

FILED
COURT OF APPEALS

NO. 38600-3-II

10 JUN 12 PM 3:26

STATE OF WASHINGTON

BY *PLC*

COURT

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GARY MEREDITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 95-1-04949-6

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Should this court defer to the trial court's ruling that there was no purposeful discrimination under *Batson*, given the recent decision in *Rhone*? 1

 2. Whether the trial court properly excluded irrelevant evidence? 1

 3. Whether prohibiting defendant from arguing about the lack of DNA evidence during his closing argument constitutes harmless error? 1

 4. Did the State adduce sufficient evidence to support the jury verdict finding defendant guilty of communicating with a minor for immoral purposes? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 7

 1. UNDER *BATSON* AND *RHONE*, THE TRIAL COURT PROPERLY DENIED DEFENDANT'S *BATSON* CHALLENGE REGARDING PROSPECTIVE JUROR NO. 4. 7

 2. DEFENDANT HAS FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ANY OF THE EVIDENTIARY RULINGS THAT ARE CHALLENGED ON APPEAL. 18

 3. THE TRIAL COURT IMPROPERLY PROHIBITED DEFENDANT FROM DISCUSSING DNA EVIDENCE DURING CLOSING ARGUMENT HOWEVER THE ERROR WAS HARMLESS. 41

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO
PROVE DEFENDANT COMMUNICATED WITH A
MINOR FOR IMMORAL PURPOSES.....44

D. CONCLUSION.50

Table of Authorities

State Cases

<i>In re Twining</i> , 77 Wn. App. 882, 893, 894 P.2d 1331, <i>review denied</i> , 127 Wn.2d 1018 (1995).....	21
<i>Mad River Orchard Co. v. Krack Corp.</i> , 89 Wn.2d 535, 537, 573 P.2d 796 (1978)	20
<i>Sears v. Seattle Consol. St. Ry. Co.</i> , 6 Wn. 227, 232, 33 P. 389 (1893)...	41
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	44
<i>State v. Ashcraft</i> , 71 Wn. App. 444, 859 P.2d 60 (1993)	15
<i>State v. Baird</i> , 83 Wn. App. 477, 482, 922 P.2d 157 (1996), <i>review denied</i> , 131 Wn.2d 1012 (1997)	20
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988)	44
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).....	27
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	45
<i>State v. Campbell</i> , 103 Wn.2d 1, 20, 691 P.2d 929 (1984).....	22
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	45
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)	45
<i>State v. Darden</i> , 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).....	24
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	45
<i>State v. Evans</i> , 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000)	10
<i>State v. Frost</i> , 160 Wn.2d 765, 782, 161 P.3d 361 (2007).....	43
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	18, 19, 43

<i>State v. Hettich</i> , 70 Wn. App. 586, 592, 854 P.2d 1112 (1993)	19
<i>State v. Hicks</i> , 163 Wn.2d 477, 490, 181 P.3d 831 (2008).....	17
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	44
<i>State v. Hosier</i> , 157 Wn.2d 1, 11, 133 P.3d 936 (2006)	46, 49
<i>State v. Hudlow</i> , 99 Wn.2d 1, 15, 659 P.2d 514 (1983)	21, 24
<i>State v. Johnson</i> , 90 Wn. App. 54, 69, 950 P.2d 981 (1998)	21
<i>State v. Jones</i> , 67 Wn.2d 506, 512, 408 P.2d 247 (1965).....	22
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	44
<i>State v. Kilgore</i> , 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001)	22
<i>State v. Knapp</i> , 14 Wn. App. 101, 107-08, 540 P.2d 898, <i>review denied</i> , 86 Wn.2d 1005 (1975).....	21
<i>State v. Luvene</i> , 127 Wn.2d 690, 699, 903 P.2d 960 (1995)	9, 11
<i>State v. Lynn</i> , 67 Wn. App. 339, 342, 835 P.2d 251 (1992).....	36
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	44
<i>State v. McCullum</i> , 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).....	44
<i>State v. McDaniel</i> , 83 Wn. App. 179, 185, 920 P.2d 1218 (1996)	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	36, 37
<i>State v. McNallie</i> , 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)	46
<i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 6 P.3d 1160 (2000).....	19, 41
<i>State v. Ray</i> , 116 Wn.2d 531, 538, 806 P.2d 1220 (1991)	20
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, <i>review denied</i> , 120 Wn.2d 1022 (1992).....	18, 19, 21
<i>State v. Rhone</i> , 168 Wn.2d 645, 229 P.3d 752 (2010)	1, 7, 11, 12, 13, 17, 18

<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	45, 48
<i>State v. Scott</i> , 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)	36
<i>State v. Smith</i> , 106 Wn.2d 772, 780, 725 P.2d 951 (1986)	27
<i>State v. Swan</i> , 114 Wn.2d 613, 658 790 P.2d 610 (1990)	18
<i>State v. Thetford</i> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987)	19
<i>State v. Thomas</i> , 166 Wn.2d 380, 397, 208 P.3d 1107 (2009)	17
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)	44
<i>State v. Vreen</i> , 143 Wn.2d 923, 927, 26 P.3d 236 (2001)	9
<i>State v. Zeigler</i> , 114 Wn.2d 533, 538, 789 P.2d 79 (1990)	37
<i>Thieu Lenh Nghiem v. State</i> , 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)	27

Federal and Other Jurisdictions

<i>Batson v. Kentucky</i> , 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)	1, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	20
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct 1354, 158 L.Ed.2d 177 (2004)	35, 36, 37, 40
<i>Delaware v. Fensterer</i> , 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)	22, 25
<i>Frye v. United States</i> , 293 F. 1013 (D.C.Cir.1923)	19
<i>Geders v. United States</i> , 425 U.S. 80, 89, 86 S. Ct. 1330, 47 L.Ed.2d 592 (1976)	25, 26
<i>Georgia v. McCollum</i> , 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)	7, 8

<i>Hernandez v. New York</i> , 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).....	9, 11
<i>Herring v. New York</i> , 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d593 (1975).....	41
<i>Johnson v. California</i> , 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005).....	8, 10
<i>Melendez-Diaz v. Massachusetts</i> , --- U.S. ---, 129 S.Ct. 2527, 174 L.Ed.2d. (2009).....	39, 40
<i>Montana v. Engelhoff</i> , 518 U.S. 37, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996).....	21
<i>Purkett v. Elem</i> , 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834	8, 9, 10
<i>Rock v. Arkansas</i> , 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).....	20
<i>Taylor v. Illinois</i> , 484 U.S. 400. 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988).....	21
<i>Washington v. Texas</i> , 388 U.S. 14, 18, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	20
Constitutional Provisions	
Fourteenth Amendment	20
Sixth Amendment	20, 21, 22, 25, 26, 35, 40
Statutes	
RCW 5.45.020	37
RCW 9.68A.001	50
RCW 9.68A.090	45, 48, 49, 50

Rules and Regulations

ER 10318

ER 103(2)29, 31

ER 103(a)(1).....19

ER 103(a)(2).....19

ER 40119, 24

ER 40319, 24

RAP 2.5(a).....36

RAP 2.5(a)(3)36

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this Court defer to the trial court's ruling that there was no purposeful discrimination under **Batson**, given the recent decision in **Rhone**?
2. Whether the trial court properly excluded irrelevant evidence?
3. Whether prohibiting defendant from arguing about the lack of DNA evidence during his closing argument constitutes harmless error?
4. Did the State adduce sufficient evidence to support the jury verdict finding defendant guilty of communicating with a minor for immoral purposes?

B. STATEMENT OF THE CASE.

1. Procedure

On November 3, 1995, the Pierce County Prosecuting Attorney's Office charged GARY MEREDITH hereinafter "defendant," with one count of rape of a child in the second degree. CP 1. On February 27, 1996, the State filed an amended information, adding one count of communicating with a minor for immoral purposes. CP 108-111.

The case was assigned to the Honorable Vicki Hogan for trial. On May 6, 1996, the parties exercised their peremptory challenges and concluded the voir dire process. CP 176. After peremptory challenges were made, defendant brought a **Batson** motion, challenging the State's removal of Prospective Juror No. 4. RP 106, CP 176. The court held defendant failed to establish a *prima facie* case of discrimination and

denied defendant's motion. RP 111. The jury began hearing the evidence on May 6, 1996. Upon hearing the evidence and deliberating on it, the jury returned a verdict finding defendant guilty of both charges. CP 31-31. After the verdict, defendant posted bail and was released from custody until sentencing. CP 173-183.

On July 2, 1996, the court convened for a sentencing hearing. CP 184. When defendant failed to appear, the court issued a bench warrant for his arrest. *Id.* On July 11, 2008, defendant was arrested in Reno, Nevada, and transported to Pierce County for sentencing on the 1996 conviction. CP 195-196. The court sentenced defendant on November 21, 2008, to the high end standard range, imposing 198 months for rape of a child in the second degree, and 60 months for communicating with a minor for immoral purposes, to run concurrently with each other. CP 70-80. This resulted in a total confinement period of 198 months. *Id.* From entry of this judgment, defendant filed a timely notice of appeal. CP 103.

2. Facts

A.B.,¹ born November 11, 1980, met defendant and his friends in September 1994 when she was 13 years old. RP 365. At trial, A.B. testified defendant introduced himself to her as Gary Tyler. RP 365. Defendant gave A.B. his pager number and began speaking with A.B. on the phone daily. RP 368. A.B. testified defendant told her he was 17

¹ This case involves two minor victims (Count I – B.L.; Count II – A.B.), and two minor witnesses (M.J. and S.T.). All four minors testified at trial.

years old. RP 370. Defendant told A.B. he liked her, but A.B. had a boyfriend and was not interested in defendant. RP 371. When A.B. revealed she had a boyfriend, defendant expressed an interest in meeting A.B.'s friends. *Id.*

A.B. testified that on October 29, 1994, she paged defendant. RP 372. Defendant returned A.B.'s page and spoke with A.B., B.L., who was 12-years-old, and M.J., who was 13-years-old, over the phone. RP 123, 244, 372. S.T., who was 13-years-old, was with the three other girls but did not speak to defendant on the phone. RP 194. After the girls spoke to defendant on the phone, A.B. arranged for defendant to pick the girls up from a Safeway near M.J.'s home. RP 373. A.B., B.L., M.J., and S.T. all testified that defendant and his friend, Jason Gross, met the four girls at the Safeway. RP 128, 194, 252, 373. Defendant and Gross transported the four underage girls to the mall where the group walked around. RP 131, 195, 253, 375. At some point during the afternoon, defendant asked the girls how old they were. RP 374. The girls responded, "7th grade." *Id.*

Defendant, Gross, and the four girls left the mall together later that afternoon. RP 132, 196, 256, 376. The girls parted from defendant and Gross, eventually making their way to B.L.'s home. RP 133, 197, 260, 378. At B.L.'s house the girls told their parents they were going to Linda's Skating Rink in Puyallup for the evening. RP 134, 197, 261. B.L. and A.B. testified the girls actually intended to go to a party with

defendant and Gross. RP 262, 378. A.B. testified to contacting defendant and arranging for him to pick the girls up near B.L.'s house. RP 377.

The four girls left B.L.'s house and walked toward the skating rink. RP 135, 198, 262, 378. Down the street from B.L.'s house, the girls spotted defendant and Gross sitting in Gross' parked car. RP 135, 198, 262, 378, 526. Defendant and Gross drove the girls from B.L.'s street to a Chevron station in Puyallup to get gas then drove to a liquor store. RP 137, 199-200, 263, 379, 527. At the liquor store, defendant purchased "Mad Dog" wine and Olde English beer. RP 138, 200, 264, 380, 527. The girls did not contribute money towards the purchase of the alcohol. RP 160, 200, 379. After defendant purchased the alcohol, Gross drove the group to defendant's apartment. *Id.* M.J. and B.L. testified they split the bottle of wine. RP 141-142, 268. B.L. drank a little more than half the bottle. RP 268.

After drinking the wine, B.L. began to feel sick; someone helped her to defendant's bedroom to lie down. RP 146, 272, 384, 529. Defendant eventually joined B.L. in the bedroom. RP 146, 205, 276, 384. B.L. testified she did not remember defendant entering the room, but remembers waking up with defendant lying next to her on the bed. RP 277. B.L. testified defendant took off her pants and panties. RP 278. Defendant asked B.L. if she wanted to have sex. RP 279. She told defendant she wanted to sleep and tried to push defendant away. *Id.* Defendant then took off his clothes and began engaging in vaginal

intercourse with B.L. RP 280. M.J. and A.B. testified they opened the door to the bedroom while B.L. and defendant were inside and saw defendant on top of B.L. RP 151, 386. M.J. testified both B.L. and defendant were naked. RP 151. The girls shut the door leaving B.L. alone with defendant. RP 153, 386. B.L. testified she fell back asleep and when she woke up, defendant had left the bedroom. RP 283. B.L.'s clothes were on the bed and floor and B.L. was naked except for her bra. *Id.* She got dressed and returned to the living room. RP 284.

Gross agreed to drive the girls back to the skating rink where the girls planned to meet their parents. RP 159, 210, 292, 391. On the way to the skating rink, Gross stopped at a gas station. RP 158, 210, 292. At the gas station the girls saw a group of boys they knew through mutual friends. RP 210, 293. The boys offered to drive the girls from the gas station to the skating rink. RP 210, 293. The girls accepted the offer and climbed into the boys' truck bed. RP 210, 293.

When the truck pulled into the skating rink parking lot, the girls saw their parents waiting for them. RP 160, 211, 294. B.L.'s mother, Vicki Gwyn, testified she was extremely upset and began yelling at the girls and the boys who were in the truck. RP 342. On the drive home, Ms. Gwyn testified B.L. was crying and shaking. RP 344. Ms. Gwyn testified this behavior was unusual for B.L. who usually yelled back when in trouble. RP 343. Ms. Gwyn pulled her car over and asked B.L. what was wrong. RP 344. B.L. told her mother about the sex that occurred

with defendant. RP 345. Ms. Gwyn then drove B.L. to M.J.'s house and called the police. RP 345. After notifying police, Ms. Gwyn took B.L. to the hospital. *Id.*

Good Samaritan Hospital staff nurse Michelle Russell testified she assisted Dr. Bobbi Snipes with B.L.'s sexual assault examination on October 29, 1994. RP 431. Ms. Russell conducted a blue light exam on B.L., finding no abnormal bodily secretions on B.L.'s external skin. RP 430-431. Ms. Russell also assisted in collecting vaginal swabs and submitting those swabs to the hospital pathology lab for testing. RP 431. Dr. Snipes testified she performed the main physical and pelvic exam on B.L. RP 494. During the examination, Dr. Snipes found a superficial laceration on B.L. in the area between the vaginal opening and the anus. RP 498. Dr. Snipes also found redness on one thigh and what appeared to be semen pooled inside B.L.'s vagina. *Id.* Laboratory tests confirmed the substance found inside B.L.'s vagina was semen. RP 501. Dr. Snipes testified semen can be found in the vaginal vault up to three days after sexual intercourse. RP 503. B.L.'s only prior sexual encounter occurred more than three months prior to the rape. RP 502. From the evidence found during B.L.'s pelvic examination, Dr. Snipes concluded B.L. had intercourse within 72 hours of coming into the hospital. RP 503. Dr. Snipes also concluded the redness and superficial laceration occurred within 24 hours of B.L.'s examination. RP 504.

Jason Gross testified on defendant's behalf. Gross denied defendant went into the apartment bedroom with B.L. RP 529. However, he confirmed the girls' story that A.B. maintained communication with defendant and Gross throughout the day on October 29, 1994. RP 522-523. Gross also testified he and defendant took the girls to the mall, later picked up the girls down the street from B.L.'s house, and took the girls to defendant's apartment to "have like a little party." RP 522-529. According to Gross, defendant bought the alcohol and gave the alcohol to the four underage girls. RP 534.

C. ARGUMENT.

1. UNDER **BATSON** AND **RHONE**, THE TRIAL COURT PROPERLY DENIED DEFENDANT'S **BATSON** CHALLENGE REGARDING PROSPECTIVE JUROR NO. 4.

In *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Six years later in *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), the court extended this principle to peremptory challenges exercised by a criminal defendant as well, reasoning, "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same--

in all cases, the juror is subjected to open and public racial discrimination.” *Id.* at 49.

Batson and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

In deciding whether step one has been met, the court in **Batson** “held that 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.’” **Johnson v. California**, 545 U.S. 162, 169, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005), quoting **Batson**, 476 U.S. at 94. To satisfy his burden, a defendant may rely solely on the facts concerning the selection of the venire in his case. **Batson**, 476 U.S. at 95. The Supreme Court has declined to require proof of a pattern or practice because a single invidiously discriminatory governmental act is not rendered less harmful by the fact that it is not one in a series of discriminatory acts. **Johnson**, 545 U.S. at 169; **Batson**, 476 U.S. at 95.

If the court finds a prima facie showing, then it will ask the prosecutor for an explanation. Should the prosecutor volunteer a race-neutral explanation before the trial court rules on whether the defendant has made out a prima facie case, and the trial court then rules on the ultimate question of racial motivation, the preliminary prima facie case evaluation is unnecessary. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

Going to the second step marks a shift in the burden of production but not of the burden of persuasion. The burden of persuasion “rests with, and never shifts from, the opponent of the strike.” *Purkett*, 514 U.S. at 768. In assessing the second step, the trial court is guided by the following cautionary instruction: “The second step of this process does not demand an explanation that is persuasive, or even plausible.” *Purkett*, 514 U.S. at 767-68; *see also, State v. Vreen*, 143 Wn.2d 923, 927, 26 P.3d 236 (2001). While the proponent must have legitimate reasons for exercising the strike, this is not the same as stating that the proffered reason must make sense; the constitution requires only that it be a reason that does not deny equal protection. *Purkett*, 514 U.S. at 768-769 (“Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral.”).

The court has described the process as the “first two Batson steps govern the production of evidence that allows the trial court to determine

the persuasiveness of the defendant's constitutional claim.” *Johnson*, 545 U.S. at 171. In the third step, the court weighs the persuasiveness of the justification and “determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.” *Purkett*, 514 U.S. 768.

One division of the Court of Appeals has established circumstances for the court to consider in making its determination: (1) striking a group of jurors sharing race as the only common characteristic; (2) disproportionate use of strikes against a group; (3) the level of the group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the prosecutor; (6) type and manner of the prosecutor's voir dire questions; (7) disparate impact of the challenges; and (8) similarities between the individuals who remain on the jury and those stricken. *State v. Evans*, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000).

The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. ...The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.

Johnson v. California, 545 U.S. at 172-173 (2005) (citations omitted)

A trial court's determination is accorded great deference on appeal, and will be upheld unless clearly erroneous. *Hernandez*, 500 U.S. at 364; *Luvone*, 127 Wn.2d at 699.

Defendant asserts the State's use of a peremptory challenge on Prospective Juror No. 4 was discriminatory. Brief of Appellant at 13. The court found the State did not act improperly when challenging this juror. RP 111. The record does not demonstrate an abuse of discretion in this ruling.

- a. The bright line rule adopted in *Rhone* is not applicable to defendant's case.

In supplemental briefing to the court, defendant argues the new bright line rule adopted by the Washington Supreme Court in *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010), establishes a prima facie showing of discrimination during the *voir dire* process in his case. Supplemental Brief of Appellant at 8. Defendant misapplies the *Rhone* rule.

In *Rhone*, Rhone challenged on appeal the prosecutor's removal of the sole African-American venire member, claiming such a challenge necessarily established a prima facie case of discrimination in violation of *Batson*. *Rhone*, 168 Wn.2d at 754. In the majority opinion, signed by four justices, the Washington Supreme Court found that the trial court's determination that Rhone failed to establish a prima facie case of

discrimination was not clearly erroneous. *Id.* at 758. The four justices signing the majority opinion rejected the idea that a bright line rule superseding a trial court's discretion is necessary in this situation. *Id.* at 756 These justices felt such a rule would be beyond the intended scope of ***Batson***, "transforming a shield against discrimination into a sword cutting against the purpose of a peremptory challenge." *Id.*

Justice Madsen concurred with the majority opinion in Rhone's specific case, but wrote in her concurring opinion that "going forward, I agree with the rule advocated by the dissent." *Id.* at 758. Four justices signed the dissenting opinion advocating a new bright line rule applicable to certain ***Batson*** challenges. *Id.* at 761. Justice Madsen's concurring opinion in dicta agreed with the dissent's bright line rule and indicated she would apply the bright line rule in future cases before the Court. However, Justice Madsen's one sentence concurring opinion does not explain what she means by "going forward." Justice Madsen may decide to apply the bright line rule in cases currently pending on appeal. Likewise, she may only apply the bright line rule to cases tried after the ***Rhone*** decision. It therefore is unclear whether Justice Madsen would apply the bright line rule in defendant's case, a 1996 trial conducted well before the bright line rule's proposal. However, even if Justice Madsen's opinion in dicta is interpreted as meaning all cases currently pending on

appeal, the bright line rule would not apply to defendant's *Batson* challenge.

The bright line rule states, “[W]hen the defendant objects, the State must provide a race-neutral reason for exercising a peremptory challenge against the only remaining minority member of the defendant’s cognizable racial group or the only remaining minority in the venire.” *Id.* at 761.

Prospective Juror No. 4, the challenged juror, appeared to be African-American. RP 107. According to the discussion on the record, she appeared to be the only African-American in the venire. *Id.* However, Prospective Juror No. 4 does not belong to the same “cognizable racial group,” as the defendant who is Caucasian. RP 110. Furthermore, the prosecutor pointed out the presence of other possible races or ethnicities on the panel. RP 109. As Prospective Juror No. 4 did not appear to be the only remaining minority in the venire, her dismissal does not satisfy the second triggering option of the *Rhone* rule. The defendant’s situation does not meet either qualification that triggers the bright line *Rhone* rule.²

² This situation highlights one of the inherent difficulties in applying the bright line *Rhone* rule. As jurors are not asked to identify what minority groups they may or may not belong to, courts are required to make decisions on when to apply the *Rhone* rule based on jurors’ appearances. In today’s society, where more and more people belong to one or more racial “minority” group, accurately determining when the final minority juror is removed will be nearly impossible. Additionally, short of a judge reciting on the record the apparent race, gender, national origin, etc., of remaining jurors, the record available to appellate judges for review will be overwhelmingly inadequate to resolve *Rhone* challenges on appeal.

- b. The trial court exercised proper discretion in ruling on defendant's *Batson* challenge.

On appeal, defendant alleges that the only reason the State could have exercised its peremptory challenge on Prospective Juror No. 4 was because of her race. Opening Brief of Appellant at 13. Defendant further argues the State's actions raised a prima facie case of discrimination as Prospective Juror No. 4 was the only African-American juror in the venire. *Id.* Defendant suggests throughout his Opening Brief and his Supplemental Brief that the prosecutor had no race-neutral reason for challenging Prospective Juror No. 4, and had the trial court required the prosecutor to provide a race-neutral reason, the prosecutor's reason would have been insufficient. Defendant's argument fails because 1) it conflates the first prong of the *Batson* test by failing to require defendant to point to 'other circumstances' that would give rise to an inference that the State's use of its peremptory challenge was racially motivated; 2) ignores the record, which shows the prosecutor's use of its peremptory challenge was not racially motivated; and 3) fails to give any deference to the trial court's ruling on review.

In defendant's case, the trial court found defendant failed to satisfy the first prong of the *Batson* test because he failed to make a prima facie case of discrimination. RP 111. The trial judge stated:

At this point in time, the Court finds the burden of proof is on the defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason....The fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case pattern of exclusion. This is under *Batson* and under *State v. Ashcroft*,³ even though from appearances she was the only black or African American juror on the panel. There being no other evidence, the Court denies the motion.

RP 111. Because defendant did not make a prima facie showing, the court was not required to advance to the second and third prongs of the *Batson* test. While Prospective Juror No. 4 was a member of a constitutionally cognizable group, African Americans, defendant failed to present any other circumstances to raise an inference that the State had exercised its peremptory challenge because Prospective Juror No. 4 was a member of that group.

To support his arguments, defense counsel pointed to facts he believed identified Prospective Juror No. 4 as "beneficial to both the State and to the defense" as a juror. RP 110. However, the "facts" defense counsel discussed did not apply to Prospective Juror No. 4. Defense

³ The court appears to have referenced *State v. Ashcroft*, 71 Wn. App. 444, 859 P.2d 60 (1993), holding a trial court has control over all aspects of the dockets and cases that come before it, including jury issues.

counsel argued that Prospective Juror No. 4 indicated she had previously served on a jury in a criminal jury trial and that she clearly articulated “how it is that a person who received the evidence is supposed to listen to all of the evidence before reaching a conclusion.” RP 108. In fact, upon review of the jury questionnaires, Prospective Juror No. 4 indicated she had *not* served on any juries prior to defendant’s trial. Exhibit 1, Sealed Jury Questionnaires, Juror No. 4 Questionnaire, Questions No. 22-24. Additionally, her only reference in the questionnaire to the trial process was that she believes individuals are innocent until proven guilty beyond a reasonable doubt. Exhibit 1, Sealed Jury Questionnaires, Juror No. 4 Questionnaire, Question No. 30. Defense counsel appears to have confused answers provided by Prospective Juror No. 4 with those provided by Prospective Juror No. 1, who incidentally was sworn in as a juror in defendant’s trial. Prospective Juror No. 1 indicated she had previously served on one other criminal jury trial and that each side must present enough evidence to allow the jury to reach a just decision. Exhibit 1, Sealed Jury Questionnaires, Juror No. 1 Questionnaire, Question No. 22-24, 30.

Defense counsel’s failure to accurately articulate facts supporting his *Batson* challenge suggests it in fact was *defense counsel*, not the prosecutor, who had a “perverse focus on skin color.” *See* Opening Brief

of Appellant at 19. Defense counsel unjustifiably used Prospective Juror No. 4's skin color as a potential reason to unnecessarily delay defendant's trial.

As the new bright line rule in *Rhone* does not apply to defendant's case, applicable law on the subject clearly establishes that while a trial court *may* recognize a prima facie case of discrimination when the only venire person from a constitutionally cognizable group is dismissed, they are not *required* to do so. *Rhone*, 168 Wn.2d at 755; *State v. Thomas*, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009) (quoting *State v. Hicks*, 163 Wn.2d 477, 490, 181 P.3d 831 (2008)). While defendant cited a number of cases from other jurisdictions that reached different conclusions, the majority in *Rhone* cited to a number of jurisdictions that agree with its ruling. *See Rhone*, 168 Wn.2d at 756.

Nothing in the record indicates the prosecutor had a discriminatory motive in challenging Prospective Juror No. 4. Upon a review of the jury questionnaires, it is likely the prosecutor challenged Prospective Juror No. 4 because she worked as a licensed practical nurse. Exhibit 1, Sealed Jury Questionnaires, Juror No. 4 Questionnaire. The prosecutor had a nurse testifying in his case and chief and it is reasonable to assume he did not want a juror applying their own expertise to the nurse's testimony. No

juror sworn in for defendant's trial had nursing or medical experience.

Exhibit 1, Sealed Jury Questionnaires.

Even though reasonable minds may differ in determining what constitutes an inference of discrimination, an appellate court may not conclude that a trial court's determination regarding that inference is clearly erroneous. *Rhone*, 168 Wn.2d at 758. In reaching its decision, the trial court was able to consider factors not available to the appellate court on the record, such as Prospective Juror No. 4's demeanor, body language, and other signs tending to show reasons other than race that may have led to the juror's challenge. The trial court denied defendant's *Batson* challenge because he failed to make a prima facie case of discrimination. As this determination was not clearly erroneous, the trial court's ruling should be upheld.

2. DEFENDANT HAS FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ANY OF THE EVIDENTIARY RULINGS THAT ARE CHALLENGED ON APPEAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object

precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected to below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held Hettich could not raise a *Frye*⁴ objection on appeal because he did not make a *Frye* objection at trial. Error may not be predicated on rulings that admit evidence unless a timely objection was made, stating the specific ground for the objection. ER 103(a)(1); *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000).

Under ER 103(a)(2), error may not be asserted based upon a ruling

⁴ *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. “An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Ray*, 116 Wn.2d at 539, citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), *Washington v. Texas*, 388 U.S. 14, 18, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992); *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (*quoting Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988)). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where

the evidence is vague or merely speculative or argumentative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Kilgore*, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001). While the Sixth Amendment Confrontation Clause guarantees an opportunity for effective cross-examination, it does not guarantee effective cross-examination, “in whatever way, and to whatever extent the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). Evidence offered by a criminal defendant during cross-examination must be: (1) relevant; and (2) balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). A trial court’s rulings on that scope will not be disturbed unless there is a manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

Defendant complains the trial court improperly excluded: (a) evidence of B.L.’s behavior during a court recess; (b) evidence about the frequency of positive blue light tests for bodily secretions in sexual assault cases; and (c) evidence about the purpose behind collecting vaginal swabs in sexual assault exams. Brief of Appellant at 38, 42, 44. Each evidentiary issue below is only applicable to defendant’s conviction for rape of a child in the second degree.

a. The court properly excluded irrelevant evidence of B.L.'s alleged bias

Defendant argues the court improperly prevented him from eliciting information that victim B.L. was laughing and giggling in the hallway outside the courtroom during a court recess. Brief of Appellant at 38. The record and the facts of this case do not support defendant's argument.

After a short recess taken in the middle of victim B.L.'s testimony, the prosecutor commented on the record that when B.L. walked outside the courtroom during the break she "ran a virtual gauntlet of the defendant's friends and other supporters which there is a certain amount of name calling, laughing, that sort of activities in the hallway." RP 287. The prosecutor urged the court to prohibit such conduct by defendant's family and friends. *Id.* Defense counsel responded, "I have not seen any of that, but I have heard reports exactly opposite of what [the prosecutor] is saying dealing with [B.L.] and members of her family and other friends that they are doing these shenanigans." *Id.* The court informed everyone in the gallery it would not tolerate such behavior "either on behalf of the State or on behalf of the defense." RP 288. Attorneys for both parties agreed to stop such behavior if it occurred again. RP 286.

Once court resumed, victim B.L. retook the stand. RP 292.

During cross examination the following occurred:

Defense Counsel: [B.L.], at the break the Court just took, were you laughing and giggling outside the courtroom?

B.L.: Yes.

The State: Objection. Relevance.

The Court: Sustained. The jury is instructed to disregard the answer.

RP 299. The court excluded the testimony as non-relevant. *Id.*

The confrontation right and associated cross-examination rights are limited by general considerations of relevance. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing, ER 401, ER 403, *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). In the instant case, the trial court properly exercised its discretion in excluding irrelevant evidence.

Defendant claims that by laughing and giggling in the hallway, B.L. was clearly putting on an act while on the stand, making it more likely B.L. made up a story about the events of October 29, 1994. Brief of Appellant at 39. This conclusion is highly speculative. People, especially teenagers, respond to stressful situations in many different ways. Laughing and giggling with friends during a break is not necessarily indicative of lying while under oath. Witnesses are not required to remain

somber when relaxing outside the courtroom and the jury should not be called upon to interpret witnesses' behavior when off the stand. Based on the discussion between the State, defense counsel, and the court regarding the hallway behavior of supporters on both sides, it is just as reasonable to infer that B.L.'s behavior had more to do with a nervous reaction to her immediate environment, and nothing to do with the case or any alleged bias. The evidence therefore served no relevant purpose in defendant's case.

It is important to note, the trial court did allow defense counsel great leeway in impeaching B.L. on cross-examination. RP 300, 301, 319 (regarding B.L.'s level of intoxication the night of the rape); RP 303, 304 (regarding B.L.'s mother's reaction when B.L. returned to the skating rink); RP 307, 309, 316 (prior inconsistent statements). This constituted an effective opportunity to cross-exam B.L. as guaranteed by the Sixth Amendment. See *Fenster*, 474 U.S. at 20.

Defendant cites to a United States Supreme Court case to support his argument that witnesses may be cross-examined about their behavior during a court recess. Brief of Appellant at 40; *Geders v. United States*, 425 U.S. 80, 89, 86 S. Ct. 1330, 47 L.Ed.2d 592 (1976). *Geders* is not analogous to defendant's case. In an attempt to prevent coaching and testimony influence, the trial court in *Geder* prohibited Geder's attorney

from discussing the case with him during an overnight recess held in the middle of Geder's direct examination. *Geder*, 425 U.S. at 82. The Supreme Court held this order violated Geder's Sixth Amendment right to counsel. *Id.* at 91. In its opinion, the Supreme Court stated less restrictive options were available allowing Geder to exercise his right to counsel, including allowing the prosecutor to cross-exam Geder about any coaching that may have occurred during the recess. *Id.* at 89. Cross-examining a witness about coaching that occurred during a break in testimony is fundamentally different from cross-examining a witness about laughing and giggling that occurred. The former goes directly to the credibility and reliability of the witness's testimony, whereas the latter merely places undue attention on the way a 14-year-old girl relieves tension during a break in the proceedings.

Defendant has failed to show the trial court acted unreasonably, on untenable grounds, or for untenable reasons when sustaining the State's objection to defendant's questions. The trial court did not abuse its discretion in prohibiting defense counsel's line of questioning during B.L.'s cross-examination.

Should this Court find error in the exclusion of this evidence, the error was harmless. Evidentiary error is grounds for reversal only if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d

1120 (1997). An error is prejudicial if, “within the reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. *Thieu Lenh Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Assuming *arguendo* the court erred in excluding the above evidence, the error did not prejudice defendant. Each evidentiary issue above dealt with defendant’s rape charge. Even without the above evidence, the State presented overwhelming evidence of defendant’s guilt.

First, the State presented overwhelming evidence that B.L. had intercourse within 72 hours of arriving at the hospital. Dr. Snipes testified that lab results confirmed the presence of semen inside B.L.’s vaginal vault. RP 501. The presence of semen means intercourse occurred within 72 hours of B.L.’s examination. RP 503. In addition to the semen, Dr. Snipes found a superficial laceration in the area between B.L.’s vaginal opening and anus, and redness on B.L.’s thigh. RP 498. The redness and laceration were inflicted within 24 hours of B.L.’s examination. RP 504. This constituted strong physical evidence corroborating the State’s version of events.

Second, four people, B.L., S.T., A.B., and M.J., testified B.L. and defendant were alone in defendant's bedroom for a period of time on the night in question. RP 146, 205, 277, 384. Third, A.B. and M.J. witnessed defendant naked and on top of B.L. inside defendant's bedroom engaging in what looked like sexual intercourse with B.L. RP 150-152, 386. B.L. also testified defendant climbed on top of her and engaged in intercourse with her. RP 280. Fourth, B.L. identified defendant as the only person she had intercourse with that day and disclosed only one other sexual encounter in her life. RP 502. The prior sexual encounter occurred four months before the assault. *Id.* Finally, defendant's own witness confirmed defendant was with B.L. during the relevant time period. RP 522-534.

Given the overwhelming evidence of defendant's guilt in this case, the speculative theory defendant attempted to argue through the excluded evidence would not have changed the jury's verdict.

- b. Defendant failed to properly preserve his claim as to the admissibility of evidence regarding the frequency of positive blue light exams in sexual assault cases.

On appeal, defendant assigns error to the trial court's exclusion of evidence regarding how often secretions appear on external areas of a sexual assault examination patient's body. Opening Brief of Appellant at

42 A discussion between the trial court and defense counsel as to the admissibility of this evidence occurred at RP 433-436. Defendant does not identify where in the record the defense made an offer of proof regarding this excluded evidence which: 1) informed the trial court of the specific nature of the proffered evidence; and 2) informed the trial court of the legal theory under which the proffered evidence was admissible. The State can find no offer of proof regarding this ruling excluding evidence sufficient to satisfy the requirements of ER 103(2).

During cross-examination of state witness Michelle Russell, a nurse at Good Samaritan Hospital in Puyallup, defense counsel asked Ms. Russell, "Is it not true that often times in a sexual assault case there will be secretions on the outside of the body?" RP 433. The prosecutor objected to the relevance of this question. *Id.* After the prosecutor's objection, defense counsel asked to be heard outside the presence of the jury. *Id.* After the court excused the jury, defense counsel argued:

Your honor, I believe I should be given some latitude to cross examine this particular witness on findings that occurred. Often times when there is an allegation of sexual assault. [Ms. Russell] testified she has [performed blue light examinations] between 75 to a hundred times over a 15-year period. I believe that it's appropriate question to be able to ask as to whether or not there are secretions that are found on the times, or at any point in time when sexual assault is claimed.

....

I believe that it would be appropriate to ask questions about if there was anything significant of not having any other physical findings or markings of the body that might or may not be consistent with some type of assault that allegedly occurred just a few hours before.

RP 434.

While defense counsel attempted to articulate the appropriateness of his question, at no point did he offer what answers he expected Ms. Russell to give. Defense counsel may have been seeking a simple yes or no answer to the question. However, he quite possibly was seeking a more detailed answer from this witness. By failing to offer either orally or in writing what evidence he expected to adduce from Ms. Russell during this line of questioning, defense counsel failed to create an adequate record for review.

Nor did defense counsel state on the record how the frequency of positive blue light tests during sexual assault exams had any relevance to whether or not a sexual assault occurred in this case. Blue light exams detect bodily secretions invisible to the human eye on external areas of a victim's body. RP 430. A juror can reasonably determine on their own that sometimes secretions will be found and sometimes secretions will not be found simply from the fact that the examinations are done. However, the absence of secretions on external areas of a victim's body has no bearing on whether or not a sexual assault occurred, as evidenced in this

case, where doctors found semen inside B.L.'s vaginal vault but found no bodily secretions on external areas of B.L.'s body. *See* RP 431, 501.

As defendant failed to preserve this issue for appellate review, this Court lacks the proper record necessary to engage in any sort of review. It is impossible to know the complete nature of the excluded evidence, its admissibility, or its relative importance to defendant's case. Defendant has not properly preserved this claim for appellate review and therefore, it should be dismissed.

c. Defendant failed to properly preserve his claim as to excluded evidence regarding DNA testing.

On appeal, defendant assigns error to the trial court's exclusion of certain evidence pertaining to DNA that he attempted to adduce during the cross-examinations of Ms. Russell and Dr. Snipes. *See* Opening Brief of Appellant at 44. Once again, defendant does not identify where in the record the defense made an offer of proof regarding this excluded evidence which: 1) informed the trial court of the specific nature of the proffered evidence; and 2) informed the trial court of the legal theory under which the proffered evidence was admissible. The State can find no sufficient offer of proof regarding these rulings excluding evidence as required by ER 103(2).

At defendant's trial, Ms. Russell testified as to the hospital procedures she followed during B.L.'s sexual assault examination. Ms. Russell performed a blue light exam to check B.L.'s skin for any bodily secretions. RP 430. She also performed a pubic combing and took nail parings from B.L. RP 431. During the pelvic examination, Ms. Russell assisted Dr. Snipes in collecting six vaginal swab samples. RP 431. Ms. Russell submitted three swabs to the hospital pathology lab. RP 431, 442. For those three swabs, the hospital requested a Chlamydia test, a Wet Mount test, a Grandstein test, and a test to identify the secretions found inside B.L.'s vaginal vault. RP 440. Ms. Russell gave the three remaining swabs to the police officer at the hospital. RP 431, 442. The three swabs collected for the police department were not analyzed or tested by the hospital. RP 442. There was no evidence adduced at trial about what happened with the latter three swabs after police took them from the hospital.

During Ms. Russell's cross-examination, defense counsel asked about DNA:

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

The State: Objection.

The Court: Sustained.

Defense Counsel: Your Honor, I'm sorry. I need to ask to take up another matter outside the presence of the jury. I apologize at this time.

RP 437-438. The court excused the jury. RP 438.

Defense counsel stated he believed Ms. Russell would affirm that the swabs were taken for purposes of DNA analysis but was not sure whether his belief was correct. RP 438. He further stated that if she did answer affirmatively he would next ask whether or not DNA analysis was done. RP 439. Defense counsel did not know how Ms. Russell would answer the second question. *Id.* While defense counsel attempted to offer the expected answer to the first question, he offered no proof as to the full extent of the DNA evidence he intended to adduce from Ms. Russell. He had no idea what evidence, if any Ms. Russell would be able to provide on the subject, and therefore could not provide the court with a proper offer of proof. This did not create an adequate record for review as this Court has no way to determine exactly what evidence was excluded by this ruling.

Defense counsel also failed to state on the record any legal theory under which the proffered evidence was admissible. His discussion with the trial judge focused entirely on what the witness might or might not say in response to his questions. *See* RP 438-439.

During Dr. Snipes's cross-examination, defense counsel again attempted to raise the DNA issue:

Defense Counsel: There were swabs taken for purposes of DNA?

Dr. Snipes: Yes.

The State: Objection. Same objection as yesterday.

The Court: Sustained. The jury is instructed to disregard the question and answer.

RP 503-504. Defense counsel did not argue against this ruling, ask to be heard outside the jury, or make any offer of proof as to the nature or admissibility of this evidence as it pertained to Dr. Snipes. He simply asked his next question.

In both attempts to discuss DNA evidence, defendant failed to preserve the issues for appellate review. Once again, it is impossible to know the nature of the excluded evidence, its admissibility, or its relative importance to defendant's case. These claims have not been properly preserved for appellate review and should be dismissed.

- d. Defendant failed to properly preserve for appeal any evidentiary issues regarding Dr. Snipes's reliance on laboratory results during her testimony.

Dr. Snipes testified at trial that she collected vaginal swabs from B.L. during B.L.'s sexual assault examination and submitted the samples

to the hospital pathology lab for testing. RP 498. The test results confirmed the presence of semen in B.L.'s vaginal vault. RP 501. Defendant did not object at trial when Dr. Snipes testified to the lab results. Rather, defendant cross-examined Dr. Snipes at length about the lab results. *See* RP 502-503. As defendant failed to object below, no error associated with admission of this evidence has been preserved for appellate review. This issue should be dismissed.

- e. Defendant has failed to show that the admission of the lab report is an error of constitutional magnitude.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Sixth Amendment's confrontation clause only applies when an out of court statement is "testimonial." *Crawford*, 541 U.S. at 51. The decision in *Crawford* was restricted to the use of testimonial hearsay, but "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the "core class" of testimonial statements at which the Confrontation Clause was directed. These include (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar

pretrial statements that declarants would reasonably expect to be used prosecutorially;” (2) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;” and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford*, 124 S. Ct. at 1364.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A defendant may claim error for the first time on appeal only if it is a “manifest error affecting a constitutional right”. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)(citing *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)); *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992)). The rationale to limiting even potential constitutional errors is sound:

[P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.

McFarland, at 333 (citing *Lynn*, 67 Wn. App. at 344). The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this

showing of actual prejudice that makes the error “manifest,” allowing appellate review. *State v. McFarland*, 127 Wn.2d at 333.

In this case, defendant claims that his right of confrontation was abridged by the admission of “testimonial hearsay” through hospital lab reports generated for the purpose of treating B.L. Opening Brief of Appellant at 25. As discussed above, there was no objection to the lab reports at trial. As the lab reports do not constitute “testimonial hearsay”, defendant has failed to show an error of constitutional magnitude.

In *Crawford*, the Court suggested in dictum that a business or official record would not be subject to its holding as this exception was well established in 1791. *Crawford*, 541 U.S. at 56. RCW 5.45.020 defines a business record as the record of an act, condition or event made in the regular course of business, at or near the time of the act, condition or event, and created in a method and time of preparation that justifies its admission. Test results from hospital or clinic labs qualify as business records so long as a proper foundation is laid. *State v. Zeigler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990) (lab tests showing the results of a Chlamydia test admissible as a business record where treating physician routinely relied on test results from clinic lab).

In defendant’s case, Dr. Snipes testified about the contents of lab reports provided to her by her hospital’s pathology lab. RP 501. The lab

reports detailed what tests were performed on swabs collected from B.L., and revealed the results of those tests. RP 501, 503. These lab reports fall under the business record exception and provided information that Dr. Snipes relied upon in her treatment of B.L. Both Ms. Russell and Dr. Snipes testified to following strict hospital procedures when they examined B.L., collected the samples, submitted the samples to the hospital lab for testing, and reviewed the resulting lab reports. RP 430-431, 440, 442, 494, 498, 501. The reports were therefore generated during the regular course of business. Ms. Russell and Dr. Snipes testified to collecting the samples, submitting them to the hospital lab and reviewing the reports all on the night B.L. came into the hospital. *Id.* The reports were therefore created near the time of the act and prepared in a manner that justifies their admission as evidence. Finally, Dr. Snipes herself, not a doctor only loosely connected with the case, testified at trial as to the lab reports and their relative importance in treating B.L. RP 494-506. This created a reliable method for properly relaying the findings in the lab reports to the jury. These factors qualify the lab reports as a business record. These factors also clearly show the lab reports were generated for the sole purpose of treating B.L., not in anticipation of any criminal prosecution that might occur, refuting the argument that the reports constitute testimonial hearsay.

Defendant attempts to analogize his case to *Melendez-Diaz v. Massachusetts*, to show the lab reports were testimonial hearsay admitted in violation of the Confrontation Clause. This case is easily distinguishable. *Melendez-Diaz*, --- U.S. ---, 129 S.Ct. 2527, 174 L.Ed.2d. (2009). In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court held that admission of analysis certificates of certain types of scientific tests violates the confrontation clause, if admitted in lieu of live testimony with no opportunity for cross-examination by a defendant. Justice Scalia, writing for the majority, reasoned that where a report is prepared with a reasonable expectation that it will later be used at trial, and sets forth facts helpful to the prosecution, which are sought to be proved at the trial, it must be considered testimonial and cannot be admitted as a business record. *Id.*, at 2531-2. *Melendez-Diaz* involved a lab report certifying that a substance was cocaine, along with its weight, the very fact the prosecution was required to prove at trial. Further, the certified lab report was clearly prepared for the case, and the preparer of the report did not testify. The majority observed that the certificates were “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” *Id.* at 2532 (quotation marks omitted). Further, the certificates “certainly provided testimony against petitioner, proving one fact necessary for his conviction--that the

substance he possessed was cocaine.” *Id.* at 2533.

The *Melendez-Diaz* analysis is in line with the purpose behind *Crawford*. The *Crawford* decision examined the history of the right to confront ones accusers and held that the Sixth Amendment right must be interpreted keeping in mind the evils it was designed to prevent. The court declared that the principal evil it was trying to prevent was the “civil-law mode of criminal procedure and particularly its use of *ex parte* examinations as evidence against the accused.” *Crawford*, 541 at 50. Inherent in the court’s analysis is the assumption that the “testimonial hearsay” at issue is evidence which, in fact, incriminates the defendant in the crime with which he is charged. The lab reports in defendant’s case, which fall under the business records exception, did not incriminate the defendant. Rather, the reports provided B.L.’s treating physician in the emergency room with the medical information necessary to provide proper treatment. Additionally, the lab reports were not used in lieu of live in-court testimony as occurred in *Melendez-Diaz*. Dr. Snipes merely used the reports to assist her in her treatment of B.L. The report was created according to hospital policies and procedures and was used to treat B.L. at the hospital. As outlined in *Crawford* and *Melendez-Diaz*, this is not the type of testimony which raises a confrontation clause concern.

As defendant cannot show that the lab reports constituted testimonial hearsay in violation of *Crawford*, this issue is not of constitutional magnitude and cannot be raised for the first time on appeal.

3. THE TRIAL COURT IMPROPERLY PROHIBITED DEFENDANT FROM DISCUSSING DNA EVIDENCE DURING CLOSING ARGUMENT, HOWEVER THE ERROR WAS HARMLESS.

Closing argument presents a criminal defendant with a final opportunity to “persuade the trier of fact that there may be reasonable doubt of the defendant’s guilt.” *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d593 (1975). While a criminal defendant must be afforded “the utmost freedom in the argument of [their] case” and “some latitude in the discussion of their causes before the jury,” argument by counsel must be restricted to the facts in evidence and the applicable law, lest the jury be confused or misled. *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (quoting *Sears v. Seattle Consol. St. Ry. Co.*, 6 Wn. 227, 232, 33 P. 389 (1893)). The United States Supreme Court has held:

The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations.... [The judge] may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects [the judge] must have broad discretion.

Herring, 422 U.S. at 862. In line with this ruling, the Washington Supreme Court has held that judges should “in all cases...restrict the argument of counsel to the facts in evidence.” *Sears*, 6 Wn. at 233.

This ruling, however, does not prevent a defendant from arguing about the lack of evidence in the case against him.

At trial, the prosecutor asked the court to restrict defense counsel from arguing that the lack of DNA evidence had any bearing on the case. RP 548. Defendant objected to the prosecutor's motion, arguing the lack of DNA evidence related directly to the State's burden to prove their case against defendant. RP 550. The court granted the State's motion and instructed both sides to refrain from discussing DNA evidence during closing argument. RP 551. A criminal defendant has the right to argue about the lack of evidence in the case against him. Therefore, the judge erred when it precluded defendant from discussing the lack of DNA evidence against him. However, the judge did not err in precluding defendant from speculating during closing argument as to why the State did not present DNA evidence. As the lack of DNA evidence defendant wished to discuss in closing argument is only relevant to the rape charge, any ruling assigned to this issue will not affect defendant's conviction for communicating with a minor for immoral purposes.

Despite the court's error, this Court should affirm defendant's conviction for rape of a child in the second degree as the error was harmless. In Washington, if overwhelming untainted evidence in a criminal defendant's case necessarily leads to a finding of guilt, any errors found are deemed harmless. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d

321 (1986). A finding of harmless error requires proof beyond a reasonable doubt that “any reasonable jury would have reached the same results in the absence of the error.” *Id.* at 425. The overwhelming untainted evidence in defendant’s case necessarily renders any error in closing argument harmless.

The trial court’s action in restricting defendant’s closing argument did not taint the evidence before the jury in any way as counsel’s argument is not evidence. *See* CP 32-50, Jury Instruction No. 1. Thus, all the evidence of defendant’s guilt may be considered in determining whether the trial court’s error was harmless. *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361 (2007). As discussed *supra* at 25-27, the State presented overwhelming evidence of defendant’s guilt for the rape of a child charge. Given the strength of the physical evidence and eyewitness evidence against defendant, defendant’s proposed argument that the State failed to present DNA evidence would have had no effect on the jury’s decision.

It is important to note that while the court granted the State’s motion, defendant still argued there was a “lack of physical evidence that anything that was obtained from [B.L.]” connected defendant to the crime. RP 590. Defendant essentially replaced the words “DNA evidence” with “physical evidence” allowing him to make the same argument he would

have made absent the court's ruling. Given the overwhelming evidence of guilt in this case, and defendant's statement during closing argument, the error did not materially affect the trial's outcome, and was therefore harmless.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE DEFENDANT COMMUNICATED WITH A MINOR FOR IMMORAL PURPOSES.

Due process requires the State to bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant commits the crime of communication with a minor for immoral purposes when he communicates with a minor for immoral purposes of a sexual nature, and has previously been convicted of a felony sexual offense. CP 32-50, Jury Instruction No. 12; *See also* RCW 9.68A.090. Communication may be by words or conduct. *State v.*

Hosier, 157 Wn.2d 1, 11, 133 P.3d 936 (2006). To convict defendant of communication with a minor for immoral purposes, the State had to prove beyond a reasonable doubt that:

- (1) on or about October 29, 1994, defendant communicated with A.B. for immoral purposes of a sexual nature;
- (2) A.B. was a minor;
- (3) the acts occurred in the State of Washington; and
- (4) the defendant had been convicted of the crime of rape in the third degree or assault in the third degree with sexual motivation prior to October 29, 1994.

CP 32-50, Jury Instruction No. 11. Defendant challenges the sufficiency of the evidence showing he had an immoral purposes when communicating with A.B. Brief of Appellant at 30. A defendant has an immoral purpose when he promotes a minor's exposure to, and involvement in, sexual misconduct. *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). In this case, evidence supports the jury's conclusion that defendant had an immoral purpose when communicating with A.B. on or about October 29, 1994.⁵

Defendant, a 24-year-old man at the time of the incident, gave his pager number to A.B., a 13-year-old child. RP 365. For a month,

⁵ Defendant attempts to limit the charge to one phone conversation that occurred between defendant and A.B. the morning of October 29, 1994. Brief of Appellant at 32. However, the jury instructions are clear that the temporal aspect of the charge encompasses communications between defendant and A.B. on or about October 29, 1994 as a whole, not just one short portion of that time period carefully selected and singled out by defendant. CP 32-50, Jury Instruction No. 11.

defendant spoke to A.B. on the phone daily. RP 368. During these conversations, defendant told A.B. he was 17 years old, and told A.B. he liked her. RP 370-371. From this evidence alone, a jury could reasonably conclude defendant had an immoral purpose in communicating with A.B. A 24-year-old man does not speak daily to a 13-year-old child and lie about his age for innocent reasons. When A.B. disclosed she had a boyfriend, defendant expressed an interest in meeting A.B.'s friends. RP 371. Shifting his interest from A.B. to her friends further supports a reasonable conclusion that defendant had an immoral purpose in communicating with A.B. Were his purposes in communicating with A.B. innocent, her disclosure of the boyfriend would have had no effect on defendant. Rather, after A.B.'s disclosure defendant shifted his interest to A.B.'s friends. RP 371.

On October 29, 1994, A.B. contacted defendant. Defendant then maintained communication with A.B. throughout the day, including making plans to pick up A.B. and her friends in order to drive them from Puyallup to defendant's apartment in Tacoma. RP 136, 199, 262, 377, 523. Through defendant's communications with A.B., defendant gained the ability to hangout with four underage girls at a mall, buy the underage girls alcohol, take the underage girls to his apartment, and finally, rape a 12-year-old child.

While it is true, as defendant points out, a man does not necessarily intend to have sex with a woman every time he agrees to meet with, speak with, eat with, or drink with her, defendant's case is not a typical meeting between a man and a woman. Defendant was a 24-year-old man who communicated daily with a 13-year-old girl, expressed an interest in her, expressed an interest in meeting her friends, facilitated a meeting with the underage girls through his contact with A.B., and groomed the underage girls for a sexual encounter. A jury is allowed to draw all reasonable inferences and conclusions from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). From this evidence, the jury could reasonably find the defendant communicated with a minor for an immoral purpose.

While defendant did not use sexual language to explicitly convey his immoral purpose in communicating with A.B., the statutory language only requires defendant's *purpose* in communicating be immoral, not the communication itself. RCW 9.68A.090. A defendant can clearly have an immoral purpose without using immoral language, and defendant's immoral purpose in this case was apparent from his actions, especially the final contact between defendant and A.B. where the two made arrangements for defendant to pick up the girls and take the girls to

defendant's apartment for a party. This conclusion is supported by defendant raping 12-year-old B.L. at his first opportunity to do so.

The fact that the underage girls did not realize defendant's purpose in communicating with them is also irrelevant. *State v. Hosier*, 157 Wn.2d at 13. To require a victim to understand the sexual purpose of a communication, for the communication to be illegal, would restrict application of this statute to victims who are mature or sexually aware beyond their years. *Id.*

Similarly, the argument that defendant lacked an immoral purpose in communicating with A.B. because A.B. initiated the communication lacks merit. *See* Brief of Appellant at 33. Defendant provided A.B. with the means to communicate with him. RP 368. Rather than ignoring A.B.'s pages, defendant returned her calls. *Id.* Defendant used A.B.'s willingness to communicate with him to his advantage and ultimately groomed A.B. and her friends for sexual encounters. In passing RCW 9.68A.090, the legislature expressed its belief that:

the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children.

RCW 9.68A.001. Defendant's conduct in communicating with A.B. falls under the sexual exploitation the legislature intended to prevent through the passage of RCW 9.68A.090.

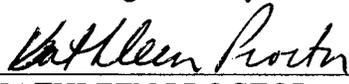
In reaching its verdict, the jury found A.B.'s testimony credible. Defendant communicated with A.B. in order to expose the underage girls to a sexual environment, and defendant derived sexual gratification from that exposure. Accepting the State's evidence as true and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence to find defendant guilty of communication with a minor for an immoral purpose.

D. CONCLUSION.

For the reasons discussed above, the State respectfully requests this Court affirm the judgment and sentence below.

DATED: July 12, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Amanda Kunzi
Rule 9 Legal Intern

FILED
COURT OF APPEALS

10 JUL 12 PM 3:26

STATE OF WASHINGTON

BY [Signature]
CITY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-12-12 [Signature]
Date Signature