IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GARY D. MEREDITH, Appellant.	No. 38600-3-II OPINION PUBLISHED IN PART

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

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 In the unpublished portion of this opinion,

[1] Deoxyribonucleic acid.

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

PUBLISHED FACTS

In 1996, Meredith was preparing to stand trial on one count of second degree child rape[2] and one count of communication with a minor for immoral purposes.[3] During voir dire, the prosecutor peremptorily challenged juror 4, the sole African American on the venire. Meredith, who is Caucasian, objected, arguing that the State did not give a basis for challenging juror 4 and, thus, the "only belief can be that she was removed because of her minority status." III Report of Proceedings (RP) at 107.

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

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

[2] RCW 9A.44.076.

[3] Former RCW 9.68A.090 (1989).

> At this point in time, the Court finds that the burden of proof is on the Defendant to demonstrate the use of a peremptory challenge based on a discriminatory reason. Defense has failed in that proof, one, as to whether or not the Prosecuting Attorney's Office here in Pierce County exercises challenges in a racially biased or discriminatory manner, or two, that . . . [the] prosecutor in this case has done so. There is no evidence of racial bias in challenging Juror No. 4 on either of those two bas[es].
>
> The fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case pattern of exclusion. This is under *Batson* and under *State v. Ashcroft*,[4] even though from appearances she was the only black or African American juror on the panel. There being no other evidence, the Court denies the motion.

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

The jury convicted Meredith on both counts. He appeals.

PUBLISHED ANALYSIS

Batson Challenge

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

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

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

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

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

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

In *Rhone*, there were two African Americans in the venire. 168 Wn.2d at 648. One was challenged for cause per the parties' agreement, and the other was removed by one of the

prosecutor's peremptory challenges without an objection by the defense. *Rhone*, 168 Wn.2d at 648. After the jury was sworn in, the defendant, an African American, raised a *Batson* challenge. *Rhone*, 168 Wn.2d at 648-49. The trial court ruled that the defendant had failed to establish a prima facie case of purposeful discrimination. *Rhone*, 168 Wn.2d at 650.

In *Rhone*'s lead opinion, four justices[5] rejected a bright-line rule that a prima facie case of discrimination is always established whenever the prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group. 168 Wn.2d at 652-53. They noted that *Batson* involved a three-part analysis, in which the first part directs a trial court "to determine whether 'something more' exists than a peremptory challenge of a member of a racially cognizable group." *Rhone*, 168 Wn.2d at 653. Consequently, they explained:

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

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

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

The dissent, which Justice Alexander[6] authored, advocated "a bright line rule that a prima facie case of discrimination is established under *Batson* when the sole remaining venire member of

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

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

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

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

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

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

Meredith fails again because the record does not clarify whether juror 4 was, in fact, the last remaining minority member of the venire. *See Rhone*, 168 Wn.2d at 661 (Alexander, J., dissenting). For instance, the prosecutor pointed out that at least one of the remaining venire members appeared to be a racial minority.

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

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

Rhone, 168 Wn.2d at 656.

Although this is not an exhaustive list of factors that a court may consider in deciding whether "something more" exists, Meredith did not argue to the trial court that any of these factors were present. Instead, he argued that nothing in juror 4's answers indicated "that she was in any way confused, evasive or said anything that might lead one to believe that there would be a proper basis for removing the juror." III RP at 107. We hold that this alone is not "something

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

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

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

UNPUBLISHED FACTS

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

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

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

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

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

MJ testified that at some point after BL and Meredith went into the bedroom, ST opened the bedroom door and MJ saw Meredith lying on top of BL. According to MJ, both were naked and "it looked like [Meredith] was on top of [BL] and they were both moving." III RP at 152.

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

AB also testified that, on a separate occasion, she opened the door and saw Meredith on top of BL, who was naked. They had a sheet on top of them and Meredith was moving around "[a] little bit." V RP at 388.

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

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

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

Dr. Sipes also took swabs from BL's vagina and sent them to the hospital lab. Dr. Sipes

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

UNPUBLISHED ANALYSIS

I. Right to Confrontation

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

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

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

Assuming, without deciding, that the lab report was "testimonial," we conclude that the error was harmless. Excluding the lab report's statement that BL's vagina contained semen with nonmotile sperm, the untainted evidence against Meredith included Dr. Sipes's conclusion that BL

had recently had intercourse (including her personal observation of secretions that appeared to be semen in BL's vagina) and testimony from BL and other eyewitnesses that Meredith had sexual intercourse with BL.

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

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

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

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

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

Meredith next argues that the trial court violated his Sixth Amendment right to cross-

examination when it prohibited him from asking BL about her laughing and giggling during a court recess.[9] He maintains that the purpose of such testimony would have been to cast doubt on the veracity of BL—who appeared teary and distraught while testifying—and to suggest that her courtroom testimony was fabricated.

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

B. Blue Light Tests

Meredith next argues that the trial court violated his right to cross-examination when it prohibited him from asking Russell, the registered nurse who conducted the blue light tests,

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

> [Meredith]: [BL], at the break the Court just took, were you laughing and giggling outside the courtroom?
> [BL]: Yes.
> [Prosecutor]: Objection. Relevance.
> THE COURT: Sustained. The jury is instructed to disregard the answer.

IV RP at 299.

whether secretions are usually present on the outside of the victim's body in sexual assault cases.[10] Assuming, without deciding, that the trial court erred by disallowing this testimony, we hold that such error was harmless. As discussed above, there was overwhelming evidence of rape, including strong evidence of bodily secretions and eyewitness reports of the sexual encounter.

C. Purpose Behind Collecting Vaginal Swabs

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

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

> [Meredith]: [Ms.] Russell, with respect to the blue light exam is that for purposes of detecting if there is secretions on the external body?
> [Russell]: Uh-huh (affirmative)
> [Meredith]: You stated there was no finding of that?
> [Russell]: Uh-huh (affirmative)
> [Meredith]: Is it not true often times in a sexual assault exam there will be secretions on the outside of the body?
> [Prosecutor]: Objection. Relevance, not confined to the facts of this case.
> THE COURT: Sustained.

V RP at 433.

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

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

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

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

Meredith contends that the State wanted to elicit evidence showing that the lab found evidence consistent with his guilt—semen with nonmotile sperm—when it examined the vaginal swabs, but it "did not want the defense to be able to elicit testimony that an additional

exam—DNA testing—could have resolved whether the sperm was the defendant's or someone else's." Br. of App. at 48. He maintains that this is exactly the type of unfairness that *Gefeller* was trying to prevent, i.e. allowing one party to bring up a subject and bar the other party from inquiring about it.

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

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

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

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

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

Former RCW 9.68A.090 (1989).

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

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

IV. Closing Argument

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

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

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

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

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

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

Penoyar, C.J.

We concur:

Hunt, J.

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

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

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

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

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

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

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

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

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

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

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

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

The benefit of giving each member of a racially cognizable group a fair opportunity to

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

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

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

Johanson, J.