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No. 34339-8-II

BY: 

IN THE COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

COVELL PAUL THOMAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Sergio Armijo, Judge

REPLY BRIEF OF APPELLANT

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A. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The defense theory of the case was that Edward Rembert fired the shots that killed Richard Geist and that the jurors at the first trial may have, given the court's instructions, found Covell Thomas guilty of premeditated murder only because they believed he acted with knowledge that his actions would facilitate a robbery *not* a murder. What Respondent fails to include in its "Statement of the Case," which is crucial to this defense, is that the primary testimony implicating Covell Thomas came from co-defendants Lynette Ducharme and Desiree Azevedo, who testified under plea bargains that reduced their charges from aggravated murder to accessory to robbery and rendering criminal assistance in Ms. Ducharme's case and a 40-day sentence for rendering criminal assistance in Ms. Azevedo's case. CP 219-225; RP 276-278, 281, 1052-1057. Moreover, Ms. Azevedo was Edward Rembert's girlfriend; and Lynette's testimony was riddled with inconsistencies between her sworn testimony at trial, her sworn testimony at the first trial, her statements to the police and her statements to friends. RP 210, 214; Opening Brief of Appellant (AOB) 12 n. 7. Even so, Lynette was clear in her testimony that Mr. Thomas never said that he had shot Mr. Geist and that she had not seen him with a gun on the night of the shooting. RP 316, 242-245.

What is also significant and omitted from Respondent's "Statement of the Case," is the degree to which supposedly "unbiased" witnesses had adapted and changed their testimony to support the state's theory of the case. Raymond Cool, the school security guard, had adapted his testimony to support the theory that Mr. Thomas rather than Edward Rembert was in the back of the van. Mr. Cool simply altered his testimony on virtually every point relevant to identification of the man outside the van. AOB at 8 and n. 2. Further, because having the back door open gives rise to the implication that Rembert was in the back seat and opened the door to get out and urinate, the state asserts that Mr. Cool said that "[t]here was no one in the front passenger seat of the van." Brief of Respondent at 9-10. What Mr. Cool actually said was that the back sliding door of the van was open, that he did not see anyone in the front passenger seat and did not see anyone in the van at all. RP 510. For another example, both of the neighbors testified at trial that they either heard two doors slam or saw two people get into the van. RP 656, 689. The husband, however, had told the police two days after the incident that he saw one person come out of the apartment and enter the van. As Sandy Ducharme had candidly admitted to the police, it was difficult to tell what she had learned from what source. RP 620. Sandy also admitted that she spoke with another witness about what she had been asked while on the stand testifying. RP 615-616.

Jeremy Horst, another important witness for the state, testified that he was very high at the time of his arrest and that he had used methamphetamine every day for five years prior to his arrest. RP 358-359. In his taped interview, Horst had simply agreed to information provided by the detectives; he averaged six to ten of such agreements per page of the transcript of the interview. RP 354-356.

Although the state concludes that Mr. Thomas did not present any evidence, BOR at 19, Mr. Thomas in fact presented evidence which substantially impeached the testimony of virtually every fact witness presented by the state.

B. ARGUMENT IN REPLY

All of the state's arguments are premised on a fundamentally flawed reading of the decision in State v. Thomas, 150 Wn.2d 821,83 P.3d 970 (2004). The state asks this Court to disregard the clear holding that, for purposes of imposing an enhanced sentence of life without parole or death, the "to convict" instruction for the underlying first degree murder as well as the special verdict form was insufficient. The instruction was insufficient because it did not require the jury to find that Mr. Thomas intended to facilitate a murder rather than just a robbery.

We agree with Thomas that the "to convict" jury instruction and the aggravating factors special verdict form given in his case did not require the jury to find that Thomas in particular had the intent

to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice. . . These facts must be found by the jury.

State v. Thomas, at 876 (2004).

The Thomas court held that the instructional error in the “to convict” instruction was harmless error if the state was willing to have Mr. Thomas sentenced only for first degree murder. If, however, the state wanted to seek a sentence beyond the standard range for first degree murder, it had to retry him in a constitutionally sufficient manner—requiring a jury find all necessary facts for an enhanced sentence, including that “Thomas in particular had the intent to murder Geist.” Thomas, at 876.

What the state is asking this Court to ignore is that the Supreme Court clearly held that the jury “must” find that “Thomas in particular had the intent to murder Geist.” Instead, the state asks this Court to accept that Mr. Thomas was properly convicted of first degree murder, not only for purposes of being sentenced for first degree murder, but also for purposes of being sentenced for aggravated murder. But this is precisely what the Supreme Court, in Thomas, refused to do. Accordingly, if the jury was not required to make this finding on remand, then the constitutional error which resulted in reversal of Mr. Thomas’s death sentence and aggravated murder conviction would not be remedied.

By overlooking the actual holding of the Thomas court, the state asserts erroneously that the court affirmed the underlying conviction for all purposes and that the jury was not required to find that Mr. Thomas intended the death of Mr. Geist on remand. Under this flawed assertion, the state proceeds with a number of irrelevant and faulty arguments. This reply will track the arguments set forth in the Respondent's brief.

**1. MR. THOMAS'S CONVICTION FOR
AGGRAVATED MURDER VIOLATED THE STATE
AND FEDERAL PROHIBITION AGAINST DOUBLE
JEOPARDY**

The state's double jeopardy argument is premised on the assumption that the only issue on which Mr. Thomas had the right to a jury verdict on remand was whether the state had proved one or more aggravating circumstance against him. This, however, was not why the case was remanded by the Washington Supreme Court.

The Court remanded for retrial because Mr. Thomas was denied, at his first trial, the right to a jury determination "that *[he]* in particular had the intent to murder Geist or that the aggravating factors applied specifically to him as opposed to an accomplice. . . . These facts must be found by the jury" State v. Thomas, 150 Wn.2d 821, 876, 83 P.3d 970 (2004) (emphasis added). The jury instructions which resulted in this failure to require sufficient proof included the "to convict" jury

instructions on the underlying murder conviction as well as the special verdict instruction on aggravating factors. The error was that the jury instructions allowed the jurors to convict Mr. Thomas of first degree premeditated murder without finding all of the elements of first degree premeditated murder. While this, the court found, was harmless error for purposes of upholding the underlying conviction, it was not harmless for upholding a conviction for aggravated murder. Thomas, 150 Wn.2d at 876. That is why the case was remanded:

We hold we are unable to subject these instructional errors to a harmless error analysis for purposes of upholding a death sentence because to do so would be to find facts that increase the sentence beyond the statutory maximum. These facts must be found by the jury. We reverse Thomas's conviction for aggravated murder and reverse his death sentence. Thomas, 150 Wn.2d at 976.

The double jeopardy problem stems from the fact that the jury may not have actually convicted Mr. Thomas of first degree murder or any of the aggravating factors. Thus, to cure the error identified by the Washington Supreme Court, the jurors necessarily had to first convict Mr. Thomas of first degree murder on retrial. This is because the Thomas court recognized that the jury might not have convicted him of all of the elements of this offense; they might have found that Rembert fired the shots and that Mr. Thomas did not anticipate or facilitate the shooting.

The way that the special verdict was written, the Thomas court

could not determine that the jury found that any of the aggravating factors applied specifically to him rather than to his accomplice. Thomas, at 876.

The Supreme Court set up an insoluble dilemma. The jury instructions did not require the jury to find Mr. Thomas was actually guilty of first degree premeditated murder at his first trial, and this error could not be overcome for purposes of imposing the aggravated sentence of life without parole or death. To cure this problem, however, the jurors inevitably had to convict Mr. Thomas a second time of first degree murder, in violation of the prohibition against double jeopardy. This was the only way that Mr. Thomas could be afforded his right to a jury trial on the elements of the offense for purposes of imposing an enhanced sentence of life without parole or death. The trial court tried to solve this dilemma by excusing the jury from making all of the findings that the Supreme Court returned the case for them to find. This violated Mr. Thomas's right to a jury trial and due process of law. To avoid the double jeopardy problem, Mr. Thomas's conviction for first degree murder had to be vacated or the aggravating factors dismissed.

Moreover this is not a case where one aggravating factors of several were rejected by the jurors; as the jury was instructed, it may have acquitted him of all of the charged aggravating factors, finding only that the factors applied to an accomplice. Thomas, at 876.

The state's conduct of the case on retrial clearly supports the inescapable conclusion that the state was retrying Mr. Thomas on the underlying conviction, of which he already stood convicted. As long as Mr. Thomas remained convicted of first degree murder, double jeopardy prevented the state from retrying him to establish the elements of the crime. For this reason, Mr. Thomas's conviction for aggravated murder must be reversed and dismissed on double jeopardy grounds, and he should be sentenced to a term within the standard range for non-aggravated first degree murder.

2. THE JURY'S FINDING OF THE AGGRAVATED CIRCUMSTANCES ON REMAND VIOLATED DUE PROCESS OF LAW AND MUST BE REVERSED.

- a. The state had to prove all of the facts necessary to establish the aggravating factors to a jury beyond a reasonable doubt.**

The Respondent goes to great lengths to demonstrate how, under Washington law, a person can be legally accountable for the conduct of an accomplice. BOR 31 – 36. This recitation of authority misguides this Court on the true posture of this case. A jury has never determined that Mr. Thomas was either the principal or an accomplice to premeditated murder; a fact that is legally required before an increased sentence may be imposed. State v. Thomas, supra; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068; Blakely v. Washington, 542 U.S. 296, 124

S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

During the original trial, the jury was provided with admittedly erroneous jury instructions. These instructions permitted the jury to convict Mr. Thomas of First Degree Murder and the additional aggravated factors based solely on the actions of the co-defendant. The instructions did not require a finding that Mr. Thomas intended to cause the death; the jury was permitted to convict if Mr. Thomas “or an accomplice” acted with such intent. Compounding this problem was the erroneous jury instruction that required only proof that Mr. Thomas acted with intent to facilitate “a” crime rather than “the” crime of murder. Taken together, these instructions did not require the jurors to find either that Mr. Thomas participated in the *actus reas* or *mens rea* of the underlying murder charge or that he, rather than an accomplice, had an intent to commit murder. The Washington Supreme Court concluded as much. State v. Thomas, at 876 (2004). Consequently, the factual question of whether Mr. Thomas intended to murder the victim – a fact required before the aggravators can be sought to increase punishment – was never determined by a jury beyond a reasonable doubt at the original trial or on retrial.

The authority establishing that a person is equally guilty whether he is convicted as the principal or as the accomplice has no relevance

where the person was not convicted, for purposes of an enhanced sentence of aggravated murder, as either the principal or an accomplice.

b. The court's jury instruction did not allow the defense to argue its case.

It is well settled that Mr. Thomas was entitled to present his theory of the case to the jury in the form of appropriate instructions. State v. Griffith, 91 Wn.2d at 575, 589 P.2d 799 (1979); State v. Finley, 97 Wn.App. 129, 134, 982 P.2d 681 (1999), review denied, 139 Wash.2d 1027, 994 P.2d 845 (2000). As the Ninth Circuit Court of Appeals held in Bradley v. Duncan, 315 F.3d 1091, 1098 (9th Cir. 2002), “[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the right to consider the defense.” See also, Beardsley v. Woodford, 358 F.3d 560, 577 (9th Cir, 2004) (it is reversible error not to instruct on a defense theory of the case if the theory is legally sound and the evidence in the case makes the theory applicable).

Here, the defense proposed instructions to allow it to argue its theory of the defense. The Respondent argues, however, that the trial court's rejection of the defense's proposed jury instructions was not error. BOR, 36 – 41. In essence, the Respondent assigns three reasons for this position. First, it argues that the defense proposed jury instructions contained the “theory of the case” to the jury. BOR, 39. Second, it claims

that specific instructions that read “The law des not allow for the motivation and intentions of one defendant to be attributed to another defendant” inaccurately stated Washington’s law on accomplice liability. BOR, 39. Finally, Respondent claims that other proposed instructions were objectionable as assuming true a fact that was in question (i.e. that Rembert, the co-defendant, shot Richard Geist). BOR, 39.

The Respondent’s arguments all rests, again, on the false premise that a jury properly found Thomas in particular had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice. As stated above, this fatal flaw is a theme throughout the Respondent’s brief, and is central to this argument.

Undoubtedly, the posture of this case is unique. As such, no standard jury instructions exist that could be followed, presented, or adopted by the trial court. Instead, the defense was left drafting proposed instructions that sufficiently set forth the law and provided an appropriate avenue to argue its theory. To this end, the defense submitted jury instructions, a few of which were alternative instructions. Even assuming proposed instructions were inartfully drafted in their particulars, the fact remains that the trial court did not offer any instruction that provided the defense a means to argue its theory.

Respondent further argues that the defense proposed instructions were objectionable since it assumed true a fact that was in dispute. (BOR, at 39). This argument actually proves the point underlying the defense position that the court's instructions were improper. Respondent claims the instruction that directed the jury to determine whether the defendant shared the same intent as the accomplice when "Rembert (accomplice) shot Richard Geist" was a fact in dispute since, as the Respondent specifically states, "the State and defense have always been at odds over who pulled the trigger, therefore stating that it was Rembert as a matter of fact was improper." BOR, 39). This claim concedes the error of the court's instruction that required the jury to take, as a matter of fact and law that Mr. Thomas shot Geist or intentionally facilitated his death.¹

As the Washington Supreme Court acknowledged, the "accomplice" jury instruction given at the original trial failed to require the jury to determine whether "*Thomas in particular had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice.*" State v. Thomas, 150 Wn.2d at 876. On remand, the jury instructions provided to the jury *required* that the jury

¹ As noted, the jury was instructed as follows: "The *defendant has been found guilty of premeditated murder in the first degree*. You must now determine whether any of the following aggravating circumstances exist:" (emphasis added).

accept the fact that Mr. Thomas was the shooter, or acted with the intent to facilitate the shooter, for purposes of applying the aggravating factors.

Mr. Thomas was entitled to instructions which required the jury to find that he intended the death of Geist, and he was denied those instructions.

This denied him his fundamental state and federal due process rights to appear and defend at trial with jury instructions which permitted him to argue his theory of the case.

c. The Remand failed to comply with the guarantees set forth in Apprendi, Ring, and Blakely.

The Respondent claims the proceeding on remand complied with the requirements set out in Apprendi/Ring/Blakely line of cases. BOR, 41. The Respondent points to the fact that, on remand, the jury was asked to determine whether the aggravating factors were proven beyond a reasonable doubt. BOR, 42. The Respondent conveniently cites to the special verdict form to argue that Apprendi/Ring/Blakely was satisfied. BOR, 42 – 43. The Respondent argues that the jury instructions directs the jury to focus on just the defendant and does not mention an accomplice, thus, the argument goes, the jury was to consider the aggravators as applicable to Mr. Thomas only. Again, the Respondent's argument is flawed since it advantageously skips a necessary requisite factor that the jury must find, but never has, specifically whether *Thomas in particular*

had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice.” State v. Thomas, 150 Wn.2d at 876.

The Respondent, finally acknowledging that a necessary fact was not found by a jury, seeks refuge by requesting this court to apply a harmless error analysis to address this deficiency. BOR, 44 – 45. The Respondent’s harmless error request must be rejected. The state asserts that “Blakely/Apprendi errors are subject to harmless error analysis,” citing Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). BOR 44. There are three reasons why this holding in Washington v. Recuenco does not apply in Mr. Thomas’s case: (1) the question of whether Blakely/Apprendi error can be harmless under Washington state law is as yet undecided; (2) the law of the case doctrine precludes such consideration; and (3) the state is collaterally estopped from relitigating the issue.

First, the Washington Supreme Court will consider in the winter term “whether entry of a firearm enhancement based on a deadly weapon finding can be considered harmless under Washington law,” State v. Recuenco, No. 74964-7 (order of October 17, 2006), and “whether entry of the exceptional sentence in this case, based on findings made by the trial court rather than a jury, can be considered harmless error.” State v.

Hall, No. 75800-0 (order of October 17, 2006).² Any conclusion that the instructional errors in this case could ever be harmless is premature.

On the second point, the law of the case doctrine precludes relitigating a clear holding already decided in the case:

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are “authoritatively overruled.”

Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966). Here, the Washington Supreme Court determined that the instructional errors which resulted in the remand could not be harmless. This determination has not been “authoritatively overruled.”

Third, the doctrine of collateral estoppel applies in criminal cases and precludes re-litigation of issues that have actually been adjudicated in a previously. State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992); State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). Collateral estoppel applies where the issue was raised and resolved by the former judgment and where the issue being raised in the subsequent proceeding is identical to the issue sought to be barred. Collicott, 118 Wn.2d at 661.

This test is clearly met here. The issue was clearly before the Washington Supreme Court and decided adversely to the state. The state did not move

² The Recuenco case also involves the question of whether it should be dismissed as moot.

for reconsideration on the issue, nor did it petition for certiorari. The holding of the court became final and law of the case. The state is collaterally estopped from re-litigating the issue again before this Court.

d. The Respondent's argument that Howerton should be overruled or limited in application is without authority, support, and misplaced.

In PRP of Howerton, 109 Wn.App. 494 (2001), the court specifically rejected the argument that accomplices can be held strictly liable for the existence of aggravators factors, concluding instead that the State must prove the applicability of the aggravating factors to the individual defendant.

The Respondent realizing this requires the state to prove that the aggravating factors apply to Thomas' own conduct and that proof can not be premised solely upon accomplice liability for the underlying substantive crime, begs the court to disregard this legal principle. BOR, at 48. Instead the Respondent urges this Court to conclude that Howerton does not apply to certain aggravators set out in RCW 10.95.020. BOR, at 50. The Respondent's plea must be rejected. First, the Respondent cites to no authority for its position, probably because there is none. Second, even if this court were to accept the Respondent's invitation, it has no application to this case.

The Respondent suggests that the Howerton principle should not apply to some of the statutorily listed aggravating factors. BOR, at 50. It then proceeds to categorize, without authority, these RCW 10.95.020 into those that Howerton would apply and those that it would not. Regardless, the two aggravators charged in this case were the same two aggravators charged in Howerton.

In Howerton, as here, the state charged two aggravating factors: concealment (RCW 10.95.020(9)) and in furtherance of robbery (RCW 10.95.020(11)(a)). In Howerton, as here, the aggravating factor applied, per jury instruction, if “[t]he defendant or an accomplice committed the murder to conceal the commission.” Howerton, at 501. The Howerton court, returning to State v. McKim, 98 Wn.2d 111, 653 P.2d 1040 (1982), concluded that because the language in the instruction allowed application of the aggravating factor without finding that it specifically applied to the defendant, it was erroneous. In short, the Respondent’s argument, arguably innovative, nevertheless lacks authority and application.

Finally, the Respondent argues that even if Howerton were to apply, the instructions provided in this case comport to its legal principles. BOR, 51. The Respondent suggests that because the instructions did not mention an accomplice, then the jury’s focus was whether the aggravators applied to Thomas. This logic again conveniently misses the point. As

stated above, who the shooter was and whether Mr. Thomas had the intent to kill has always been in dispute; a dispute that has never been determined by a jury. Therefore, to present instructions that concluded, as a matter of law, that Mr. Thomas was guilty of premeditated murder (and thus the shooter or a properly convicted accomplice) effectively eliminated the prerequisite consideration by a jury whether *Thomas in particular had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice.*” State v. Thomas, 150 Wn.2d at 876.

3. THE TRIAL COURT’S INSTRUCTION THAT THOMAS WAS GUILTY OF PREMEDITATED MURDER CREATED A MANDATORY PRESUMPTION AND WAS A COMMENT ON THE EVIDENCE.

The Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution requires the state to bear the “burden of persuasion beyond a reasonable doubt of every essential element of a crime.” State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). A mandatory presumption is treated with caution since it serves to relieve the state of its obligation to prove all elements of the crime charged (or factors of the enhanced sentence). State v. Deal, 128 Wn.2d at 699; Sandstrom v. Montana, 442 U.S. 510, 523 – 24, 99 S.Ct. 2450, 2458-59, 61 L.Ed.2d 39 (1979). Here, the trial court, upon remand,

provided an instruction that directed the jury to assume a fact (i.e. that Thomas was the shooter) as true; a fact that, as the Respondent acknowledges, was in dispute. BOR, 39. Consequently, the instructions provided on remand alleviated the state from proving, and the jury from having to find that Mr. Thomas “in particular had the intent to murder Geist” since it directed such a finding as a mandatory presumption.

The Respondent seeks refuge in State v. Rupe, 108 Wn.2d 734 (1987 (Rupe II)). BOR, 53 – 57. This analysis is misplaced. In Rupe, the defendant’s death sentence was reversed, but the aggravated murder conviction was affirmed. Consequently, and significantly different than the case at hand, the underlying first degree murder conviction and the aggravating factors had been proven to a jury beyond a reasonable doubt. On remand, a jury was impaneled for the sole purpose of determining whether a death sentence should be imposed. In Rupe, and unlike here, a statute permits the impaneling of a jury, upon remand, to determine whether death or a sentence of life without parole, as authorized by the previous jury verdict, should be imposed RCW 10.95.050.³

³ RCW 10.95.050(4) specifically permits impaneling of a jury on remand if the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury or if a retrial is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court.

In contrast to Rupe, the jury was impaneled to make the factual determinations whether Mr. Thomas intended the death of Geist and whether the aggravating factors applied specifically to him. Rupe does not alter the conclusion that the court's instruction created a mandatory presumption and constituted a judicial comment on the evidence.

4. THE TRIAL COURT DID NOT HAVE AUTHORITY TO EMPANEL TO DETERMINE THE EXISTENCE OF AGGRAVATING FACTORS.

The Respondent takes the position that the trial court, upon remand, had authority to fashion a procedure to determine the existence of aggravating factors. BOR, 57. The Respondent blurs the issue of whether a court may submit special interrogatories to an existing empanelled jury with a court's authority to empanel a jury when such a procedure is not authorized by law. As noted previously, even if the court was permitted to provide special interrogatories upon remand, the instructions provided violated Thomas' due process.

Attempting to address the second issue – empanelling a jury – the Respondent sends this court to State v. Davis, 133 Wn.App 415, ____ P.3d ____ (2006). In Davis, the trial court submitted a special interrogatory to the jury for purposes of determining whether aggravating factors existed. On appeal, Davis, relying on State v. Hughes, 154 Wn.2d 118,

110 P.3d 192 (2005) argued that the trial court did not have the authority to create such a procedure. Division Three of the Court of Appeals, in rejecting Davis' argument, read Hughes' conclusion that a trial court lacked inherent authority to empanel a jury was limited in application to cases on remand. Davis, 133 Wn.2d at 427. The Respondent apparently forgets the case at hand was a *remand*, and thus places it squarely within the confines of the Hughes decision. Properly placed, the Respondent acknowledges the result:

The Hughes court concluded that a jury could not be empanelled on remand to find aggravating factors warranting an enhanced sentence because the SRA did not provide for such a mechanism.

BOR, at 63; citing State v. Hughes, 154 Wn.2d at 151 – 152. (emphasis added).

Coincidentally, the Respondent ignores the precedents relied upon in Hughes, namely State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980) and State v. Frampton, 95 Wash.2d 469, 476-79, 627 P.2d 922 (1981), which hold that, where the legislature did not anticipate a guilty plea and had failed to provide a means of empanelling a jury after a guilty plea, the courts had no power by creating such a procedure. State v. Hughes, 154 Wash.2d at 208-209 ; State v. Martin, 94 Wn.2d at 9.

Because there is no procedure for empanelling a jury to consider aggravating factors after a remand after an appeal in which only the underlying conviction is upheld, Mr. Thomas's conviction for aggravated murder should be reversed and dismissed.

5. THE TRIAL COURT ERRED IN DENYING MR. THOMAS'S BATSON CHALLENGE.

Juror Number 33 was excused because of his concern that he was the only African-American in the entire jury panel. Juror 33 indicated that he was comfortable working in a group; that he understood the need to listen to and respect the ideas of other people; and that he understood that people, including O.J. Simpson, were found not guilty rather than innocent in our judicial system. RP(supp) 2, 3, 5. Juror 33 found the question of whether it was human nature for a person to make a judgment when they walked into the courtroom to be a racist comment; he noted the makeup of the jury as compared to the racial makeup of Tacoma or Pierce County and Mr. Thomas's race. RP(supp) 4.

Juror 33's concern over the absence of other African Americans on the jury panel was not a racially-neutral reason for excusing Juror 33, even though he stated that he believed the prosecutor was glad that there were no other African Americans. This is because the prosecutor made no attempt to clarify with Juror 33 that the prosecutor does not chose who is

selected for jury duty.

If all African Americans who can articulate an opinion that members of their race are not treated fairly by the criminal justice system or have an opinion that prosecutor may think it advantageous not to have African Americans on a jury, where the defendant is an African American, can be excused from participating in juries, then few African Americans will serve on juries. The entire reason for Batson challenges is because members of minorities are discriminated against during jury selection, often by prosecutors. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and cases cited therein.

Moreover, although the state asked this Court to ignore that trial court's ruling that a single peremptory challenge cannot violate equal protection, the state recognized that one such challenge can support a Batson challenge. BPR 72. Here, it is clear that the trial court's mistaken belief that excusing one juror did not constitute prima facie evidence of purposeful discrimination was a significant basis for the court's decision denying Mr. Thomas's Batson challenge. RP 122. Excusing Juror 33 was not based on a race-neutral reason and excusing that juror should result in reversal of Mr. Thomas's conviction.

6. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE HEARSAY INFORMATION FROM A PAGER AND CALLER ID BOX.

Contrary to the arguments of respondent, BOR 75-80, the only relevant purpose for which the telephone numbers on Mr. Geist's pager were offered and admitted at trial was to establish the assertive conduct that the callers left their numbers because they called Mr. Geist and wished to reach him. And, although the "54" code introduced to establish that Mr. Thomas wished a return phone call may have been admissible on one level as a statement of a party opponent, there were two layers of hearsay involved. The second layer was the witness who testified about numbers they saw on the pager or caller ID. Hearsay within hearsay must have an exception for each level of hearsay. ER 802. The trial court erred in not excluding information from the caller ID box and pager as hearsay.

7. THE TRIAL COURT ERRED IN ADMITTING REMEBERT'S STATEMENT AS AN EXCITED UTTERANCE.

The state argues that the law of the case doctrine precludes reconsideration by this Court of the admission of Rembert's alleged statement as an excited utterance. BOR 80-81. This argument should be rejected.

First, at trial, additional evidence was introduced to impeach the credibility of Edward Rembert. Ms. Azevedo testified that Rembert stole

stereos from cars, and the defense introduced evidence of his burglary convictions. RP 1097, 1587. This impeachment further undermined the credibility of Rembert's out-of-court accusations laying the blame on Mr. Thomas and exonerating himself.

Second, given the court's instructions to the jury preventing the jury from considering whether Rembert or Mr. Thomas shot Geist, there was no probative value in the evidence to be weighed against its prejudicial impact; the evidence was not relevant.

Moreover, the importance of the right to confront witnesses, as affirmed in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 Wn.2d 177 (2004), supports exclusion of Rembert's hearsay. It is simply a denial of fundamental right to confront one's accusers to permit the state to present the self-serving testimony of Edward Rembert without providing the defense with any opportunity to cross examine him. This denied Mr. Thomas his right to confront the witnesses against him and violated his Sixth Amendment rights as well as his due process rights under the Fifth and Fourteenth Amendments.

8. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE ER 404(B) EVIDENCE.

Defense counsel objected to the admission of testimony by Alexandra Toomah that Lynette had told her about a threat Mr. Thomas

allegedly made. Defense counsel objected on the grounds that Ms. Toomah's credibility had not been attacked and that the witness had no direct knowledge of the allegations. RP 382-386. The state argued that the evidence was relevant to Ms. Toomah's state of mind and the court admitted the evidence for that reason. RP 386. On appeal, Mr. Thomas asserts that the hearsay did not fit within the state of mind exception, that Ms. Toomah's state of mind was at issue, and the evidence should have been excluded under ER 404(b). The state's response addresses only the ER 404(b) issue. BOR 82-83.

It is undisputed that Ms. Toomah's credibility had not been attacked and the issue of why she delayed reporting was not at issue at trial. It is further undisputed that hearsay statements about the past conduct of Mr. Thomas was not admissible under the state of mind exception. State v. Parr, 93 Wn.2d 95, 102-104, 606 P.2d 263 (1980); In re Dependency of Penelope B., 104 Wn.2d 643, 709 P.2d 1194 (1985).

The evidence was not admissible on the grounds urged by the prosecutor or found by the court. As set out in the Opening Brief of Appellant, the evidence should also have been excluded under ER 404(b), and the state never sought to have it admitted as a prior bad act.

Finally, the state's argument that the evidence was not prejudicial should be disregarded. Obviously this is the kind of evidence that makes

it likely the jury will convict based on its view of the defendant's character rather than the evidence at trial. Moreover, Lynette's testimony that Mr. Thomas had threatened her if she told anything about the incident, was impeached by her prior statement to the police. RP 274; 325-327. The court erred in admitting the evidence; the unfair prejudice it engendered denied Mr. Thomas a fair trial.

9. CUMULATIVE ERROR DENIED MR. THOMAS A FAIR TRIAL.

The numerous errors alone, and certainly cumulatively, denied Mr. Thomas his state and federal constitutional rights to a fair trial.

C. CONCLUSION

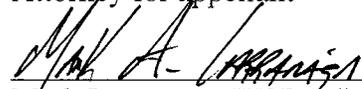
Appellant respectfully submits that his conviction for aggravated murder should be reversed and the enhanced sentence for aggravated murder dismissed.

DATED this 14th day of November, 2006.

Respectfully submitted,

For 

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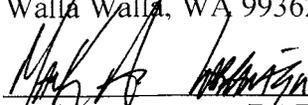
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I certify that on the 14th day of November, 2006, I caused a true and correct copy of the Appellant's Reply Brief and Motion for Over-length Brief to be served on the following via prepaid first class mail:

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