge against Currie. His response was a non sequitur. When it was suggested that he removed Currie because of her race, he replied that he left people of different "racial minorities" on the jury. This response seems to confirm, rather than dispel, the suspicion that he had a racially motivated reason for removing Currie from the jury.⁹

⁹ There appears to be a pattern of racial discrimination by the Pierce County Prosecutor's office as a whole. In the past decade there have been at least ten cases originating in Pierce County which involved a *Batson* claim of racially motivated exercise of peremptory challenges. *State v. Thomas*, ___ Wn.2d ___ 208 P.3d 1107 (2009); *State v. Sadler*, 147 Wn. App. 97, 193 P.2d 1108 (2008); *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008); *State v. Nunn*, 140 Wn. App. 1032 (2007)(unpublished); *State v. Rhone*, 137 Wn. App. 1046 (2007)(unpublished), *rev. granted* ___ Wn.2d ___ (2008); *State v. Titalli*, 129 Wn. App. 1036 (2005)(unpublished); *State v. Williams*, 119 Wn. App. 1044 (2003)(unpublished); *State v. Jalothot*, 117 Wn. App. 1086 (2003)(unpublished); *State v.*

2. THE FACT THAT THE PROSECUTOR MAY HAVE LEFT SOME OTHER MINORITY JUROR ON THE JURY IS IRRELEVANT.

Assuming, *arguendo*, that there was someone else in the jury box who *was* a “minority” person but who was *not* an African-American, that does not mean that the removal of the one African-American juror in the jury box did not establish a prima facie case. The prosecutor seemed to believe that as long as at least one “racial minority” person was left on the jury, it was permissible for him to deliberately remove other minority persons because of their race. But this is incorrect. The removal of even one person for racial reasons violates the equal protection clause.

A racially motivated challenge victimizes the individual juror who was improperly excluded. As the Supreme Court has noted:

As long ago as *Strauder* this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. [Citation]. While “[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race.”

Georgia v. McCollum, 505 U.S. 42, 48-49 (1992).

The improper exclusion of one minority person is not “cured” by the fact that some other minority person remained on the jury. *See, e.g., People v. Baker*, 558 N.Y.S.2d 44, 45 (1990) (inclusion of one black alternate juror does not negate the prima facie case). Therefore, even if an African-American juror has remained on Meredith’s jury, the removal of

Dial, 115 Wn. App. 1037 (2003)(unpublished); *State v. Nordlund*, 113 Wn. App. 1033 (2002)(unpublished). No other county prosecutor’s office appears to have generated as high a number of *Batson* challenges.

Currie for racial reasons still constitutes an equal protection violation. As the Supreme Court of Connecticut noted:

[U]nder *Batson*, the striking of even one juror on the basis of race violates the equal protection clause, even when other jurors of the defendant's race were seated and even when valid reasons for striking some of the jurors of defendant's race were shown.

State v. Gonzalez, 206 Conn. 391, 400, 538 A.2d 210 (1988).

3. REVERSAL SHOULD BE REQUIRED WHERE THE STATE REFUSES TO OFFER ANY EXPLANATION FOR ITS REMOVAL OF A JUROR. REMAND FOR AN EVIDENTIARY HEARING EVISCERATES THE ART. 1, § 22 RIGHT TO AN APPEAL.

Batson establishes a rule of *per se* reversal for those cases where the prosecutor's explanation for his peremptory is unconvincing and the Court determines that the real reason is race discrimination: "If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that the petitioner's conviction be reversed." *Batson*, 476 U.S. at 100.

However, in those cases where the trial judge erroneously declined to find a *prima facie* case, and thus failed to order the prosecution to offer a race-neutral reason, the record does not contain anything for the courts to review. In this situation, some courts have concluded that the appropriate response is to remand for an evidentiary hearing, with directions that to order a new trial if the prosecutors explanation is determined to be a pretext for race discrimination. Appellant submits, however, that Washington courts should not follow this path. Instead,

because criminal defendants have a constitutional right to an appeal under art. 1, § 22, they should be entitled to a reversal and a new trial.

Under the Washington Constitution, a defendant has a fundamental constitutional right to an appeal which “is to be accorded the highest respect.” *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). *Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). Under normal circumstances, the party appealing has the burden of presenting the appellate court with an adequate record so that the appellate court can decide the issues raised. *See, e.g., State v. Garcia*, 45 Wn. App. 132, 140, 724 P.2d 412 (1986)(failure to include photographs in appellate record); *State v. Armstrong*, 91 Wn. App. 635, 639, 959 P.2d 1128 (1998)(failure to include presentence report in record on appeal).

In *Batson* cases, however, the defendant does not have the power to place in the record the prosecutor’s professed reason for exercising a peremptory challenge. Only the prosecution can do that, and that is precisely why the Supreme Court’s decision in *Batson* places the responsibility for creating an adequate record on this particular issue on the State. Once a prima facie showing has been made, “*the burden shifts to the State* to come forward with a neutral explanation for challenging” the juror. *Batson*, 476 U.S. at 97 (italics added).

When the State refuses to offer any explanation for a challenged peremptory, the State precludes the defendant from presenting the appellate court with a complete record for appellate review. If the State is allowed a second chance to come up with a race-neutral explanation at a

remand hearing then the State will be better able to disguise racially motivated peremptories, and will often benefit by prolonging the day of reckoning. By lengthening the period of time it takes to prosecute the appeal to conclusion, the period of the defendant's incarceration under a judgment that may eventually be reversed will be prolonged. Moreover, a remand hearing will afford the State years of time in which to think up some plausible race-neutral explanation which it could not have come up with on the spur of the moment in the midst of jury selection.

If the constitutional right to an appeal is to be an effective remedial tool for a convicted defendant, it should not be something which the State can stretch out for years simply by virtue of refusing to explain its actions. Moreover, when the State refuses to voluntarily offer a race-neutral explanation and the trial judge declines to order it to do so, the State assumes the risk that the trial judge's ruling will be reversed and that the record on appeal will not contain anything that will permit the appellate court to find that the State has carried its burden under *Batson* of providing such an explanation. In sum, while the defendant normally has the burden of providing a complete appellate record, that rule should be reversed where the claim is one of *Batson* error. Since only the State can provide the explanation and thus complete the record, the State's deliberate refusal to provide such a record should not be rewarded by giving the State a second chance to come up with an innocent explanation of its conduct. Instead, since the equal protection clause places the burden of providing such an explanation on the State, its failure to carry that

burden should result in a reversal. Any other result diminishes the protection provided by the state constitutional right to an appeal.

4. THE ADMISSION OF THE HEARSAY REGARDING THE FINDINGS OF THE LABORATORY EXAMINATION OF THE VAGINAL SAMPLES VIOLATED THE RIGHT TO CONFRONTATION.

a. Crawford Drastically Changed the Rules Regarding the Confrontation Clause and the Admission of Hearsay.

The trial in this case took place before the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which drastically changed the law pertaining to the admission of hearsay in a criminal trial. *Crawford* overruled *Ohio v. Roberts*, 448 U.S. 56 (1980) and “rejected [the] theory that unopposed testimony was admissible as long as it bore indicia of reliability.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2533 (2009). In its place, *Crawford* adopted a *per se* rule prohibiting the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination.” 541 U.S. at 54.

Crawford requires courts to determine whether the witness’ statement is “testimonial.” A statement is testimonial if it is made under circumstances where one “would reasonably expect [it] to be used prosecutorially.” *Id.* at 52. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court considered statements made to a 911 operator and other statements made to police officers arriving at the crime scene. The Court held that the statements made to the 911 operator while there was an

ongoing emergency were not testimonial, but that the statements made to officers after the emergency had ended were testimonial. Statements “are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 822.

b. **The Supreme Court Recently Held The Admission of Statements By Forensic Scientists Violated the Confrontation Clause Because They Were Testimonial.**

In its most recent post-*Crawford* decision, the Supreme Court held that the admission of written certificates from forensic scientists violated the Confrontation Clause where the scientists themselves did not testify at trial and thus were not available for cross-examination. In *Melendez-Diaz*, the scientists executed affidavits “reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine.” 129 S.Ct. at 2530. The Court held that these affidavits “were testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.” *Id.* at 2532.

The State of Massachusetts “advance[d] a pot pourri of analytic arguments in an effort to avoid this rather straightforward application of [the] holding in *Crawford*,” and the *Melendez-Diaz* Court rejected all of them. *Id.* at 2532-33. Massachusetts argued that only “accusatory” witnesses who “directly accuse” the defendant of criminal wrongdoing are covered by the Sixth Amendment, but the Court held that the Sixth Amendment applies to all witnesses against the defendant. Just as the

forensic analyst in *Melendez-Diaz* provided testimony of a fact essential for conviction – that he possessed cocaine – the lab analyst in this case provided testimony that someone had sexual intercourse with Lopic, a fact essential for conviction in a prosecution for Rape of a Child where intercourse is an element of the offense. The Court also rejected the contention that only “conventional” witnesses who are recalling events observed in the past are subject to the Confrontation Clause, noting that under this theory a police officer’s investigative report describing the crime scene as he found it after the crime had been committed and the criminal had left would be exempt from coverage of the Sixth Amendment. *Id.* at 2534-35.

The Court rejected the argument that the Confrontation Clause did not apply to testimony relating to “neutral, scientific testing” stating that scientific testing is not always “neutral,” that forensic evidence is not immune from “the risk of manipulation,” and that cross-examination “is designed to weed out not only the fraudulent analyst but the incompetent one as well.” *Id.* at 2536.

Finally, the Court rejected the contention that the forensic reports were akin to business records which were admissible at common law, stating that the analysts’ affidavits “do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.” *Id.* at 2538. The Court refused to “relax the requirements of the Confrontation Clause to accommodate the ‘necessities of trial and the adversary process,’” noting that while producing scientific

witnesses in court for live testimony “may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience.” *Id.* at 2540.

c. **State v. Hopkins Held That It Violates the Confrontation Clause To Allow a Doctor to Relate the Substance of a Report Authored By A Nurse Regarding the Nurse’s Examination of an Alleged Child Victim of Sexual Assault.**

In *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006), this Court found a Sixth Amendment violation under extremely similar circumstances. There the defendant Hopkins fell under suspicion of having sexually molested 13 year old K.R. Police “referred K.R. to the sexual assault clinic at St. Peter Hospital in Olympia.” *Id.* at 784.

Nancy Young, a nurse practitioner, examined K.R. and produced a report. Young had a family emergency, however, and did not testify at trial. Dr. Deborah Hall, her supervisor, testified instead, relating the contents of Young’s report to the jury. In the report, Young documented that K.R. admitted that Hopkins had performed oral sex on her. Dr. Hall then testified that the physical exam was normal but consistent with the reported sexual activity.

Hopkins, 134 Wn. App. at ¶ 7.

Hopkins claimed “that the trial court erred in allowing Dr. Hall to testify about Nancy Young’s examination of K.R.” *Id.* at ¶ 20. This Court agreed, holding that Young’s report did not meet the requirements for admission as a business record. *Hopkins*, at ¶ 27.¹⁰ Moreover, this Court

¹⁰ “Hopkins correctly points out that the State failed to establish the necessary prerequisites for the business record exception. Dr. Hall did not testify how the reports were made or whether they were made in the regular course of business. While the State

held that “[e]ven if the State had laid the proper foundation for the business records exception, this report constituted testimonial hearsay and therefore was inadmissible under *Crawford*.” *Hopkins*, at ¶ 29

Here, Young, created her report under circumstances that would lead an objective witness to believe that the statements would be available for use at a later trial. Under RCW 26.44.030(1)(a), medical providers are required to file reports with the proper law enforcement agencies where they have reasonable cause to believe that a child has suffered abuse or neglect. And in this case, law enforcement agencies referred K.R. to Young for investigation of sexual abuse, so that Young knew that there was an ongoing legal investigation. . . .

Hopkins, 134 Wn. App. at ¶ 32.

d. Under the Circumstances of This Case, The Conclusions of the Scientist Who Examined the Vaginal Secretions were Testimonial Because it was Reasonable to Expect that the Test Results Would be Used Prosecutorially.

Here, as in *Hopkins*, the lab report was created under circumstances that would lead an objective person to believe that the report would be available for use at a later criminal trial. As in *Hopkins*, the child was referred to the hospital in question by the police. Lopic herself testified that it was “the cops” who “decided to take me to the hospital,” and that she talked to police officers there. RP VI, 296. Here, as in *Hopkins* the hospital was dealing with a 13 year old referred to them by law enforcement for having had sexual contact with an adult, triggering the same statutory duties as those in play in *Hopkins*.

is undoubtedly correct that medical records can be admitted under the business records exception, the State is not excused from laying the appropriate foundation.” This Court also noted that the exception did not apply in any event because “[w] here the preparation of a report requires the exercise of the declarant’s skill and discretion, the business record exception does not apply.” *Hopkins*, at ¶ 28.

Exactly as in *Hopkins* the trial court permitted a physician to relate what was in the report of another medical professional. Here, as in *Hopkins*, “[t]he trial court erred in allowing [the doctor] to relate [the pathology lab’s] report to the jury in violation of [Meredith’s] confrontation rights.” *Id.* at ¶ 33.¹¹

5. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR COMMUNICATION WITH A MINOR FOR AN IMMORAL PURPOSE.

a. There Must Be Some Evidence That an Immoral Purpose Existed At the Time of the Communication. Evidence That It Existed Several Hours Later Is Not Sufficient.

The amended information which charged Meredith violating RCW 9.68A.090 alleged that “on or about the 29th day of October, 1994,” Meredith “communicate[d] with A.B., a child under the age of 18 years for immoral purposes . . .” CP 109. At the time of the alleged offense that statute provided in pertinent part:

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

In *State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993), the Supreme Court construed the term “immoral purposes” to mean “immoral purposes of a sexual nature.” The word “purpose” demonstrates that the crime is only committed if the defendant possesses the requisite criminal intent or *mens rea*. In the reported cases involving this statute and its predecessor, the requisite intent generally has not been in dispute since the

¹¹ In *Hopkins* this Court held that the error was harmless beyond a reasonable doubt, noting that the evidence included the defendant’s confession given to law enforcement. There was no confession in this case.

words used by the defendant were explicitly sexual in nature and were directed at young girls.¹² In the present case, however, the defendant's intent or purpose when he spoke to Amanda Bevacqua was very much in dispute and there was no evidence that any words referring to sex were spoken. Of course, it is not necessary that *any* words be actually spoken since communicating includes conduct as well as words. *State v. Pietrzak*, 100 Wn. App. 291, 997 P.2d 947 (2000)(photographing 16 year old niece in the nude). Thus, if a defendant conveys a message of a sexual nature by *nonverbal* means, such as by hand gestures, that can also suffice to prove the requisite criminal sexual purpose. But there must be some evidence of a sexual purpose or else there is no criminal offense.

In this case, the prosecution's theory was that even though Meredith never spoke a word about sexual activity to Bevacqua, his sexual purpose at that time was manifested by his subsequent conduct in having sexual intercourse with Lopic later on the evening of that same day. See RP VI,560-563. In closing the prosecutor asked the jury a series of rhetorical questions:

[W]hat is really at issue in the [communicating with a minor] charge is what was the defendant's purpose in doing what he did that day. And in the days previous to that, what is his purpose in communicating back and forth with Amanda [Bevacqua]. What is his purpose in meeting Amanda through another 15 year old girl, Heather. What is his purpose for keeping in touch with her in [sic]

¹² See, e.g., *McNallie*, 120 Wn.2d at 926 (defendant asked girls if there was anyone in the area who gave hand jobs); *State v. Hosier*, 157 Wn.2d 1, 133 P.2d 936 (2006)(defendant wrote paper notes referring to having sex with a young girl and "a message fantasizing about sexual contact with a seven year old girl" on the back of a pair of pink children's underpants); *State v. Schimmelpfennig*, 95 Wn.2d 95, 594 P.2d 442 (1979)(asking 4 year old girl "in explicit terms to engage in various sexual acts with him").

what is his purpose in coming all the way from Tacoma up to Puyallup to meet these four girls. What is his purpose in going to the Safeway store? What is his purpose for having them all pile into the car and go with him to the mall? What is his purpose in going for fast food? What is his purpose for making arrangements with them to meet them later that night?

RP VI, 560-61.

The prosecutor's theory of the case was retrospective in nature: since he wound up having sex with Lopic (according to Lopic), and since sex followed talking, walking, eating, drinking, and partying with her, that purpose must have been present from the very start:

Now, *what we are focusing on here in this charge is purpose, his purpose in doing everything that he did and consider what he did*, he bought them alcohol, he took them to his apartment, he went all the way out to Puyallup, he communicated with them. He is staying in touch with the young teenage girls.

He is a 24 year old man, what is his purpose in doing that? Well, at the first opportunity he effectuated his purpose. *That purpose was to have sex with a young girl and you can see that from the course of events that led up to what happened with the rape*, that is why we are talking about the communication with a minor before we get to the rape, because its leading up to the rape. It's what happens with the defendant. It's what he was guilty of before the rape happened.

RP VI, 562.

But the obvious logical flaw in this argument is that there is no evidence to show that a purpose to have sex was present *at the earlier time of the phone conversation* with Bevacqua. It is equally possible that the purpose to have sex did not develop until all the parties were present at Meredith's apartment later that evening and then not until Lopic decided

to go into Meredith's bedroom.¹³

In the present case, the evidence was that after Lopic told Bevacqua that she thought Meredith "sounded cute," *Lopic* got the idea to contact Meredith the next day and make arrangements to meet him. RP V, 372-73.¹⁴ Moreover, after walking around the mall and then being dropped off by Meredith and Gross, it was the girls' idea to get back together with the boys: RP V, 375.¹⁵

Defense counsel, in his closing, pointed out that there was *nothing* in the testimony of Bevacqua that even remotely implied any sexual purpose whatsoever *at the time he spoke to her on the phone* to arrange their first meeting and trip to the mall:

To say that well, there has been a claim that some sexual misconduct occurred and that there was, that they were together, it's for that reason therefore contact for immoral purposes begs the question. *The question is whether or not there was any communication of an immoral purpose and whether that was communicated to Amanda Bevacqua and there is no evidence at*

¹³ It is obviously *not* true that every time a man agrees to meet with a woman that he intends to have sex with her later that day or night. Nor is it true that every time a man talks with, eats with, or drinks alcohol with, a woman, he is acting pursuant to a plan to have sex with her later that evening. That *may* be true in some cases; it is clearly not true in all cases.

¹⁴ "Q. Did you end up setting up that meeting? A. I think it was me and Bobbi together that set it up. Q. Okay. *Did Bobbi express an interest in the Defendant?* A. *She said he sounded cute on the phone. She wanted to meet him but that was about it.* Q. Okay. Now, after the phone calls the night before, did you go about setting up a meeting between the group of girls and the defendant? A. Yeah. *I think Bobbi was the one that set it up of where we were going to meet her but I am not the one that said we wanted to meet him.* Q. *Bobbi said let's meet someplace and then you communicated that?* A. *Yes.* Q. Tell us how that – how you ended up arranging that meeting? A. We decided that she [sic] was going to meet us at Safeway, which was in front of the house that we were staying at. And we went out in front and waited for him, and that he picked us up." (bold italics added).

¹⁵ "The girls wanted me [Beveracqua] to spend the night with them, so that we could get back together with Gary [Meredith] and do something later on that night."

all. In fact, try as the State might to get her to say something, was there any communication, was there any communication, was there any sexual advances towards you, her response consistently was no. No means no. ***In this particular time there was no communication for any immoral purposes,*** any sexual purposes, any purpose whatsoever.

RP VI, 593 (bold italics added).

The prosecution simply ignored the temporal aspect of the case. There was no evidence to indicate that an intent to have sex was present *at the time* of the conversation with Bevacqua. Since the statute criminalizes communication “for” immoral purposes, it is clear that the immoral sexual purpose must be present *at the time the communication is made*. If there is no such sexual purpose *at that time* then the communication cannot possibly be said to have been “for” an immoral purpose.

The Supreme Court made a similar ruling in *State v. Lilyblad*, 163 Wn.2d 1, 177 P.3d 686 (2008), a case involving the offense of telephone harassment defined by RCW 9.61.230(1). That statute provides that: “Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone phone call to such other person . . . threatening to inflict injury on the person . . . is guilty of a gross misdemeanor . . .” The Court held that the language of the statute clearly showed that the crime of telephone harassment was not committed unless the defendant “form[ed] the specific intent to harass at the time the defendant initiate[d] the call” to the victim. *Id.* at ¶¶ 1, 16.¹⁶

¹⁶ In *Lilyblad* the defendant placed a phone call to the home of her sons’ paternal grandmother; one of her sons answered the call; the defendant instructed her son to give the phone to the grandmother and while speaking to the grandmother an argument ensued and the defendant wound up threatening to have the grandmother killed.

The Court held that the statutory clause “with intent to harass, intimidate, torment or embarrass any other person” completed the meaning of the main clause “every person who . . . shall make a telephone call to such other person.” *Id.* “Reading the verb ‘to make’ in association with ‘a telephone call’ clarifies the temporal scope of the act described in the statute.” *Id.* at ¶ 18. “We hold that the crime of telephone harassment requires proof that the defendant formed the intent to harass the victim at the time the defendant initiates the call to the victim.” *Id.* at ¶ 25.

The same type of analysis leads inexorably to the conclusion that to commit the crime of communicating with a minor for immoral purposes, the immoral purpose must exist “at the time” the defendant communicates to the minor in question. The phrase “for immoral purposes” comes immediately after the phrase “every person who communicates with a minor” and “completes the meaning of the main clause,” just as “with intent to harass” completed the meaning of the main clause in the telephone harassment statute. *Id.* at ¶ 16. The phrase “with intent” is synonymous with the phrase “for the purpose.” The preposition “for” links the verb phrase “communicates with a minor” to the intent phrase “for immoral purpose.” If the immoral purpose does not arise until after the communication is completed, then the communication cannot possibly have been “for” that immoral purpose.

b. There is No Evidence That Meredith Had an Immoral Purpose In Mind When He Spoke to Bevacqua and Arranged to Meet The Girls and Go to the Mall.

In this case it was undisputed that (1) the defendant never made any reference to sex during his phone conversation with Bevacqua; (2) Bevacqua paged him to get him to call her and thus he did not even initiate the communicative contact; (3) it was Lopic's idea to get together with Meredith; (5) Meredith did go with Gross to meet Bevacqua's friends; (6) he did spend part of the afternoon with them at a shopping mall; and (7) that the girls decided that arrangements should be made to get together again that evening. When they did get together again later that evening, the only testimony about the specifics of any "plan" was that the Gross and Meredith would take the girls to a party somewhere. RP IV, 258.

The prosecutor argued that it could be inferred that Meredith had been planning all along to have sex with one of the girls. He suggested that Meredith's entire purpose for getting together with the girls at the mall in the afternoon was to groom one of them for eventual sexual contact later that night.

While it is *hypothetically possible* that Meredith had such a plan, there is absolutely no evidence of it. The evidence at trial was that Meredith met Bevacqua in September sometime, and that he spoke to her on the telephone frequently between then and October 29th. Thus, it is also *theoretically possible* that Meredith had a plan to have sex with Bevacqua or one of her friends from the very moment he was first introduced to her. But there is no *evidence* of that either.

There certainly was testimony from which a rational jury could infer that at some point in time on October 29th Meredith formed the

specific intent of having sex with Lopic. But there is no evidence to indicate whether that intent was formed (a) at the shopping mall during the afternoon; or (b) while they were driving to the liquor store later that evening; or (c) while they were talking and drinking in the living room of Meredith's apartment; or (d) when Meredith went into the bedroom where Lopic had gone to lie down. And there is not even a scintilla of evidence to indicate that when Meredith returned Bevacqua's page and agreed with her suggestion that he come and meet her friends that he had the specific purpose in mind *at that time* of having sex with her friend Lopic. (At this point in time he had never even *met* Lopic in person).

In deciding a challenge to the sufficiency of the evidence the test is whether the evidence, viewed in the light most favorable to the State, could induce any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Myles*, 127 Wn.2d 897, 816, 903 P.2d 979 (1995). Even under this very lenient test the evidence in this case must be found insufficient as a matter of law because there was no evidence to establish the *temporal* element of the offense – there was nothing to show that *at the time* of his phone conversation with Bevacqua the defendant was communicating with an immoral purpose in his mind.

There was simply no evidence at all of the existence an immoral sexual purpose *at the time* the defendant communicated with Bevacqua. Because there was legally insufficient evidence that the requisite *mens rea* element existed at the moment of communication, the conviction for communicating should be reversed and the charge dismissed. *Cf. State v.*

Hyunh, 107 Wn. App. 68, 26 P.3d 290 (2001)(insufficient evidence that the defendant's purpose was to deliver the drugs he possessed).

6. BY PROHIBITING DEFENSE COUNSEL FROM QUESTIONING LAPIC ABOUT HER LAUGHING AND GIGGLING BEHAVIOR IN THE HALL OUTSIDE THE COURTROOM, THE TRIAL COURT VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION.

During trial the court took a recess between the end of the direct examination and the beginning of the cross-examination of the complaining witness Bobbi Lopic. When the recess ended and cross-examination began, defense counsel asked her about her behavior during the break and drew a "relevance" objection which was sustained:

Q. Bobbi, at the break the Court just took, *were you laughing and giggling outside the courtroom?*

A. Yes.

MR. SCHACHT: Objection. Relevance.

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

RP IV, 299.

Later, at the very outset of his closing argument, the prosecutor commented at length on Bobbi Lopic's courtroom demeanor when she testified about the sex she allegedly had with the defendant:

Returning with me to Bobbi Jo being on the stand, we had gone through the chronology of what happened. We had come up with the way down to the bedroom. She was lying on the bed and she – we were getting close to the crux of what this case is about. The crux of what happened to her and then the question and answer with Bobbi Jo it came extremely difficult for her to testify and it

went into like this. . . . Bobbi Jo, what happened next. She was sitting there in the witness stand. She was looking down like this. There was silence, dead silence. And I, as the lawyer, was hoping that she would answer the question so we don't have to go through it anymore than we have to. But she can't answer the question.

RP VI, 557-558.¹⁷

The prosecutor argued that Lopic's courtroom demeanor showed that she was telling the truth:

Is it someone who made this up? Was this someone who cooked it up in order to get out of being in trouble with her parents? . . . is this the testimony you heard, no, this is the testimony of someone who had experienced exactly what she was talking about. This is the testimony of someone who found it extremely painful to come into court and testify about what happened to her, not only to you, but to the entire gallery. . . .

RP VI, 559.

If defense counsel had not been prohibited from cross-examining Lopic about her conduct in the hall during the break in her testimony, the jury would have had evidence of a vastly different witness: a witness who was "laughing and giggling." This would have supported the defense argument that she and her friends had "cooked up" a story that got them out of trouble at the defendant's expense. But because of the trial judge's ruling that such conduct was not relevant, the defense was helpless to expose the "acting job" that Lopic was doing in the courtroom, representing herself as the sad child forced to testify about the incident.

¹⁷ The prosecutor continued to describe how he asked another question, which was followed again by silence. RP VI, 558. And then he asked another question, and she gave a very minimal answer "we had sex." RP VI, 558. Yet another question was asked and finally "she got the word vagina out of her mouth" and according to the prosecutor "at that point, we broke the log jam" and she "was able to say in just a brief detail that she had vaginal intercourse with the Defendant." RP VI, 558.

“It is fundamental” that when the State charges the defendant with a crime, the trial court should allow the defendant “great latitude in the cross-examination of prosecuting witnesses to show motive or credibility ... [t]his is especially so in prosecutions of sex crimes.” *State v. Wilder*, 4 Wn. App. 850, 486 P.2d 319 (1971). *Accord State v. Spencer*, 111 Wn. App. 401, 410, 45 P.3d 209 (2002); *State v. Peterson*, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970); *State v. Tate*, 2 Wn. App. 241, 469 P.2d 999 (1970). And yet in this case the Court precluded cross-examination of the alleged victim on the grounds that the subject matter was not relevant, even though the subject matter went directly to the witness’ credibility.

Here, as in virtually every criminal case tried in this State, the jurors were instructed that “You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each.” CP 34. Moreover, the instruction told them in considering the testimony of any witness they could consider a list of enumerated factors “and any other factors that bear on believability and weight.” CP 34. But in reality, the trial judge precluded the jurors from considering one of those factors, by prohibiting them from considering the fact that during the break, in sharp contrast to her demeanor inside the courtroom, Lopic was joking and laughing, thereby seemingly taking the entire proceeding very lightly.

While there is not much case law to be found on the subject of questioning witnesses about their behavior during a court recess, *Geders v. United States*, 425 U.S. 80, 89 (1976) does recognize that a prosecutor can question a defendant about his behavior during such a recess. While it is

possible that an unethical defense attorney might improperly coach the defendant on how to answer questions during a courtroom recess, the Court held that it was impermissible for a trial judge to prohibit the defendant from having any contact with his attorney during an overnight break in his testimony because there were other ways of dealing with the problem of potential coaching. The prosecutor could simply cross-examine the defendant about his conduct during the break:

A prosecutor may cross-examine a defendant as to the extent of any “coaching” during a recess, subject of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant’s credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Geders, 425 U.S. at 89-90.

What is sauce for the goose is sauce for the gander. If the prosecution can cross-examine the defendant about his conduct during a court recess, then surely a defendant, who has a cross-examination right of constitutional magnitude, can cross-examine a prosecution witness about her conduct during a court recess. A criminal defendant has a Sixth Amendment right to use cross-examination “to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.” *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). Since “[a] reasonable jury might have received a significantly different impression of [the witness’] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination,” *id.*, the

defendant's convictions should be reversed.

7. THE REFUSAL TO PERMIT CROSS EXAMINATION ABOUT THE INCIDENCE OF POSITIVE BLUE LIGHT TESTS FOR BODILY SECRETIONS IN SEX CASES VIOLATED THE SIXTH AMENDMENT.

During the State's *direct* examination of nurse Michelle Russell she was asked "what is involved in [the] process" of physically examining Lopic and she replied, "We use a blue light on the patient to examine her skin for secretions." RP V, 430. The prosecutor then asked "Do you recall during the course of the blue light examination any findings that were in any way remarkable?" and she answered "None." RP V, 431.

On cross-examination, defense counsel confirmed that the blue light exam revealed nothing, and then attempted to ask nurse Russell "Is it not true that often times in a sexual assault case there will be secretions on the outside of the body?" RP V, 433. The Court, however, sustained the State's "relevance" objection to this inquiry. RP V, 433-34.

Meredith respectfully suggests that the prosecution's relevance objection makes no sense. Evidence is relevant if it tends to make any fact of consequence more or less probable. ER 401. If evidence of bodily secretions is found in some high percentage of sexual assault cases, then the absence of such secretions is a fact which tends to make it less probable that there was a sexual assault, and the presence of such secretions is a fact that tends to make it more probable that there was such an assault. As this Court expressly recognized in *State v. Welker*, 37 Wn. App. 628, 634, 683 P.2d 1110 (1984):

It is well-known to officers of Sergeant Harrison's experience ***that important "trace evidence," such as*** hair, fibers, ***bodily secretions,*** scratches and bite marks, ***is usually present in rape cases . . .***

(Bold italics added). It is because such evidence is "usually present" in rape cases that in such cases the prosecution routinely presents evidence that semen or vaginal fluid *was* found on objects or bodies because this tends to increase the probability that sex did occur.¹⁸ It strains credulity to argue that the presence of semen on the outside of an alleged rape victim's body is relevant because it tends to show that a rape did occur, but that the *absence* of semen on the outside of the alleged victim's body is irrelevant and has no tendency to show that a rape did *not* occur.

Because such trace evidence of bodily fluids on the outside of the body is "usually present" in rape cases, its absence is highly relevant. By precluding cross-examination on this subject, which the State first brought up, the trial judge violated Meredith's constitutional right to cross examination. *See, e.g., State v. Horton*, 116 Wn. App. 909, 917 n.26, 68 P.3d 1145 (2003)("The State opened up the subject of S.S.'s past sexual behavior . . . Horton had a right to respond through cross-examination," citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969))¹⁹.

¹⁸ *See, e.g., State v. Clafin*, 38 Wn. App. 847, 849, 690 P.2d 1186 (1984)(semen on rags); *State v. Radcliffe*, 164 Wn.2d 900, 904, 194 P.3d 250 (280)(semen on underpants); *State v. Jackson*, 145 Wn. App. 814, 817, 187 P.3d 321 (2008)(semen on face and clothes); *State v. Athan*, 160 Wn.2d 354, 379, 158 P.3d 27 (2007)(semen on decedent's leg).

¹⁹ "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. . . . To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry . . . he contemplates

8. PROHIBITING CROSS-EXAMINATION ABOUT THE ABSENCE OF DNA TESTING VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHTS.

9. PROHIBITING CLOSING ARGUMENT ABOUT THE ABSENCE OF DNA TESTING VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

a. The Trial Court's Rulings.

During cross-examination of nurse Russell, defense counsel twice asked her if one of the purposes of taking vaginal swabs was to conduct a DNA analysis on them. On both occasions the State objected and the trial judge sustained the objections. RP V, 437-439. The prosecutor argued that the answer to that question was "outside the scope of her knowledge." RP V, 439. Defense counsel argued that he expected if permitted to answer she would answer yes, but the trial judge did not permit the question to be asked. RP V, 439.

The following day the State presented the testimony of Dr. Sipes who testified that she collected vaginal swabs and submitted them to the pathology lab. RP VI, 494-95. Defense counsel asked Dr. Sipes whether the vaginal swabs were "taken for the purposes of DNA" and Dr. Sipes answered "yes." RP VI, 503. However, the State's objection ("same objection as yesterday") was sustained and the trial judge struck Dr. Sipes' answer and instructed the jury to disregard it. RP VI, 503-04. After Dr. Sipes finished testifying the State rested. RP VI, 513.

The defense presented the testimony of one witness, Jason Gross,

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."

and then rested. RP VI, 545. The State then made a motion asking the Court “to restrict the defense in their closing argument from arguing that the lack of DNA evidence has any bearing on this case in any respect.” RP VI, 548. The prosecutor acknowledged that three of the six vaginal swabs were turned over to the police, but contended that since there was no evidence that those three swabs “are in such a form that they are capable of being utilized for DNA analysis,” and since there was no defense “questioning of the police officer on this topic as to why the DNA was not done,” defense counsel should not be able to mention the absence of DNA testing in his closing. RP VI, 548-49. The prosecutor concluded, “There is just a complete lack of evidence about DNA testing in any respect,” and therefore, since the jurors had undoubtedly heard of DNA testing before, it was “prejudicial” to the State to raise its absence. RP VI, 549. He “urge[d] the Court to order the defense not to raise that type of argument in closing arguments since it is outside the scope of the evidence and would invite the jury to simply speculate;” he concluded that since there was no showing by the defense that the police had the ability to do DNA testing, there was “simply a lack of evidence and its something neither party should talk about it.” RP VI, 549.

Defense counsel argued against the State’s motion to restrict his closing argument, pointing out that in the standard WPIC instruction on reasonable doubt “the final sentence in that, talks about jurors considering the evidence or lack of evidence.” RP VI, 550. (This instruction was, in fact, given by the trial court in this case and the State did not object to

it.²⁰) Defense counsel noted that the trial court's previous ruling had prohibited him from cross-examining either the nurse or the doctor about whether the swabs were taken for purposes of DNA testing. RP VI, 550. He objected to the suggestion that he be precluded from mentioning the lack of DNA evidence stating that he "should be allowed to argue that issue since it is the State's burden to prove its case." RP VI, 550.

The prosecutor then argued that defense counsel could have done its own DNA testing and could have cross-examined the police officer as to why no DNA was done. RP VI, 550-51.²¹ The trial judge then granted the State's motion and forbade any reference to the absence of DNA testing because it was "outside the evidence." RP VI, 551-52.

b. Closing Arguments.

In his initial closing argument the prosecutor argued that there was no evidence that the sperm found in Lopic's vaginal secretions came from any source except the defendant since by Lopic's own report prior to October 29th her last instance of sexual intercourse was three months earlier and sperm from that intercourse would no longer be present:

We have sperm in the vaginal canal. *That, according to the testimony can only be there for three days before it's flushed by*

²⁰ "A reasonable doubt is a doubt for which a reason exists and may arise from the evidence or lack of evidence." CP 36.

²¹ "[If] the defense has chosen to make that the heart of their case, had the ability to request to see the swabs, have their expert look at them, say yeah, we could run a DNA test on this swab if we wanted to. As there is a complete lack of evidence even on cross-examination of my witnesses, specifically the police officer. They would [sic] have asked my witness why didn't you do a DNA analysis, who knows what the answer would be to the witness, but just a complete lack of evidence about DNA whatsoever."

the body's own system. We have Bobbi's report of consensual sex approximately *three months prior* and nothing up until then. Then we have her last menstrual period approximately two weeks before.

Now we have the presence of sperm and we are [sic] one option and one option only for how that sperm got there. That was sexual intercourse that night. And the only report from any of the witnesses about who had sex with Bobbi was that the Defendant had sex with Bobbi.

RP VI, 566 (bold italics added).

Defense counsel's closing argument specifically referenced the reasonable doubt instruction and its statement that a reasonable doubt can come from a lack of evidence. RP VI, 59. He did not mention DNA testing, but he did argue without objection that there was a "lack of physical evidence that anything that was obtained from Bobbi Lopic that matches Gary Meredith." RP VI, 590.

In his rebuttal the prosecutor argued that there was no evidence that anyone else had sex with Lopic that night. RP VI, 601.²² He argued that the defense was doing "nothing more than suggesting to you to go back in the jury room and cook up evidence." RP VI, 601. He then proceeded to discuss a hypothetical stabbing case in which the State offered no DNA evidence and he hypothetically explained why:

[L]et's take, for example, this is a stabbing and the police catch the person who did the stabbing right there on the scene. He has got

²² Let's see, did Joe down the street do it? Nothing further. No one testified to that. Who did it? Did Victor do it? No one testified to that. Who did it? Did Jason do it? No one testified to that. Everybody testified that the Defendant did it.

the knife in his hand. And then a year goes by and we go to trial and the defense stands up and says there is a lack of evidence. ***They never did DNA the blood on that knife.*** They don't do any testing of the blood on that knife. When whoever caught him with the knife in his hand dripping blood and there was a body with a stab wound that matched that knife on the floor, ***Now there is no issue as to identity here. No one has suggested that it was anyone other than the Defendant in this case.*** The defense is doing nothing more than saying you jury ignore the evidence over here, just look at this . . .

RP VI, 601-602 (bold italics added).

c. Application of the Gefeller Rule.

The prosecution brought up the subject of the collection of vaginal swabs and then persuaded the trial judge not to allow any cross-examination as to the purposes for which such samples were collected. The State wanted to elicit evidence to show that when the collected sample was examined evidence consistent with the defendant's guilt – sperm – was found. But the State 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. This is a classic example of the type of unfairness prohibited by the rule of *Gefeller*. The trial judge “allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar[red] the other party from all further inquiries about it.” 76 Wn.2d at 455.

d. Application of the Frost Rule.

The right to make closing argument in a criminal case “is unquestionably fundamental.” *State v. Frost*, 160 Wn.2d 765, 781, 161 P.3d 361 (2007). The right to effective assistance of counsel encompasses

the making of closing argument. *Id.* at 768. *Herring v. New York*, 422 U.S. 853, 858 (1975). “When a court’s limitation of argument relates to a fact necessary to support a conviction, the defendant’s due process rights may also be implicated.” *Id.* In *Frost* the trial court prohibited defense counsel from arguing both that the State failed to prove that Frost was guilty as an accomplice and that Frost acted under duress. The Court held that a trial court cannot compel counsel to argue only those inferences which the court believes to be logical. 160 Wn.2d at ¶ 13.

In the present case the prosecution was required to prove beyond a reasonable doubt that the defendant had sexual intercourse with Lopic. The argument that there was no DNA testing to show that the sperm found came from the defendant bore directly on the element of identity of the perpetrator. Here, as in *Frost* (160 Wn.2d at ¶ 24), the trial court abused its discretion by precluding an argument which the defense counsel had every right to make, and thereby violated both the right to counsel and the right to make the State prove every element of the offense charged.

In *United States v. Poindexter*, 942 F.2d 354 (6th Cir.), *cert denied*, 502 U.S. 994 (1991), the Court reversed the defendant’s conviction because, just as in the present case, trial counsel was prohibited from arguing to the jury that they should not convict because there were no fingerprints found on the gun. *Poindexter*, 942 F.2d at 360.²³

Similarly, in *United States v. Thompson*, 37 F.3d 450, 454 (9th Cir.

²³ “In every criminal case . . . it is the absence of evidence upon such [material] matters that may provide the reasonable doubt that moves a jury to acquit.”

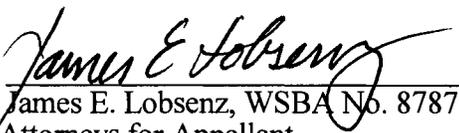
1994), the defendant claimed she did not know that she was carrying cocaine in her suitcase and sought to corroborate that claim by showing her prints were not on the drugs. Her conviction was reversed because the trial judge erroneously granted prosecution motions to preclude cross-examination and closing argument by defense counsel about the lack of fingerprint and other evidence. *Thompson*, 37 F.3d at 454.²⁴ Here, as in *Thompson* and *Poindexter*, the convictions should be reversed.

E. CONCLUSION

For these reasons, appellant asks this Court to reverse and dismiss his conviction for Communicating with a Minor, and to reverse and remand for new trial his conviction for Rape of a Child 2.

DATED this 31st day of July, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant

²⁴ “[T]he lack of fingerprint evidence is a relevant fact which may be elicited by defense counsel during direct or *cross examination* of witnesses, and incorporated into counsel’s *closing statement*. *The district court therefore erred in granting the government’s in limine motion to prohibit Thompson from eliciting and commenting upon the lack of fingerprint evidence* in her case.” (Bold italics added).

Accord Washington v. State, 180 Md. App. 458, 480, 951 A.2d 885 (Md. App. 2008)(defense “should have been permitted to comment on the unexplained absence of fingerprint evidence.”) *Cf. Wheeler v. United States*, 930 A.2d 232, 247 (D.C. Ct. App. 2007)(“Appellant could have argued, and the jury would have been entitled to consider, the lack of fingerprint evidence”); *Greer v. United States*, 697 A.2d 1207, 1210 (D.C. Ct. App. 1997)(“defense counsel may appropriately comment in closing argument on the failure of the government to present corroborative physical evidence”).

COURT OF APPEALS
DIVISION II

09 AUG -5 PM 1:45

STATE OF WASHINGTON
BY K. Proctor
DEPUTY

NO. 38600-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

vs.

GARY MEREDITH,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On August 4, 2009, I caused to be served via legal messenger, a true and correct copy of the following documents on:

Kathleen Proctor
Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South Room 946
Tacoma WA 98402-2171

ORIGINAL

Entitled exactly: BRIEF OF APPELLANT


DEBORAH A. GROTH

00 AUG -6 AM 11:19
 STATE OF WASHINGTON
 BY [Signature]
 DEPUTY

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2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. Pursuant to RAP 10.2, On August 6, 2009, I caused to be served via US First Class Mail, a true and correct copy of the following documents on Appellant at the address mentioned below:

Mr. Gary Meredith
 DOC #984777, EE-128
 Washington State Penitentiary
 1313 N. 13th Avenue
 Walla Walla, WA 99362

Entitled exactly:

BRIEF OF APPELLANT.



Lily T. Laemmle
Legal Assistant to James E. Lobsenz

CERTIFICATE OF SERVICE - 2