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No. 34339-8-II

STATE OF WASHINGTON

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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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not requiring the state to prove that Mr. Thomas acted with the intent to murder Richard Geist.
2. The trial court erred when it gave an instruction that created a mandatory presumption of facts, which the state was required to prove.
3. The trial court erred when it prevented the jury from making determinations of facts necessary to increase Mr. Thomas' sentence above the statutory maximum for first degree murder.
4. The trial court's instructions informing the jurors that Mr. Thomas had already been found guilty of first degree premeditated murder were impermissible judicial comments on the evidence.
5. The trial court erred in giving Jury Instruction No. 1.¹
6. The trial court erred in giving Jury Instruction No. 2.
7. The trial court erred in giving the Special Verdict Form Instruction.
8. The trial court erred in denying the Defense Theory of the Case Instruction Proposed Alternative Number 1.
9. The trial court erred in denying the Defense Theory of the Case Instruction Proposed Alternative Number 2.
10. The trial court erred in denying the Defense Theory of the Case Instruction Proposed Alternative Number 3-a.
11. The trial court erred in denying the Defense Theory of the Case Instruction Proposed Alternative Number 3-b.
12. The trial court erred in denying the Defense Theory of the Case Instruction Proposed Alternative Number 3-c.
13. The trial court erred in denying the Defense Theory of the Case Instruction Proposed Alternative Number 3-d.

¹ All jury instructions to which error has been assigned are attached to this brief.

14. The trial court erred in denying the defense the right to have the jury meaningfully consider whether Mr. Thomas, and not an accomplice, intended to commit murder.
15. The trial court erred in not requiring the state to prove that Mr. Thomas was a major participant in the crime.
16. The trial court erred in empanelling a jury to consider aggravating factors after a conviction of first degree murder had been affirmed on review.
17. The trial court erred by placing Mr. Thomas in jeopardy twice for the same offense.
18. The trial court erred in denying Mr. Thomas's Batson challenge.
19. The trial court erred in admitting information from Mr. Geist's caller ID and pager which was inadmissible hearsay.
20. The trial court erred in admitting a statement of co-defendant Edward Rembert as an excited utterance.
21. The trial court erred in allowing the state to introduce hearsay testimony and evidence that violated Evidence Rule (ER) 404(b).
22. Cumulative error denied Mr. Thomas a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the Washington Supreme Court reversed Mr. Thomas's aggravated murder conviction because the jury at the first trial was not required to find that he had the intent to murder or that the aggravating factors applied personally to him rather than his accomplice, but upheld his underlying murder conviction, did the trial court on remand deny Mr. Thomas his state and federal constitutional rights to due process and a jury trial by instructing the jurors that Mr. Thomas had been convicted of first degree premeditated murder and never requiring the jurors to find the facts the case was remanded for a jury to find?
2. Where the trial court's instructions which required the jurors to find that Mr. Thomas had already been convicted of first degree premeditated murder and never required them to find that he intended the murder or that the aggravating factors applied personally to him, did the instruction create a mandatory presumption that denied Mr. Thomas his state and federal constitutional rights to due process and a jury trial?

3. Where the trial court instructed the jurors that Mr. Thomas had already been convicted of first degree premeditated murder and did not require them to find that he intended the murder or that the aggravating factors applied personally to him rather than to his accomplice, did the trial court impermissibly comment on the evidence in violation of the state constitution?
4. Did the trial court err and deny Mr. Thomas his state and federal constitutional rights to due process and to a jury trial by failing to require the jury to find that he intended the murder and that aggravating factors applied personally to him and not just his accomplice, facts which were constitutionally necessary under the state and federal constitutions to be determined by a jury before an enhanced sentence of life without the possibility of parole could be imposed for aggravated murder?
5. Did the trial court commit constitutional error, in violation of the state and federal constitutions, in not requiring the jury to find that Mr. Thomas was a major participant in the underlying premeditated murder?
6. Where there is no procedure set forth in the death penalty statute, which provides for enhanced punishment of life without the possibility of parole for aggravated murder, for retrying a case to establish aggravating factors where an underlying conviction for first degree premeditated murder is affirmed on appeal, must Mr. Thomas's enhanced penalty for aggravated murder be reversed and vacated?
7. Where the purpose of retrying Mr. Thomas for aggravated murder was to have a jury decide whether he intended the murder and whether the aggravating factors applied to him rather than an accomplice, was the jury necessarily reconsidering facts which may have been decided favorably to him in the first trial and necessarily trying him a second time for first degree premeditated murder after his conviction for that crime was affirmed on appeal, in violation of the state and federal constitutional prohibitions against double jeopardy?
8. Where the reason the state excused the only African-American in the entire jury panel because of that potential juror's dismay at finding himself the only African-American in the panel, did the trial court err in denying the defense Batson challenge in violation of Mr. Thomas's state and federal constitutional rights to equal protection?
9. Where numbers listed on a caller ID and pager were introduced as assertions made by the persons calling the telephone or pager that they wished to speak to Mr. Geist or that they wanted him to return their calls, did the trial court err in ruling that the numbers were admissible as non-hearsay?

10. Where Mr. Thomas's co-defendant Edward Rembert did not take the stand and testify and where he had been convicted of crimes of dishonesty and routinely engaged in theft, did the trial court err in finding that his lack of credibility did not weigh against admitting his self-serving out-of-court statement as an excited utterance?
11. Where the trial court never found that the alleged prior bad act by Mr. Thomas which supposedly was relevant to the witness's state of mind actually occurred, where the witness's state of mind was not relevant to any actual disputed issue at trial and where the evidence of the prior bad act recounted in the double hearsay was far more unfairly prejudicial than any possible probative value, did the trial court err in admitting evidence of the prior bad act?
12. Did cumulative error deny Mr. Thomas his state and federal constitutional rights to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

On January 27, 1999, the Pierce County Prosecutor's Office charged Covell Thomas and co-defendants Edward Rembert, Lynette Ducharme Thomas, and Desiree Azevdo, "acting as accomplices to one another," with the aggravated murder of Richard Geist. CP 219-225. The alleged aggravating circumstances were (1) that the murder occurred during the course or furtherance of or immediate flight from a robbery and (2) that the murder was committed to conceal the commission of a crime or the identify of the person committing a crime. CP 219-225. On June 14, 1999, the state filed a Notice of Special Sentencing Proceedings to determine imposition of death penalty. CP 227-229.

On July 30, 1999, the prosecutor filed an amended information, charging felony murder as an alternative to aggravated murder, adding counts of residential burglary and

unlawful possession of a firearm, and adding that the murder was committed in the course or furtherance of or immediate flight from a residential burglary. CP 1-4.

Mr. Thomas entered pleas of not guilty to all charges, but was convicted by jury verdict after trial before the Honorable Sergio Armijo. CP 230-232. After a penalty phase trial, the jury found that there were insufficient mitigating circumstances to warrant leniency. CP 233.

On mandatory direct review, the Washington Supreme Court reversed Mr. Thomas' aggravated murder conviction and death sentence and remanded the case for the prosecutor to elect either to impose judgment and sentence for first degree non-aggravated murder or to again seek enhanced penalties:

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. We hold that 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 first degree murder and must reverse his death sentence. We find, however, that the errors in the accomplice liability and "to convict" instructions were harmless beyond a reasonable doubt for purposes of upholding Thomas's underlying convictions for first degree murder and residential burglary. Therefore, we remand for either a new trial on the aggravating factors or resentencing in accordance with this opinion. (emphasis added). State v. Thomas, 150 Wn.2d 821, 867, 83 P.3d 970 (2004).

On remand, the state elected not to seek the death penalty, but tried Mr. Thomas to establish the aggravating factors. Mr. Thomas was convicted of the aggravating factors after a trial before the Honorable Sergio Armijo, who sentenced him to the mandatory term of life without the possibility of parole. CP 205-214. Mr. Thomas filed a timely Notice of Appeal from the judgment and sentence. CP 215.

2. Pretrial rulings

a. State's proposed jury instructions

The defense theory of the case was that Edward Rembert fired the shots that killed Richard Geist and that the initial jury, given the court's instructions at the first trial, may well have found Mr. Thomas guilty because they believed he acted with knowledge that his actions would facilitate a robbery *not* a murder. Because no jury made the factual determination of whether Mr. Thomas intended to commit murder -- a fact necessary before a sentence enhancement could occur --- the defense argued that therefore a jury must make that determination. To this end, the defense objected to the state's proposed jury instructions that instructed the jury that, as a matter of law, Mr. Thomas was guilty of premeditated first degree murder, a fact the defense argued was never conclusively determined by a jury. CP 98 – 119; RP 2 – 12; RP 18 – 26; RP 78- 92; RP 102 - 106; RP 123 – 130; RP 134 – 150; RP 1528 – 1596.

The state argued that since the Washington Supreme Court affirmed Mr. Thomas's first degree murder conviction, then it was unnecessary for a jury to make such a determination. The state, therefore, offered proposed instructions that informed the jury that Mr. Thomas was guilty of premeditated murder in the first degree. CP 95- 97; CP 137 – 150; RP 12 – 17; RP 92 – 101; RP 106 – 109; RP 130 – 140; 148; 151; RP 1538 – 1596. The trial court agreed with the state. CP 178 – 202; CP RP 140 – 144; RP 156 – 163; RP 1579, RP 1582.

b. Defense proposed jury instructions

Pursuant to the its argument that due to the erroneous jury instructions at the first trial a jury never made the necessary determination that Mr. Thomas intended to commit

murder, the defense proposed alternative instructions that would inform the jury that Mr. Thomas had been charged as an accomplice. The defense argued that this instruction would permit the defense to argue its case and clearly define the necessary factual issue (i.e. whether Mr. Thomas intended to commit murder) for the jury. CP 167 – 177; RP 2 – 12; RP 18 – 26; RP 78- 92; RP 102 - 106; RP 123 – 130; RP 134 – 150; RP 1528 – 1596.

The state again argued that Mr. Thomas' affirmed conviction of premeditated first degree murder made such an instruction moot and irrelevant. RP 12 – 17; RP 92 – 101; RP 106 – 109; RP 130 – 140; 148; 151; RP 1538 – 1596. The trial court ruled for the state and refused to submit the defense instruction to the jury. CP 178 – 202; CP RP 140 – 144; RP 156 – 163; RP 1579, RP 1582.

3. Trial testimony

On Saturday March 28, 1998, a woman driving by on her way to work saw the body of Richard Geist lying beside the road across the street from the campus of Tacoma Baptist Church; she returned home and called 911. RP 173-174, 177-178. When the police responded, they found was blood on the curb near where the body was found and what they believed to be four sets of bloody footprints and drag marks from the curb to the body. RP 406-417, 814-818. Sometime later the police discovered Mr. Geist's pager and wrote down the telephone numbers of the people who had recently tried to page him. RP 947, 954-989, 1196-1204, 1212-1220, 797.

The medical examiner determined the cause of death to be four gunshot wounds to Mr. Geist's head and neck, fired from behind angled from right to left. RP 905, 918-920, 946.

The police contacted Raymond Cool, the security guard and janitor for the church school, who told the police that the previous evening while he was locking up the school and making his security check, he encountered a young man whom Mr. Cool believed had gotten out of a van parked nearby to urinate in the school parking lot. RP 490-508. The back sliding door of the van was open. RP 510. Someone in the van, whom Mr. Cool could not see, had challenged his authority when Mr. Cool said that the van was on private property and it would have to leave. RP 510-515, 518. The van ultimately left the parking lot and parked along the side of the street that ran past the school. RP 521. A short time later, Mr. Cool heard a loud commotion coming from the van and the firing of a number of shots. RP 522-523. Mr. Cool called the police and believed that a police car drove by, but no one from the police department contacted him that evening. RP 524, 526, 5288-529. Mr. Cool estimated that the incident occurred sometime after 10:00 p.m. RP 502. A neighbor in the area reported hearing shots ten or fifteen minutes after 10:00. RP 441-443.

At trial, Mr. Cool described the man he saw as six feet tall, slender and wearing new clothes. RP 509. Mr. Cool admitted that he had told the police at the time of the incident that the man was six feet tall, was in his late twenties or early thirties, weighed 200 to 220 pounds and was wearing a hooded sweatshirt and jeans.² RP 558. Moreover, Mr. Cool had not described the man outside the van as wearing the dressy tan pants or

² The detective who interviewed Mr. Cool confirmed that he described the man outside the van as six feet tall, weighing 200 to 220 pounds and wearing a hooded sweatshirt. RP 1397. Lead Detective Webb described Ed Rembert at that time as being six feet to six feet one inch tall, weighing 190 pounds and being somewhat heavier than Mr. Thomas. RP 1491. When the state tried to get Desiree Azevedo to identify Rembert from a later picture in which his hair was longer than at the time of the incident, Ms. Azevedo said that the picture was not a fair representation of him at that time. RP 1000-1009, 1064.

nice shirt at the prior trial. RP 560. Mr. Cool was shown a photomontage with Mr. Thomas' picture in it, but not a montage with Ed Rembert's picture; he was unable to identify Mr. Thomas in the montage as the person he saw outside the van. RP 533-534, 1280, 1285.

The police identified Mr. Geist from his fingerprints. RP 1424. From this identification, the police were able to locate Mr. Geist's home address and find his car license plate number. RP 1377-1378. When Mr. Geist's van was found burned down to its metal frame near Gig Harbor, the police had the remains towed to a secure lot and sifted the debris in it for evidence. RP 867-874, 882-8871378, 1380, 1290, 1292. The police located what the officers believed to be a shell casing in front of the driver's seat. RP 1293. The state's firearm expert gave his opinion that it was not a casing; the expert, however, believed that the gun that fired the shots that killed Mr. Geist was a revolver, which does not eject casings. RP 1340. The expert agreed, however, that the bullets that were recovered from Mr. Geist during the autopsy could have been fired from an automatic or semiautomatic as well as a revolver and from a large number of different weapons. RP 1332, 1349, 1354.

The fire marshal gave his opinion that the fire originated in the front passenger seat of the van. RP 954. 957.

Mr. Geist lived in a duplex near Titlow Beach, Washington. RP 193. When the police went to his apartment they found what they believed to be a bloody footprint on the front porch, partial footprints in blood in the kitchen and near the bathroom, and a blood smear in the bedroom where drawers and a filing cabinet had been opened and

looked through.³ RP 832-845, 1230-1240, 1384, 1386. The blood samples from the apartment matched the DNA profile of Mr. Geist. RP 1359, 1365-1368. No useable latent prints were found in the apartment. RP 845.

Richard Geist owned a franchise to clean businesses. Mr. Thomas worked for and socialized with him. RP 190-194. On Friday, March 27, 1998, Mr. Geist had gone to Coverall of Washington, the company which granted the franchise, for payment for his work. RP 774, 779, 781, 784, 785, 790. As was his habit, he immediately cashed the \$5,566.20 check. RP 781, 784, 793. Mr. Geist paid Mr. Thomas from this cash the same afternoon. RP 211-212. The police contacted people associated with numbers from Mr. Geist's pager, including Lynette Ducharme and her sister Sandy Ducharme, without learning any information useful to their investigation.⁴ RP 1434-1436. Then in August, 1998, the police were contacted by a person named Kenneth Adams, who was fitted with a body wire so that a conversation between him and a friend of Mr. Thomas's named Jeremy Horyst could be recorded. RP 1436-1444. The conversations led to further contacts with and the ultimate arrests of Lynette, Desiree Azevedo, Ed Rembert and Mr. Thomas. RP 1445. All were charged with aggravated murder. CP 219-225. After their arrests, Lynette and Ms Azevedo made statements which were incriminating to Mr. Thomas. RP1446-1448.

³ The forensic technician who processed the apartment agreed that what was noted as a possible blood stain on the vanity in the bathroom could very likely have been cigarette burns. RP 1246-128. As a result the theory that someone came into the bathroom to clean up was not tested. RP 1249. The defense also established that items of evidence identified on the trial exhibit diagram of the apartment were not on the original diagram prepared at the scene. RP 1249-1257. Those were added by the forensic expert for use in court at the request of the prosecutor. RP 1272-1275.

⁴ The pager was found after the scene was processed; it was only twenty-five paces from the curb on a well-traveled path and open to view. RP 986-989; 993-995.

Lynette Ducharme testified that on the evening of March 27, 1998, she and Mr. Thomas picked up Desiree Azevedo and Ed Rembert, who were girlfriend and boyfriend at the time.⁵ RP 210, 214. Lynette took Mr. Thomas and Rembert to the Titlow Beach area and later, after a call from Mr. Thomas, went back there to pick them up. RP 222-231. When she went to pick them up, she drove past Mr. Geist's apartment and stopped at a tavern nearby; Mr. Geist's van was in the driveway and someone was knocking at the door. RP 233. A short time later, she saw Mr. Geist's van pass by with Mr. Thomas driving; the van was followed by another car. RP 236-238, 240. Lynette drove quickly to get between the van and the car and finally the car turned into a service station and stopped following the van. RP 238, 240. A short time later, Mr. Thomas stopped the van and he and Rembert told Lynette and Desiree that they needed to burn the van. RP 240-241. They followed her to a place near Gig Harbor, Washington, where Mr. Thomas lit the van on fire using perfume from Lynette's purse to set fire to Desiree's windbreaker.⁶ RP 246-248.

The four next went to Desiree's house where Mr. Thomas and Rembert changed clothes. RP 253. Lynette and Mr. Thomas left and threw the clothes in a dumpster and,

⁵ Lynette Ducharme and Covell Thomas were married after the incident; she divorced him as part of her plea bargain so that she could testify against him in court. RP 271-272, 276-278.

⁶ The testimony was inconsistent as to whether the windbreaker was stuffed in the gas tank or not. RP 249, 398.

according to Lynette, threw Mr. Thomas's shoes in a brushy area.⁷ RP 254, 257-258.

She learned that Mr. Geist had been shot. 261.

Lynette was clear in her testimony that Mr. Thomas never said that he shot Mr. Geist. RP 316. She had not see him with a gun on the night of the incident, but claimed that she had seen him with a gun at some point shortly before the incident which she "believed" was a .38 caliber revolver. RP 242-245. She also told the police that Mr. Thomas liked to sit in the front seat of a car, rather than in the back seat. RP 307.

Lynette testified that she saw Mr. Thomas give some of the money to Rembert after they returned to Ms. Azevedo's house. RP 255. In her statement to the police, however, Lynette had said that she and Desiree actually went into Mr. Geist's house to help look for the money. RP 312.

According to Lynette, before March 27, 1998, Mr. Thomas had spoken to her about a plan to rob Mr. Geist. RP 201. He wanted to find someone to go out on a date with Mr. Geist and take him to a place where he could be robbed. RP 207-209.

⁷ The police searched extensively and found one tennis shoe which Lynette said was Mr. Thomas's. RP 257-259. At trial, she testified he wore size 15 shoes, although she had testified that he wore a different size at an earlier hearing. RP 259. Lynette, in fact was impeached with a number of inconsistencies. At the prior trial, she testified that she picked Rembert up where he was with his friend Troy Frank, not at home; she testified at the prior trial that the van was not in the driveway when she first drove by Mr. Geist's apartment, not that it was in the driveway; she testified earlier that she had not seen anything on Rembert's person, but at trial that he looked wet; and she had told the police that the money was divided evenly, not that Mr. Thomas kept the majority of it. RP 299, 304-306, 308, 312, 321. Lynette was impeached with an earlier statement to a friend, Ali Wright, that she and Desiree Azevedo went into the apartment to help look for money. RP 312, 400. Her testimony that she and Mr. Thomas went to a motel the night of the incident was impeached with her earlier testimony that she went home, had a beer and fell asleep. RP 323. Her testimony that she didn't tell the police what happened because Mr. Thomas threatened to kill her was impeached with her statement to the police that he had threatened her once, but it was because he was jealous and had nothing to do with the incident. RP 325-327.

As a result of her agreeing to testify against Mr. Thomas, Lynette was permitted to plead guilty to being an accessory to robbery and rendering criminal assistance, instead of aggravated murder. RP 276-278, 281.

Alexander Toomah testified that her friend Lynette had told her and Lynette's sister Sandy Ducharme about the incident; Lynette was drunk at the time and appeared to be frightened. RP 377-381. Ms. Toomah, however, had not come forward to report this conversation until after Lynette had been arrested and charged with aggravated murder. RP 390, 395. Sandy Ducharme, Lynette's sister, agreed that Lynette told them what happened one evening when Lynette had been drinking. RP 604-606. Sandy had told the police at the time that she was not sure what Lynette had told her and what she had heard from other sources.⁸ RP 620.

According to Sandy Ducharme, Mr. Thomas once asked her to go out on a date with Mr. Geist to help him with a robbery. RP 595-599. Mr. Thomas, however, never discussed killing Mr. Geist. RP 599. Lisa Rodin testified that Mr. Thomas asked her to help him set up Mr. Geist for a robbery by going out with him on a date. RP 451-454.

Jeremy Horst testified, contrary to others, that Mr. Thomas asked him to help with the robbery and mentioned that he might have to kill Mr. Geist. RP 337-346. Horst admitted that because of this alleged conversation he had been picked up at home by fifteen police officers and arrested. RP 350-351. He was really high at the time of the arrest and had used methamphetamine every day for five years prior to the arrest. RP 358-359. In his taped interview, Horst primarily agreed to information provided by the

⁸ Sandy Ducharme also admitted on the stand that she talked with another witness during the trial about what she was asked during her testimony on the stand. RP 615-616.

detectives; he averaged six to ten such agreements per page of the transcript of the interview. RP 354-356.

Stacie Nickell (nee Funz) testified that she received a phone call from Ed Rembert at approximately 9:00 p.m. on March 27, 1998, and her Caller ID listed Richard Geist's residence as the source of the call. RP 737-741. According to Stacie, her cousin, with whom she shared an apartment, returned home and made a call at around 10:00 p.m. to the number on the Caller ID. RP 743., 747. Her cousin, however, denied being told about the call, returning the call or seeing anyone else return the call. RP 755-756, 759.

Desiree Azevedo testified that she went with Lynette to drop Rembert and Mr. Thomas off near Titlow beach and returned with Lynette to pick them up forty-five minutes to an hour later. RP 1014-1021. Lynette backed her car into a parking space near a tavern and followed a van when it went by. RP 1022-1023. Lynette and the van stopped near Cheney Stadium and Mr. Thomas, who was driving the van, said that they needed to burn it. RP 1024-1025. He followed Lynette. RP 1027. Desiree gave her windbreaker to Mr. Thomas to use to light the van on fire. RP 1034. Ms. Azevedo confirmed that Rembert was wearing gray jeans, a white t-shirt and a pullover jacket or sweatshirt that evening. RP 1075-1077.

After spending forty days in jail charged with aggravated murder, Ms. Azevedo was permitted to plead guilty to rendering criminal assistance and was released with credit for time served. RP 1052-1057.

On cross-examination, Ms. Azevedo testified that Rembert stole stereos from cars. RP 1097. The defense also introduced evidence of his burglary convictions as well. RP 1587. In spite of this evidence that Rembert was unreliable and that there were

significant intervening events between the shooting and the burning of the car, the state was permitted to elicit from Ms. Azevedo, as an excited utterance, that Rembert said that Mr. Thomas shot Mr. Geist.⁹ RP 1036-1047.

Mr. Geist's next door neighbors testified that they heard the van return to the apartment not long after 11:00 p.m., and heard someone fumbling with the keys. RP 655, 682-683. A short time later, a car pulled up and a man came to the door and knocked repeatedly before leaving. RP 655-658, 687-689. Shortly after the man left, someone came out of the apartment and left in the van. RP 659, 689-690. Both of the neighbors testified at trial that they either heard two doors slam or saw two people get into the van. RP 659, 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. RP 702.

The man whom the neighbors had seen knocking at the door was a friend of Mr. Geist's from Vancouver, Washington, named Cedric Walker who had come to visit for the weekend. RP 1121-1127. Mr. Walker testified that he had knocked and knocked and then driven to the nearby tavern to try to call Mr. Geist when he saw the van drive by; he gave chase for a short while. RP 1131-1145. Walker had told the police when they initially contacted him in 1998 that he had called Mr. Geist from the gym in Vancouver

⁹ The defense asked the trial court to reconsider its ruling from the first trial, affirmed on appeal, that Rembert's statement was an excited utterance on the grounds; the defense argued, that the appellate court did not consider Rembert's credibility. RP 976-978. Counsel pointed out that Mr. Thomas could not confront Rembert who had reneged on his agreement to testify at trial. RP 977. Counsel argued that Rembert had been convicted of crimes of dishonesty. RP 1043. Counsel further argued that Rembert, under the circumstances, might well have anticipated that his statement would be available at trial and was therefore testimonial. RP 977, 1043. The court found that the statement was an excited utterance based on the fact that Azevedo testified that he was cold, shaking and frightened. RP 1035-1037, 1043-1045.

before he left; no call from him, however, showed up on Mr. Geist's caller ID or pager. RP 1151, 1216-1217, 1391. He had also told the police that he saw a small light blue car parked behind the van in the driveway and that this was the same car with the two young women in it that had been following the van when he gave chase. RP 1156-1157.

The numbers copied from the caller ID box in Mr. Geist's home showed a 11:30 p.m. call from a pay phone on March 27, 1998, presumably from Cedric Walker, a 10:24 p.m. phone call from the Stacie Funz, a 5:13 p.m. call from the home of Sandy Ducharme, a 2:58 p.m. call from a friend of Mr. Thomas's who testified that she placed a three-way call for him to Mr. Geist. RP 454, 1391. A call from an unidentified caller was placed to the apartment at 12:44 a.m. March 28, 1998. RP 1391. The numbers copied from the pager included several which included the code "54" which Lynette testified was the code Mr. Thomas used, and included a number which Lynette testified was Mr. Thomas's mother's phone number. RP 218-219, 1216-1217.

4. Objection to the Caller ID and pager information

The defense objected to the introduction of information copies from the caller ID box and the pager on hearsay grounds. RP 712-735, 1171-1174. In particular, the defense objected to testimony from the pager which included the code "54." Counsel argued that this is an implied assertion that the declarant called and wished to be called back. RP 739-732, 1171-1174, 1188, 1193.

5. Double jeopardy objections

The defense objected to having Dr. Howard, the medical examiner, testify on the grounds that his testimony was irrelevant given that the court had already instructed the jury that Mr. Thomas had been convicted of first degree murder. RP 890. Counsel

agreed to stipulate that the shots were fired from behind and that the four shots were the cause of death. RP 894. The prosecutor argued that the time of death and direction of the bullets were relevant and that the state was required to prove all of the elements charged. RP 891-892, 894. The court permitted the state to call Dr. Howard as a witness and allowed the state to show six of the thirteen photographs of the body and autopsy which had been used at the first trial. RP 895-897. The defense argued that the only purpose of showing the pictures was to unfairly prejudice Mr. Thomas and inflame the jurors. RP 894.

The defense objected again and moved to dismiss on double jeopardy grounds after the state elicited testimony from its firearms expert about single and double actions on revolvers and the requirement that the gun be cocked before the trigger could be pulled on double action weapons. RP 1333-1334. Counsel objected because this evidence went to premeditation and constituted trying Mr. Thomas a second time for the same crime. RP 1334-1336. The court denied the motion and found, without explanation, that the evidence was relevant and admissible. RP 1338-1339.

6. Batson challenge

The defense objected when the state used a peremptory challenge to excuse the lone African-American on the entire jury panel. RP 119. The prosecutor's explanation was that this juror noticed the lack of racial representation, noted that "the prosecution would like it that way," and appeared hostile to the state during his few minutes of speaking – as if the state were responsible for the lack of minority representation. RP 120. Defense counsel stated that this was not a race neutral reason. RP 121.

The court found that the statements of the potential juror indicated a strong conviction about race and used words like “this is a joke” because he was the only African-American. RP 122. The court further found that excusing one minority representative could not establish a prima facie case or pattern of racial discrimination. RP 122.

In fact, Juror 33, indicated that he was comfortable working in a group and understood the need to listen to other people and appreciate their ideas. RP(supp) 2. Juror 33 indicated that he thought that O.J. Simpson was entitled to be presumed innocent, but that he was found not guilty rather than innocent; Juror. 33 noted that no one is found innocent in our judicial system. RP(supp) 3, 5.

When defense counsel asked if it was human nature for a person to make a judgment when they walked into a courtroom, Juror 33 took this to be a racist comment for two reasons: (1) guilty people such as Ted Bundy and Jeffrey Dahmer look innocent; and (2) the racial makeup of the jury panel: “I mean, I look at this jury pool. Look at that. Is this really a makeup of Tacoma or Pierce County? This is bizarre man.” RP(supp) 4. Juror 13, after a follow-up question indicated that “you have more dark in the bailiff than we have in this jury pool,” and added, “and that’s the was the prosecutors want it.” RP(supp) 4. This addition was the only negative thing Juror 33 said about the state. The state never sought any clarification.

7. Juror questions

The jurors sent out three questions during deliberations, to which the court responded, “The court refers you to the court’s instructions.” CP 234-236.

These questions were: (1) "Does the instruction (No. 2) mean only the defendant, or does it mean all persons involved in the robbery? Does it matter which of these persons had the firearm or deadly weapon?" (2) "Could the defense or state have called Ed Rembert if they wanted to?" and (3) "meaning of "in furtherance of". CP 234-236.

D. ARGUMENT

1. THE TRIAL COURT DENIED MR. THOMAS HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO DUE PROCESS OF LAW WHEN IT INSTRUCTED THE JURY THAT, AS A MATTER OF LAW, IT MUST FIND THAT MR. THOMAS WAS GUILTY OF PREMEDITATED FIRST DEGREE MURDER.

In spite of the fact that the Washington Supreme Court reversed Mr. Thomas's conviction for aggravated murder because of instructional errors, which relieved the state of its burden of proving to a jury that he had the intent to murder or that the aggravating factors applied personally to him and not just to an accomplice; the trial court, on retrial, instructed the jury that it must conclusively accept that he was guilty of first degree premeditated murder as a starting point for its consideration of whether the aggravating factors had been proven by the state. This necessarily assured that the very errors which the retrial was to cure were carried into the new trial. For this reason, this Court should reverse Mr. Thomas's conviction for aggravated murder.

First, the issue is controlled by the decisions of the United States Supreme Court in 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); and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This authority requires that every fact necessary to impose a sentence above the top of the standard range must be proven to a jury beyond a reasonable doubt.

Second, where the jury may find guilt on the underlying crime of first degree murder based on a theory of accomplice liability, the jurors must find that any aggravating factor applies to the accused's own conduct and is not based solely on accomplice liability for the underlying first degree murder. Here, the "to convict" instructions and the special verdict interrogatories at the first trial were worded in such a way that the jury was not required to make this determination. Moreover, because the jurors were not required to find at the first trial that Mr. Thomas intended to commit a murder of any kind, rather than a burglary or a robbery, the jurors were not required to find either that he committed any *actus reas* or that he had the required *mens rea* for the underlying crime. While the Supreme Court on direct review was willing to excuse this failure to require an actual jury finding for purposes of upholding the conviction for first degree murder, the Thomas Court held that under Apprendi, it could not find the failure harmless for purposes of the conviction for aggravated murder. That was why the case was remanded – because the jurors were never required to find either that Mr. Thomas had the intent to murder or that the aggravating circumstances applied personally to him.

Lastly, because the trial court's instructions at the retrial again failed to require the jurors to find that Mr. Thomas "in particular had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice," the court's instructions violated due process and the right to a jury trial and should require reversal of Mr. Thomas's conviction for aggravated first degree murder.¹⁰

¹⁰ Mr. Thomas proposed instructions which would have required the state to prove the required findings to the jury. CP 167-177. The trial court, however, refused to submit the proposed defense instructions to the jury.

- a. Under Blakely, Apprendi and Winship, the state had to prove all of the facts necessary to establish the aggravating factors to a jury beyond a reasonable doubt.

The Sixth and Fourteenth Amendments require that any fact, other than the fact of a prior conviction, which increases the maximum possible sentence, must be proven to the jury beyond a reasonable doubt. 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). The trial court violated these principles when it relieved the state from its obligation to prove to a jury beyond a reasonable doubt that the aggravating factors necessary to increase the punishment specifically applied to Mr. Thomas as opposed to his accomplice.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court invalidated a criminal sentence on Sixth Amendment grounds because the defendant's maximum penalty had been enhanced by findings of fact made by a sentencing judge rather than a jury. In Apprendi, the prosecutor sought a sentencing enhancement under a separate "hate crime" law, which authorized an enhanced increase for both the maximum and minimum term to which the defendant was subject. Apprendi, 530 U.S. at 470. The United States Supreme Court, in reversing the enhanced sentence, concluded it was not whether the legislature characterized the aggravating factor (i.e., hate crime enhancement) as a sentencing factor or an element that mattered; rather what mattered was the effect of the hate crime finding in increasing the maximum available sentence for the offense. Id. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Appendi v. New Jersey, 530 U.S. at 490.

Then, in Ring v. Arizona, 536 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2 242 (2002) (aggravating factors in capital cases function as elements of the greater crime), the Court expressly rejected the argument that form can prevail over substance. The Court held that “the dispositive question . . . ‘is not one of form, but of effect.’ If the State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” Ring, 122 S. Ct. at 2439-2440.

Thereafter, in Blakely, the Court defined the “statutory maximum” as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely v. Washington, 124 S.Ct. at 2537. Blakely, compelled by Appendi and Ring, required that all facts “which the law makes essential to the punishment” be subject to Sixth Amendment protections. Blakely, 124 S.Ct at 2537 (quoting 1 J. Bishop, Criminal Procedure § 87 (2d ed.1872)). Under this logical extension of Appendi and Ring, what matters is that facts are necessary to increase punishment, not formalistic distinctions between sentencing factors and offense elements or statutory maximums and mandatory minimums. See United States v. Malouf, 377 F.Supp.2d 315 (D. Mass., June 14, 2005).¹¹

¹¹ The Court reaffirmed this approach by concluding that the Sixth Amendment prevents federal judges from making factual determinations that mandatorily increase a defendant’s sentence under the Federal Sentencing Guidelines on basis of facts not reflected in the jury’s verdict. United States v. Booker, 543 U.S. 220, 125 S.Ct.1254, 161 L.Ed.2d 205 (2005).

The Supreme Court, in Blakely, Apprendi, and Ring, did not limit its holdings to specific types of statutes; they apply to any situation in which the jury verdict authorizes one sentence and the trial court imposes a longer sentence based on additional findings, not submitted to a jury. The legal principle underlying these decisions is that it violates the Sixth Amendment to structure sentencing laws such that the sentence reflects factual findings not submitted to the jury and the due process clause of the Fourteenth Amendment requires that this burden of proof be placed on the state.

- b. A jury had to determine beyond a reasonable doubt that Mr. Thomas in particular had the intent to murder or that the aggravating factors specifically apply to him as opposed to his accomplice before he was subject to an enhanced sentence.**

It is necessary, in light of Apprendi, Blakely, Ring and Winship, to determine what factual findings were required to increase Mr. Thomas' sentence above the sentence he could receive for the underlying murder conviction, and then whether those facts were decided by a jury beyond a reasonable doubt.

A sentence of life *with* parole (or the top of the standard range sentence) is different from and less than life *without* the possibility of parole. Thomas, 150 Wn.2d at 848. In order to increase the former to the latter, a jury must find beyond a reasonable doubt the existence of aggravating factors or elements. Thomas, at 848; 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); Ring v. Arizona, 536 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2 242 (2002). The state charged three aggravating factors to support an increased punishment to life without the possibility of parole: the murder was in furtherance of robbery or residential burglary (RCW 10.95.020(11)(a)) and the murder was committed to conceal the commission of a crime (RCW 10.95.020(9)).

Whether these factors were submitted to and determined by a jury is, however, only part of the inquiry. Aggravating factors *cannot* be established through principles of accomplice liability; aggravating factors must apply personally to the defendant and not just to an accomplice. State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000); Thomas, at 840. There must be a factual determination whether the defendant is “eligible” for a sentencing enhancement. That is, before a defendant who has been convicted of first degree murder as an accomplice can be sentenced for aggravated murder, the *state must prove that* the aggravating factor applies to the defendant’s own conduct and not premised solely upon accomplice liability for the underlying substantive crime. In re the Personal Restraint Petition of Howerton, 109 Wn.App. 494, 501, 36 P.3d 565 (2001). Consequently, in order for an aggravating factor to apply, Ring, Blakely, and Apprendi require that a jury -- and not a judge -- determine whether Mr. Thomas, and not an accomplice, is liable for the underlying substantive crime (i.e., premeditated murder).

As demonstrated below, no jury – either during the initial trial or upon remand – has determined that Mr. Thomas intended the death of Richard Geist or that the factors applied to him rather than Edward Rembert. Instead, the Washington Supreme Court made a judicial finding of the fact that Mr. Thomas was acting as a principal, a factual conclusion which the trial court permitted to suffice on remand and thus relieved the state from proving an essential fact. While the defense proposed instructions to require the findings and to support the defense theory of the case, the trial court refused to give the instruction.

- (i). **The Washington Supreme Court, and not the initial jury, made a determination of a requisite fact necessary to increase punishment.**

A jury has never determined whether Mr. Thomas' conviction was based solely on an accomplice liability to the underlying premeditated murder. Instead this fact was determined by the Washington Supreme Court on appeal. During the original trial, the trial court provided an erroneous jury instruction, which stated:

To convict the defendant of the crime of murder in the first degree as charged in Count I..., each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 27th day of March, 1998 the defendant or an accomplice shot Richard Geist;
- (2) That the *defendant or an accomplice* acted with intent to cause the death of Richard Geist;
- (3) That the intent to cause the death was premeditated . . . (emphasis added).

Furthermore, the trial court instructed the initial jury:

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction No. 15 (above), you must then determine whether any of the following aggravating circumstances exist:

The *defendant or an accomplice* committed the murder to conceal the commission of the crime or to protect or conceal the identity of any person committing a crime, and/or

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree, and/or residential burglary.¹² (emphasis added).

The court's instruction on accomplice liability made the problem worse by requiring proof only that Mr. Thomas acted with intent to facilitate "a" crime rather than

¹² "The Special Verdict Aggravating Circumstances" that was provided to the jury inquired of the jury whether "the defendant or an accomplice" committed said acts.

“the” crime of murder. Thomas, at 843. Taken together, these instructions did not require the jurors to find either that Mr. Thomas participated in the *actus reus* or *mens rea* of the underlying murder charge or that he, rather than an accomplice, had an intent to commit murder. On appeal, the Washington Supreme Court agreed that the “to convict” and the aggravating factors instruction were erroneous because:

The "or" removes a requirement that the jury find *any* form of actus reus *at all* on Thomas's part and relieves the State of its burden to prove the aggravating circumstances as they pertain to the defendant. *See Roberts*, 142 Wash.2d at 504; 14 P.3d 713. That is to say, this instruction permits the jury to impose a death sentence on Thomas even if it finds that the aggravating factors apply only to Rembert, his accomplice. Thomas's "to convict" instruction, as in Roberts, does not require the jury to find he acted with premeditated intent.

State v. Thomas, 150 Wash.2d 821, 843, 83 P.3d 970, 981 (2004).

Although the court concluded the instructions were erroneous, it nevertheless treated the affect of the error differently for the underlying offense and the enhanced penalties. The Court divided its analysis into three categories: (1) whether the erroneous instructions were harmless error as related to the issue of premeditation; (2) whether the instructions were harmless error as they related to the aggravating factors; and (3) whether the erroneous instructions were harmless as they related to the imposition of the death penalty. Regarding the death sentence, the court concluded that harmless error could not save the erroneous jury instruction since the instruction would “allow a defendant to be sentenced to death without showing that he or she personally caused the death or was a major participant in the homicidal act.” Thomas, 150 Wn.2d at 842. Citing Ring and Apprendi, the Court also concluded that a harmless error analysis for erroneous jury instructions was inappropriate to uphold an aggravated conviction or sentence.

Thomas, 150 Wn.2d at 849.

Only with regard to the underlying first degree murder conviction did the Washington Supreme Court conclude that the erroneous jury instructions were harmless and it then proceeded to make factual findings as to Mr. Thomas's participation in the premeditated murder. Thomas, 150 Wn.2d at 845; State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); Neder v. United States, 527 U.S.1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The Washington Supreme Court was very explicit, however, that the original jury never made the factual determination of whether Mr. Thomas intended to commit the crime of murder.

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. We hold that 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 first degree murder and must reverse his death sentence. We find, however, that the errors in the accomplice liability and "to convict" instructions were harmless beyond a reasonable doubt for purposes of upholding Thomas's underlying convictions for first degree murder and residential burglary. Therefore, we remand for either a new trial on the aggravating factors or resentencing in accordance with this opinion. (emphasis added).

State v. Thomas, 150 Wn.2d at 867 (emphasis added).

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.

- (ii) **The trial court, by allowing a mandatory presumption instruction, relieved the state from proving an essential and necessary element before subjecting Mr. Thomas to an enhanced sentence.**

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); State v. Hanna, 123 Wash.2d 704, 710, 871 P.2d 135 (quoting Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970-71 85 L.Ed.2d 344 (1985)), cert. denied, 115 S.Ct. 299 (1994); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. State v. Roberts, 147 Wn.2d 330, 58 P.3d 889 (2002); see also RCW 9A.04.100(1) (“Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.”). This essential tenet must also apply to a fact necessary for an enhanced sentence beyond that permitted by a plea or jury verdict. 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); Ring v. Arizona, 536 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2 242 (2002) (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.”).

In Thomas, the Supreme Court held that the failure to prove the essential elements of intent to murder and that the aggravating factors applied personally to Mr. Thomas

was reversible error for purposes of finding him guilty of aggravated murder and not subject to a harmless error analysis. Thomas, 150 Wn.2d at 847-850.

Undoubtedly, the state may use presumptions and inferences to assist in meeting its burden of proof. Hanna, 123 Wn.2d at 710. Generally, presumptions fall into two categories: mandatory presumptions and permissive inferences. State v. Deal, 128 Wn.2d at 698. The former requires a jury to find a presumed fact from a proven fact; whereas the latter merely permits, but does not require, the jury to find a presumed fact from a proven fact. A mandatory presumption, therefore, is treated with caution since it possesses the capability to run afoul of the due process guarantees when 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).

The standard for determining whether an instruction creates a mandatory - as compared to a permissive - presumption is whether a reasonable juror might interpret the presumption as mandatory. Deal, at 699. The jury instructions here cannot be categorized as anything but creating a mandatory presumption. The instructions expressly directed the jury to take, as fact, that Mr. Thomas was guilty of premeditated murder, and effectively eliminated essential facts that were constitutionally required to be proven by the state, to the jury, beyond a reasonable doubt. This was in clear violation of Mr. Thomas's due process guarantees.

Here, the Washington Supreme Court concluded that the previous jury *had not*, because of errors in instructing the jury, been required to find either that Mr. Thomas had the intent to murder or that the aggravating factors applied to him rather than an

accomplice, then upon remand; the jurors – per Blakely, Ring, and Apprendi - were constitutionally required to do so before he could be sentenced for aggravated murder. Instead of assuring that the jury made these essential findings on remand, the trial court considered the finding by the Supreme Court that Mr. Thomas's first degree murder conviction could be upheld to be legally and factually sufficient to establish the essential elements or facts for purposes of increasing punishment. The trial court did so by instructing the jurors that Mr. Thomas was guilty of premeditated murder, thus relieving the state of its obligation to prove that he intended the death of Mr. Geist before an imposition of an increased punishment. By instructing the jury that it must accept that Mr. Thomas had been convicted of first degree premeditated murder, without any reference to the possibility that he was convicted as an accomplice, the court also removed the burden of proving on retrial that the aggravating factors applied personally to Mr. Thomas.

The trial court provided an instruction that Mr. Thomas, as a matter of law, was guilty of premeditated murder. For example, the jury was instructed:

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:

The defendant committed the murder to conceal the commission of the crime or to protect or conceal the identity of any person committing a crime, or;

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree, or residential burglary.

The State has the burden of proving the existence of any aggravating circumstance beyond a reasonable doubt....

(emphasis added).

Thus, the Special Verdict Form used on retrial 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 867. On the contrary, the Special Verdict Form *required* the jury to accept the determination that Mr. Thomas had already been found guilty of premeditated murder in the first degree.

Consequently, the trial court completely eliminated essential facts from the jury’s consideration and instead informed the jury that fact had been established (albeit by the Washington Supreme Court and not a jury): “The defendant has been found guilty of premeditated murder in the first degree.” (Jury Instructions Nos. 1 and 2).

By failing to require the jury to make the factual determination that required the Supreme Court to reverse the aggravated murder conviction, the trial court carried forward all of the errors from the first trial to the retrial. For this reason, Mr. Thomas’s conviction for aggravated murder should be reversed. The state was unambiguously given the option of either entering a judgment and sentence for first degree murder or seeking an enhanced sentence of life without parole or death by proving to the jury the facts which were not proven to the jury in the first trial. The trial court erred in not requiring the state to submit the relevant questions to the jury if it chose not to sentence him for first degree murder.

The state was required to prove every essential element or fact before an increased sentence was permitted. Nevertheless the court instructed the jury that Mr. Thomas was, as a matter of law, guilty of premeditated first degree murder. By so doing,

the trial court violated Mr. Thomas' due process guarantees by creating an impermissible mandatory presumption of an essential element.

The jurors submitted questions during deliberations which showed that the jurors had questions about whether the Court's Instruction No. 2 referred to Mr. Thomas and co-defendants or only Mr. Thomas and whether it mattered who had the firearm, and about the meaning of "in furtherance of." CP 234-236. The jurors were obviously feeling constrained by the court's instructions. Given that they were provided with no guidance other than to "refer to the court's instructions" which denied them any opportunity to give consideration to Mr. Thomas's own personal level of involvement in the murder, the mandatory presumption prevailed and the jurors did not make the required findings in answering the special verdict interrogatories.

(iii) The improper jury instructions contained impermissible judicial comments on the evidence.

Article IV, § 16 of the Washington State Constitution prohibits judges from instructing the jury that matters of fact have been established as a matter of law. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); State v. Levy, 132 P.3d 1076, 1081 (2006). Specifically, Article IV, § 16 reads:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

In Becker, the defendant was charged with delivery of cocaine within a specific area of a school zone, thus subjecting the defendant to an enhanced sentence. At trial, the defense presented evidence that the school in question, Youth Education Program (YEP), did not have many of the attributes of a traditional a school and therefore the

“school zone” enhancement could not be established. The trial court provided an instruction that stated, in part, whether the defendant was “within 1000 feet of the perimeter of school grounds; to wit: Youth Employment Education Program School at the commission of the crime?” The defense argued that such an instruction violated Article IV, § 16 of the Washington State Constitution. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The Washington Supreme Court concluded that the special verdict form impermissibly relieved the state of its burden of proving an essential fact (i.e. whether YEP was, in fact, a school) necessary to justify an increased sentence, since the question of whether YEP was a school was also a threshold issue that had to be established for there to be any crime at all. Becker. At 64.

Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of Article IV, § 16. Judicial comments are presumed to be prejudicial, and the burden is on the state to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Lane, 125 Wash.2d 825, 838-39, 889 P.2d 929 (1995); State v. Stephens, 7 Wash.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974) (the state has the burden of showing that the jury's decision was not influenced, *even when the evidence is undisputed or overwhelming*); State v. Bogner, 62 Wash.2d 247,251, 254, 382 P.2d 254 (burden is not on the defendant to show prejudice; reversible error unless the record affirmatively shows that the defendant could not have been prejudiced by the error; citing cases, including State v. Amundsen, 37 Wash.2d 356, 223 P.2d 1067 (1950), where the court held that the burden was on the state to show no prejudice actually resulted); In re Detention of R.W., 98 Wash.App. 140, 144, 988 P.2d 1034 (1999); *see State v. Manderville*, 37 Wn.2d 356, 371, 79 P.977 (1905). State v. Levy, 132 P.3d

1076, 1083 (Wash.,2006).

Likewise, the question of whether "*Mr. Thomas in particular had the intent to murder Geist or that the aggravating factors specifically applied to him as opposed to his accomplice*" was a threshold issue that had to be established for there to be an increased punishment. Like Becker, the court instructed the jury that matters of fact have been established as a matter of law – in violation of Article IV, § 16. The error was not harmless and should require reversal of Mr. Thomas's conviction for aggravated murder.

2. THE TRIAL COURT ERRED BY DENYING THE DEFENSE THE RIGHT TO HAVE THE JURY MEANINGFULLY CONSIDER WHETHER MR. THOMAS, AND NOT AN ACCOMPLICE, INTENDED TO COMMIT MURDER.

As stated above, the jury was required to find beyond a reasonable doubt that Mr. Thomas, and not an accomplice, intended to commit murder -- a fact that was never determined by a jury or conceded by the defendant. This was a fact that necessarily had to be found by a jury before an enhanced sentence could be imposed. Consistent with this requirement, the defense proposed instructions that would permit it to argue its theory that Mr. Thomas, as merely an accomplice, did not intend to commit murder. The trial court denied the defense this opportunity.

Mr. Thomas was entitled to present his theory of the case to the jury in the form of appropriate instructions; his theory was supported by substantial evidence in the record. 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). "Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law." State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990) (quoting State v. Rice, 110 Wash.2d 577, 603, 757

P.2d 889 (1988)). Alleged errors of law in instructing the jury are reviewed de novo.

State v. Winings, 126 Wn.App. 75, 86, 107 P.3d 141 (2005). State v. Poling, 128

Wn.App. 659, 669, 116 P.3d 1054, 1059 (2005).

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).

The defense attempted to present jury instructions that would provide a meaningful avenue to argue its case. CP 167 – 177. The instructions informed the jury that two individuals – Mr. Thomas and Mr. Rembert – had been charged as accomplices to the charge of aggravated murder in the first degree; and before the aggravators could apply to Mr. Thomas the jury must find that he, in fact, intended to the death of the victim. CP 167 – 177. The trial court, however, denied the defense from raising the defense that Mr. Thomas did not, in fact, intend to commit murder:

THE COURT: You can discuss who shot Mr. Geist in context of the second part of the question on each aggravating factor, not with regard as to open up the issue of who did the murder. That’s been done. But you can talk about it in the context of the robbery and other stuff. It’s hard. It’s hard. RP 1579.

By providing the mandatory presumptive instruction that Mr. Thomas was guilty of premeditated first degree murder, and denying the defense’s instructions on whether Mr. Thomas intended to commit murder, the trial court unconstitutionally determined as a matter of law essential facts that the jury was obligated to determine and denied Mr.

Thomas his right to present a defense. The failure to allow Mr. Thomas to argue his theory of the case and to support his argument with an instruction which correctly stated the law should result in reversal of his conviction for aggravated murder.

3. **RCW CHAPTER 10.95 DOES NOT INCLUDE A MECHANISM FOR EMPANELING A JURY TO CONSIDER AGGRAVATING FACTORS AFTER A CONVICTION OF PREMEDITATED FIRST DEGREE MURDER IS AFFIRMED.**

The posture of this case is unprecedented. Initially, Mr. Thomas was charged under RCW 10.95 et al, with premeditated first degree murder with aggravating factors. The state elected, per RCW 10.95.40, to seek the imposition of the death penalty. A jury convicted Mr. Thomas of aggravated first degree murder and sentenced him to death. As noted, the Washington Supreme Court reversed the death sentence and aggravated murder finding based on erroneous jury instructions. State v. Thomas, 150 Wn.2d 821, 867, 83 P.3d 970 (2004). The court upheld the premeditated first degree murder and remanded the case for further action.

On remand, the state sought to empanel a jury to consider the sole issue of whether aggravating factors were present in order to increase Mr. Thomas's sentence to life without the possibility of parole. The state did not seek to impose the death penalty upon remand.

This is not a case in which the Washington Supreme Court reversed the premeditated and aggravated murder conviction and thus death sentence, and then remanded the case for further action.¹³ Nor is this a situation in which the Washington Supreme Court affirmed the premeditated and aggravated murder conviction, but

¹³ See for example: State v. Marshall, 144 Wn.2d 266 (2001); In Re Brett, 142 Wn.2d 868 (2001).

reversed and remanded the death sentence for the state to consider whether it opted to sentence the defendant to life without parole or seek a sentence of death.¹⁴ RCW 10.95 *et al* applies under these scenarios.

Here, the court upheld the lesser crime of premeditated murder, but reversed the aggravated murder as well as the death sentence. State v. Thomas, 150 Wn.2d 821, 867, 83 P.3d 970 (2004). There is nothing in the RCW 10.95 statute that allows for the empanelling of a jury to make the determination of whether specific aggravators are present; and, consistent with State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) and the Washington Constitution, such a procedure cannot be inferred. In Hughes, the court looked at State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980) to support its conclusion. In Martin, the court addressed the situation where a defendant pleaded guilty to first degree murder and thus presented the question of whether the statute permitted a jury to be empanelled to address the issue of whether the death penalty should be imposed after a plea of guilty. The death penalty statute in question in Martin required the same trial jury to be reconvened to determine the issue of death following the trial. Martin, 94 Wn.2d at 8. The Martin court concluded:

that the legislature had not anticipated a defendant pleading guilty and had failed to provide for that situation. *Id.* at 8, 614 P.2d 164. Faced with the legislature's omission, we concluded that we did "not have the power to read into the statute that which we may believe the legislature has omitted, be it an intentional or inadvertent omission it would be a clear judicial usurpation of legislative power for us to correct that legislative oversight." *Id.* This court held that because the statute did not allow us to convene a

¹⁴ See for example: State v. Bartholomew, 98 Wn.2d 173, 176, 654 P.2d 1170 (1982); State v. Luvene, 127 Wn.2d 690 (1995); State v. Finch, 137 Wn.2d 792 (1999); State v. Roberts, 142 Wn.2d 471 (2001); State v. Clark, 143 Wn.2d 731 (2001); Personal Restraint of Cecil Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).

jury solely to consider death, we could not apply the death penalty where defendants pleaded guilty. State v. Hughes, 154 Wash.2d 118, 150, 110 P.3d 192, 208 - 209 (Wash.,2005); State v. Martin, 94 Wn.2d at 9.¹⁵

The current death penalty statute now contemplates the situation raised in Martin.

RCW 10.95.050 specifically states:

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

.....

(4) 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 of the special sentencing proceeding 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, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary.

There is nothing in RCW 10.95.050, however, that permits the court to convene a jury solely to consider the existence of aggravators when a person either pleads guilty or, as in this case, a conviction of premeditated first degree conviction is affirmed. First, by its own terms, RCW 10.95.050's application is limited to a defendant that has been "adjudicated guilty of aggravated first degree murder," whether by plea or jury verdict. RCW 10.95.050(1). Mr. Thomas's premeditated first degree murder conviction was

¹⁵ The Washington Supreme Court again refused to infer such a procedure in State v. Frampton, 95 Wash.2d 469, 476-79, 627 P.2d 922 (1981) (citing Martin, 94 Wash.2d at 19, 614 P.2d 164) (concluding that the request for a new procedure should be directed to the legislature).

affirmed, but the higher offense of aggravated first degree murder was reversed.

Therefore, RCW 10.95.050 does not apply.

Second, the very purpose of the RCW 10.95.050 proceeding is different than the purpose of retrying Mr. Thomas's case to find him guilty of aggravated murder. RCW 10.95.050(2) specifically states: A jury *shall decide matters presented in the special sentencing proceeding*. (emphasis added). The directive of the jury is to decide – taking into consideration mitigating factors – whether a person convicted of aggravated first degree murder should be punished by death. Mr. Thomas was not subject to this punishment. Here, Mr. Thomas's remanded trial did not request the jury to consider the issues presented in a special sentencing proceeding.

Lastly, RCW 10.95.050 permits a new or different jury to be empanelled to decide whether a death sentence should be imposed if the defendant's guilt was determined by a guilty plea, "or if a retrial of the special sentencing proceeding is necessary." As noted, the Washington Supreme Court did not reverse only Mr. Thomas' death sentence. The Washington Supreme Court reversed his aggravated murder conviction and upheld only the lesser charge of premeditated first degree murder. Consequently, the posture in which Mr. Thomas returned via remand cannot place him within the confines of RCW 10.95.050. Absent any authority from RCW 10.95.050, the court cannot infer a procedure which was not created by the Legislature.

RCW 10.95.050 must provide a procedure for the remand, if there is to be a procedure, because aggravated murder is created in that statute, the death penalty statute, and is not separately found in the criminal code, RCW 9A. As in Martin, Frampton and Hughes, it is for the Legislature and not the courts to correct any omissions in the statute.

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

4. **MR. THOMAS'S CONVICTION FOR AGGRAVATED MURDER SHOULD BE REVERSED AND DISMISSED BECAUSE THE PROSECUTION FOR THAT CRIME VIOLATED THE STATE AND FEDERAL PROHIBITION AGAINST DOUBLE JEOPARDY.**

The Double Jeopardy Clause of the United States Constitution guarantees that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. The Washington State Constitution has a similar provision, stating that "[n]o person shall be . . . twice put in jeopardy for the same offense." Wash. Const. Article I, § 9. The Double Jeopardy Clause protects against three abuses by the government: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-07, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984); North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); See also State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005); State v. Gocken, 127 Wn.2d 95, 97, 896 P.2d 1267 (1995). "The primary goal of barring re prosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." Lydon, 466 U.S. at 307.

The double jeopardy problem in his case is prosecuting Mr. Thomas a second time after conviction.

As this Court held in State v. Benn, 130 Wn. App. 308, 123 P.3d 484 (2005), retrial to establish an aggravating factor may be prohibited by principles of double

jeopardy. In Benn, on retrial, the state conceded that it could not prove one of the two initially-charged aggravating factors. Benn, 130 Wn. App. at 313. This Court held that to retry him to establish the second and only remaining aggravating factor was prohibited by the double jeopardy clauses of the state and federal constitution because the jurors had failed to fill in the special verdict form on that factor at the first trial, impliedly acquitting on that factor. Benn, at 315-319. In particular, the Benn court relied on Green v. United States, 355 U.S. 184, 188-189, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), which held that the defendant could not be prosecuted a second time for first degree murder where the jury found him guilty of second degree murder, but was silent on the charge of first degree murder. The Court, in Green, held that the second trial violated the prohibition against double jeopardy because the jury had a full opportunity to return a verdict, nothing prevented the jury from reaching a verdict and the jury was dismissed without the consent of the defendant. Benn, at 317 (citing Green, 355 U.S. at 188, 191).

Here, the jury, given the Court's instructions to it at the first trial, may have convicted Mr. Thomas of first degree murder as an accomplice who only intended to facilitate a robbery or burglary and acquitted him of either shooting Mr. Geist or intending to murder him. It is undisputed that the instructions permitted the jury to resolve the facts in that way. Retrial to establish his guilt as a principal, his intent to kill or his knowledge that he was facilitating the murder constituted a retrial after conviction and violates the state and federal prohibition against double jeopardy.

Twice during the course of the trial, defense counsel moved to dismiss the prosecution for violation of the prohibition against double jeopardy – when the state called the medical examiner to the stand to describe the manner of death and when the

state began to examine its firearms expert on the difference between a single action and double action revolver. RP 890-894, 1334-1339. Defense counsel reasoned that the purpose of the testimony and evidence in each instance was to establish intent or premeditation, and that the court's instruction that Mr. Thomas had already been found guilty of premeditated first degree murder made the evidence irrelevant. RP 890-894; 1334-1337. The state responded that the evidence was relevant because it had to prove all of the elements, and the court agreed that the evidence was relevant. RP 894, 1338.

These were but two examples. Throughout trial, the state introduced evidence the only relevance of which was to try to establish that Mr. Thomas shot Mr. Geist, intended his death, premeditated the intent to shoot him or was guilty of the crime of premeditated murder. Most of the evidence presented at trial was generally relevant to the murder charge. But some of the evidence was relevant only to the degree of Mr. Thomas's involvement in the death of Richard Geist. For one example, the state was permitted to ask Lynette Ducharme if, in spite of the fact that she had not seen Mr. Thomas with a gun on the day of the incident, she had seen him with a gun "shortly" before the incident. RP 242-245. If this was relevant at all, it was relevant to make it more likely that he had a gun on the day of the incident.

The testimony to try to establish Mr. Thomas's level of participation in the underlying murder and defense counsel's objections reflected the reality of the retrial -- the state was retrying Mr. Thomas on the underlying murder conviction. Given the holding of the Supreme Court on direct review, such a retrial was necessary, but also violative of the prohibition against double jeopardy. Although, at the state's request, the trial court relieved the state of its responsibility to establish that Mr. Thomas intended the

death of Mr. Geist, by instructing the jury that he had already been found guilty of first degree premeditated murder, proof of the intent to murder was required by the holding of the Supreme Court when it reversed Mr. Thomas's aggravated murder conviction.

Absent proof of that intent to murder Mr. Geist, Mr. Thomas could not be found to have personally committed the crime of murder in the course of a robbery or burglary or to conceal the commission of a crime. The state implicitly recognized this in arguing that the medical examiner's testimony was necessary because the state had to prove all of the elements of the charge. RP 894.

The double jeopardy problem stems from the failure at the first trial to instruct the jury in such a manner that it had to find that Mr. Thomas intended the death of Mr. Geist. The jury was instructed so that it could actually find him guilty without finding him guilty of all of the elements of the crime. By using an accomplice liability instruction that permitted the jurors to convict Mr. Thomas if it found that he intended only to facilitate a robbery, it is possible that the jury convicted Mr. Thomas without finding that he intended the death of Mr. Geist. Thomas, 150 Wn.2d at 843-844 ("The shortcoming of this *instruction* is that it does not require that the defendant had knowledge he was facilitating *the* crime [murder] for which he was charged.") Indeed the possibility cannot be excluded that the jury convicted Mr. Thomas by resolving the facts in a manner which was legally insufficient to establish his guilt of first degree premeditated murder. In the absence of an interrogatory, the jurors' reasoning and findings simply cannot be determined. Specifically, there is no way of knowing that the jurors did not find the Rembert fired the shots and that Mr. Thomas did not anticipate or facilitate that shooting.

While the Supreme Court was willing to accept that the instructional errors were harmless for purposes of upholding the murder convictions, by resolving the facts itself, the Supreme Court further held that only a jury could resolve those facts for purposes of upholding the aggravated murder conviction. Thomas, at 844-850 (“To do a harmless error analysis to uphold Thomas’s . . . conviction for aggravated first degree murder would be to find facts . . . that increase the penalty for the crime charged beyond the statutory maximum, here life with the possibility of parole”). Thus, the only permissible and constitutional way to convict Mr. Thomas of aggravated murder was to have the jury make findings it did not make in the original murder trial. Thomas, at 876 (“the ‘to-convict’ and aggravating factors special verdict 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. . . . These facts must be found by the jury.”) To do this, however, the new jury had to convict Mr. Thomas again of first degree premeditated murder on a possibly different theory than the earlier jury by finding that he had the intent to murder Geist. A finding of intent to murder, or at least knowledge that Mr. Thomas was acting to facilitate a murder, was an essential element of that crime whether committed by an accomplice or a principal. RCW 9A.08.020(3)(a); RCW 9A.32.030(1)(a). Therefore, retrial to establish this intent to murder violates the prohibition against double jeopardy.

The decision of the Washington Supreme Court set up an insoluble dilemma. The jury instructions did not require the jury to actually find Mr. Thomas guilty of first degree premeditated murder because the jury instructions did not require the jurors to find every element of the crime beyond a reasonable doubt. The Thomas Court excused this failure

of proof for the murder conviction, but did not excuse it for purposes of finding the aggravating factors necessary to impose the enhanced sentence of life without the possibility of parole. The omitted findings, however, are integral to both the underlying charge and the aggravating factors. The jurors simply could not make the findings required for the aggravating factors without, in effect, finding the facts necessary to convict him of first degree murder which the first jury was not required to make at the time of the first trial. In doing so, Mr. Thomas would necessarily have to face a second prosecution for the same crime, a violation of the prohibition against double jeopardy. Perhaps realizing the dilemma, the state proposed and got instructions that the jury had to accept that Mr. Thomas had already been convicted of premeditated first degree murder, *i.e.*, that "with a premeditated intent to cause the death of another person, he caused the death of another person." RCW 9A.32.030(1)(a). While this approach may have, in theory avoided the double jeopardy problem, it failed to require the jury to make the essential finding that Mr. Thomas himself intended the death of Mr. Geist and that the aggravating factors applied to him and not just his accomplice. This violated Mr. Thomas's right to a jury trial and to due process of law. The dilemma cannot be resolved in any way but to recognize that Mr. Thomas could not constitutionally be tried again for aggravated murder without reversing his underlying conviction for first degree premeditated murder.

Here, the jury did return a verdict on the first degree murder charge, and that verdict, unless reversed, prevents a second prosecution as much as the acquittal in Benn and Green. North Carolina v. Pearce, 395 U.S. at 717. As long as Mr. Thomas remained convicted of first degree murder, double jeopardy prevented retrying him to establish the

elements of that crime.¹⁶ For this reason, Mr. Thomas's conviction for aggravated murder must be reversed and dismissed on double jeopardy grounds, and he should be resentenced to a term within the standard range for first degree non-aggravated murder.¹⁷

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

The trial court erred in this case in denying Mr. Thomas's Batson challenge. As defense counsel stated the prosecutor's reason for exercising a peremptory challenge to excuse the lone African-American on the entire panel was hardly race neutral. RP 119-121. The prosecutor's reason was that this juror (number 33) was upset because of the under-representation of African-Americans in the jury pool. RP 120-122. It is of concern that Mr. Thomas did not have a jury panel which reflected the racial composition of Pierce County, but it was a denial of equal protection under the state and federal

¹⁶ See Ring v. Arizona, 536 U.S. 584, 605, 122 S.Ct. 2428, 2441 (U.S., 2002) (“[W]hen the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.”); *id.*, at 495, 120 S.Ct. 2348 (“[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.” (internal quotation marks omitted)); see also *id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) (“[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.”).

¹⁷ See also State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997), in which the Washington Supreme Court, after concluding that erroneous jury instructions regarding a fact necessary to increase punishment violated the defendant's due process rights, reversed and vacated the defendant's enhanced sentence based on those erroneous instructions. The court did not permit the state to retry the defendant and empanel a jury for the sole determination of whether the enhanced fact (i.e., within a school zone) was applicable.

constitutions to excuse the one African-American on the panel because he was upset about the under-representation of members of his race.¹⁸

Each party at trial, as a general rule, has the right to exercise peremptory challenges against potential jurors without giving a reason. RCW 4.44.140; CrR 6.4(e)(1). But under the equal protection clauses of the federal and state constitutions, a peremptory challenge "may not be exercised to invidiously discriminate against a person because of gender, race, or ethnicity." State v. Evan, 100 Wn. App. 757, 763, 998 P.2d 373 (2000); Batson v. Kentucky, *supra*. "Race-based peremptory challenges violate both a defendant's equal protection right not to have members of his or her own race excluded from the jury on account of race and the equal protection rights of the excluded jurors who are denied a significant opportunity to participate in civic life." State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996).

The discriminatory use of a peremptory challenge is structural error which is not amenable to harmless error analysis. United States v. Annigoni, 96 F.3d 1132 (9th cir. 1996).

The Supreme Court, in Batson, articulated a three-step inquiry for determining whether a peremptory challenge was a product of racial discrimination. The first step requires the defense to make a prima facie showing that the state exercised its challenges on the basis of race. Hernandez v. New York, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991); Rhodes, 82 Wn. App. at 196. Once a prima facie showing is made, the burden

¹⁸ According to the United States Census Bureau Washington Table 2: Total Population by Race, State, Counties, and Places in Washington 2000, African-Americans constituted 11.2% of the population of Tacoma, Washington, and 7% of the population in Pierce County. <http://www.ofm.wa.gov/census2000/index.htm>. Given these percentages, one would expect between five and nine African-Americans in a panel of 75 jurors.

shifts to the state to articulate a race-neutral explanation for its challenges. Hernandez, 500 U.S. at 358-359. If the state is able to articulate a race-neutral justification, step three requires the trial court to determine whether the state's explanation is a pretext. Hernandez, at 359.

The defendant's initial burden of establishing a prima facie case of discrimination is two-pronged: (1) he must "first show that the peremptory challenge was exercised against a member of a constitutionally cognizable group," and (2) he must "show that the . . . peremptory challenge" and "other relevant circumstances raise an inference of discrimination." State v. Wright, 78 Wn. App. 93, 99, 896 P.2d 713 (1995) (quoting State v. Sanchez, 72 Wn. App. 821, 825, 867 P.2d 638 (1994)).

On appeal, if the trial court has found that the defense made a prima facie showing of discrimination and ruled on the reasons provided by the state, the question of the sufficiency of the prima facie case is no longer relevant:

Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot.

Hernandez, 500 U.S. at 359 (citing United States Postal Service Bd. of Governors v. Aiken, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983) ("[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant"). Since the trial court in this case ruled on the ultimate question of intentional discrimination, the sufficiency of the prima facie case is no longer an issue. The issue is whether the state provided race-neutral reasons and whether those reasons were a pretext.

The trial court not only erred in ruling that the state provided race-neutral reasons for excusing juror number 33, the court erred in ruling that the exercise of a single peremptory challenge cannot violate equal protection. Contrary to the trial court's determination, the exercise of a peremptory challenge to excuse the only member of a racially cognizable group can imply a discriminatory act or motive. State v. Wright, 78 Wn. App. 93, 101 P.2d 713, review denied, 127 Wn.2d 1024 (1995); State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996).

The authority cited by the trial court, State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993), which did not involve excusing the only African-American on the panel, holds only that if no other circumstances indicate purposeful discrimination, a single act ordinarily does not establish a pattern of discrimination. Moreover, the decision in Ashcraft, is inconsistent with federal authority and Batson itself.

In Walker v. Girdich, 410 F.3d 120 (2nd Cir. 2005), the court held that the constitution forbids striking even one juror for a discriminatory purpose. The Second Circuit Court of Appeals noted that the United States Supreme Court, in Batson, stated that "a single invidious discriminatory governmental act is not immunized by the absence of such discrimination in the making of comparable decisions." Batson, 476 U.S. at 95; Walker, 410 F.3d at 123. The court, in Walker, concluded that striking an African American man because he was a black man with no family who seemed to have an "attitude" against the prosecution was a discriminatory act. Walker, at 123-124. In United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994), and Jones v. Ryan, 987 F.2d 960, 972 (3rd Cir. 1993), the federal appellate courts reached the same holding, that

excusing a single prospective juror could violate equal protect and require reversal of the defendant's conviction.

Here, it was undisputed that the juror was African-American. He was, the parties agreed, the only African-American in the entire jury panel. RP 119, 122. Race was central to the decision by the prosecutor to excuse him by exercise of a peremptory challenge. To excuse a juror because of his concern that he was the only member of his race in the entire panel in a trial in Tacoma, Washington, where the defendant is African-American is unconstitutional. By excusing this juror, the state merely confirmed Juror 33's fear that the state might prefer that no African-American's sat on the jury. This is not a race-neutral reason for excusing the juror, particularly where the state failed to follow-up and establish a bias. Excusing Juror 33 should result in reversal of Mr. Thomas's conviction. Defense counsel asked jurors if they thought it was human nature to judge the defendant. RP(supp) 3. Given that Mr. Thomas has African-American ancestry and given Juror 33's belief that you can't tell if a person is guilty by looking at him, the comment appeared to be a racist comment. RP(supp) 4. Juror 33 expressed this belief to defense counsel and expressed his concern about the lack of proportional representation on the jury panel. RP(supp) 4. Although Juror 33 made one comment implying that the prosecutors wanted it this way, there were no other negative comments about the state by this juror and the state never sought to clarify with Juror 33 why he felt this to be the case. RP(supp) 4. To excuse a juror because of his concern that he was the only member of his race in the entire panel in a trial in Tacoma, Washington, where the defendant is African-American is unconstitutional. By excusing this juror, the state merely confirmed Juror 33's fear that the state might prefer that no African-American's sat on the jury. This is not a race-neutral reason for excusing

the juror, particularly where the state failed to follow-up and establish a bias. Excusing Juror 33 should result in reversal of Mr. Thomas's conviction.

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

The trial court erred in allowing the state to introduce evidence from the pager and the residential caller ID box which allegedly belonged to Richard Geist. RP 1192-1193. The information was hearsay because as it was introduced to establish that Mr. Thomas put in a code "54" as an assertion that he wished Mr. Geist to return a phone call to him or as assertions that others called the pager or residence because they wished to speak to Mr. Geist or someone else who could be reached at Geist's number.

While courts have held that, under the correct circumstances, numerical displays on pagers or caller ID boxes are not hearsay, those holdings are premised on the conclusion that the displays are not assertive conduct made by a "person." See, e.g., Bowe v. State, 785 So.2d 531 (2001). In Bowe, the court held that testimony about the numerical display was not hearsay where the display was not made by a "person" and where the message on the "hello line" was not introduced for the truth of the matter asserted – that the sender actually wished to purchase particular quantities of drugs – but simply to show what use was made of the pager. The court noted that if the message on the "hello line" had been intended as an assertion it would be hearsay. Bowe, 785 S. at 532; State v. Collins, 76 Wn. App. 496, 886 P.2d 43 (1995)(same).

Here, all of the evidence was introduced as assertive conduct to prove the truth of the matter asserted: that particular people called to speak with Mr. Geist or with someone at his residence. Further, the evidence of the code "54" was introduced to show that Mr.

Thomas put that number into Mr. Geist's pager as an assertion that he had called and wished Mr. Geist to call him back. This was pure hearsay, an out-of-court statement introduced to prove the truth of the matter asserted. ER 801.

Just as a typewriter, pencil or computer is not a "person," any message written through any of these means should not be insulated from exclusion under the hearsay rules if the importance of the message is that it is an assertion of a person through a mechanical or electronic means. While a computer is capable of being programmed to produce and transmit a message automatically and the telephone company has a mechanical means of generating phone numbers and displaying them on a caller ID or pager, this does not happen unless an actual person dials a number or leaves a coded message. When the numerical displays are introduced to prove the assertions that particular people not only dialed Mr. Geist's number but did so because they wished to have a conversation with him at a particular time, then the information is a statement by a person introduced to prove the truth of the matter asserted, *i.e.*, hearsay. It should not be excluded because a machine generated the information any more than any written assertion recorded by some mechanical means. The trial court erred in not excluding information from the caller ID box and pager as hearsay.

7. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE REMBERT'S STATEMENT AS AN EXCITED UTTERANCE GIVEN THAT HE WAS NOT CREDIBLE.

Edward Rembert's out-of-court statement accusing Mr. Thomas of shooting Richard Geist was introduced at the first trial as an excited utterance. On direct review, the Washington Supreme Court affirmed the ruling. Thomas, 150 Wn.2d at 854-856.

On remand, the defense moved to exclude Rembert's statement on a grounds not considered by the Supreme Court, that Rembert was not a credible witness. RP 976-978. Defense counsel, on remand, specifically relied on the case of State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992).

In Chapin, the Washington Supreme Court recognized that the mental condition of the declarant and his history of fabrication is relevant to the determination of whether an out-of-court statement is admissible as an excited utterance. Chapin, 118 Wn.2d at 690-691. As defense counsel argued on remand, Rembert had a long criminal history including crimes of dishonesty. RP 977, 1097, 1587. Additionally, he had reneged on his promise to the state to testify at trial. RP 977. He also had the strongest possible motive to cast the blame on someone other than himself.

As held by the Chapin court, the longer the time between the alleged startling event and the statement, the greater the need to show that the statement was not a product of reflection. Chapin, at 688. Further, if the declarant engages in normal activity in between the time of the event and the statement, the statement is less likely to be an excited utterance. Chapin, at 689.

Here, in addition to the significant lapse of time, there was a great deal of purposeful and intentional activity – under the state's theory of the case – which Rembert participated in after the startling event. He allegedly helped move the body, got into the van and traveled to Mr. Geist's apartment, entered, helped look for money and then got back into the van. According to the state he took money and provided Mr. Thomas with clothing after the van was burned.

The introduction of Rembert's statement through the testimony of Desiree Azevedo was highly prejudicial. Under ER 403, given the court's instruction to the jury effectively preventing the jury from considering whether Rembert or Mr. Thomas shot Mr. Geist, there was no probative value to the evidence to be weighed against the prejudicial impact. Given the court's instruction removing the issue of who shot Mr. Geist from the jury's consideration as well as Rembert's lack of credibility, this Court should revisit the issue of the admissibility of Rembert's statement as an excited utterance and hold that the trial court erred in admitting the statement on remand.

8. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE ER 404(b) EVIDENCE IN THE GUISE OF ESTABLISHING A WITNESS'S STATE OF MIND WHERE THE WITNESS'S STATE OF MIND WAS NOT MATERIAL AND THE EVIDENCE DID NOT FIT WITHIN THE STATE OF MIND EXCEPTION.

Alexandra Toomah testified that Lynette told her about the incident with Mr. Geist and that she ultimately called Crime Stoppers anonymously to report the conversation. RP 380-383. Over defense hearsay objection and objection that Ms. Toomah's credibility had not been attacked, the state was permitted to introduce evidence that she waited a number of months to call Crime Stoppers because she was afraid for Lynette. RP 382. According to Ms. Toomah, Lynette told her that Mr. Thomas had taken her to a dead end road and threatened to kill her and the baby. RP 382, 387. The court ruled that the testimony was relevant to Ms. Toomah's state of mind and not admitted for the truth of the matter asserted. RP 386-387. This was error. It was hearsay that did not fit within the state of mind exception. Moreover, Ms. Toomah's state of mind was not at issue. The evidence should have been excluded under ER 404 (b).

The evidence was clearly ER 404(b) evidence of an alleged prior bad act by Mr. Thomas. Nevertheless, the trial court made none of the required findings for admitting this ER 404(b) evidence; the court did not find that it happened more likely than not, did not identify a material issue which the evidence was admissible to establish and did not balance the probative value of the evidence against its prejudicial impact. In particular, Ms. Toomah's credibility had not been attacked because she waited to tell the police what she allegedly heard; and, in any event, her reason for not reporting the conversation earlier was not a material issue at trial. Whatever probative value the evidence had was outweighed by the overwhelming and unfair prejudice of the evidence.

Even if the evidence was somehow relevant, Ms. Toomah had no first-hand knowledge of any threat by Mr. Thomas. Neither his alleged threat, nor Lynette's out-of-court statement asserting that Mr. Thomas had threatened her was admissible to establish Ms. Toomah's state of mind. Neither constituted a statement by Ms. Toomah of her then-existing state of mind. Moreover, prior bad acts of a defendant are not admissible under the state of mind exception.

Evidence of other uncharged, alleged misconduct by a defendant in a criminal case is never admissible to show that a defendant is a "criminal type" who is therefore more likely to have committed the crime charged, nor is it admissible to prove the character of a person to show that he or she acted in conformity therewith during the alleged crime, or that he or she had the propensity to commit the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995); ER 404(b).

ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In deciding the admissibility of evidence under ER 404(b), the trial court must first determine whether the alleged misconduct has been proven by a preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). If there is sufficient proof, then the court must follow a three-part analysis: First, the court must identify the purpose for which the evidence will be admitted. State v. Salterelli, 98 Wn.2d 358, 361-362, 655 P.2d 697 (1982). Second, the evidence must be materially relevant, under ER 401 and ER 402, and necessary to prove an essential ingredient of the crime charged. Salterelli, at 361-362. For this second condition to be satisfied, the purpose for admitting the evidence must be of consequence to the action and make the existence of the identified fact more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Third, pursuant to ER 403, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the finder of fact. Salterelli, 98 Wn.2d at 362-366.

"Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." Lough, 125 Wn.2d at 863. Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, the court made no finding that the prior bad act had been established, by a preponderance of the evidence. Lynette had, in fact, told the police herself that the incident involving a threat had nothing to do with the incident and was something Mr. Thomas said because he was jealous. RP 325. Second, Ms. Toomah's state of mind based on her concern for Lynette based on a story Lynette told about something Mr. Thomas allegedly

did was hardly of consequence to the action. Given that Ms. Toomah's credibility had not been attacked—because of her not immediately reporting the conversation – the issue was not only entirely collateral it was not even in dispute at trial.

Further, even assuming that Ms. Toomah's state of mind was relevant, hearsay statements about the conduct of the defendant are not admissible under that exception. State v. Parr, 93 Wn.2d 95, 103-104, 606 P.2d 263 (1980); In re Dependency of Penelope B., 104 Wn.2d 643, 709 P.2d 1194 (1985) (testimony of a child's therapist concerning responses to question about what the child's father had done to her was excluded as statements of *past* states of mind). ER 803(3) permits only the introduction of a "statement of the declarant's *then existing* state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . ." Thus, at most, the state of mind exception would permit Ms. Loomah to report a hearsay statement describing her state of mind at a relevant time, presumably at the time she heard Lynette's description of the incident. Instead, Ms. Loomah reported something Lynette had told her Mr. Thomas did. None of this is a statement of a declarant's then existing state of mind. Thus, even if the evidence had been admissible under ER 404(b), there was no hearsay exception authorizing its admission.

The testimony was unfairly prejudicial. It was nothing less than an allegation that Mr. Thomas was a bad person who threatened the lives of his wife and child. Given that the state was attempting to prove that Mr. Thomas committed a murder to conceal a crime or the identity of a person committing the crime, the evidence could not have been more unfairly prejudicial. Even though the trial court gave a limiting instruction, the jury would

likely have viewed it as proof that he was the type of person to have committed the charged aggravating circumstances.

The analysis of the Court of Appeals in State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), is illuminating. The Escalona Court reversed a conviction for second degree assault with a deadly weapon based on an inadvertent statement indicating that the defendant had been convicted of a prior crime involving a stabbing. This Court reversed even though the trial court struck the statement and instructed the jury to disregard it. The Escalona court noted that:

While it is presumed that juries follow instructions, see [State v.] Weber [99 Wn.2d 158, 659 P.2d 1102 (1983)], no instruction can "remove the prejudicial impression [created by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors."

State v. Escalona, at 256. The Escalona court held that a prior conviction for having "stabbed someone" was inherently prejudicial and of the type likely to impress. It was likely to impress because it was logically if not legally relevant to the issue of whether the defendant committed a similar crime. Escalona, at 256.

The erroneous admission of the evidence should require reversal of Mr. Thomas's aggravating factors. The inference that Mr. Thomas must have committed the crime to conceal his identity as a person involved in the crime because he had threatened someone else who he felt might reveal his identity was logically if not legally relevant and of the type of evidence likely to impress the jurors. The error was not cured by a limiting instruction.

9. CUMULATIVE ERROR DENIED MR. THOMAS HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

It is well settled that the combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984). Here, the numerous errors alone, and certainly cumulatively, denied Mr. Thomas his state and federal constitutional rights to a fair trial.

E. CONCLUSION

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

DATED this 23rd day of June 2006.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that on the 23rd day of June, 2006 I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via prepaid first class mail:

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Mark A. Larranaga DATE 6/23/06 at Seattle, WA

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The defendant has been convicted of the crime of murder in the first degree. You are not to consider the finding of guilt to murder in the first degree as proof of the questions submitted to you on the special interrogatory and the special verdict form.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into

account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

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:

The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, or;

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree, or residential burglary.

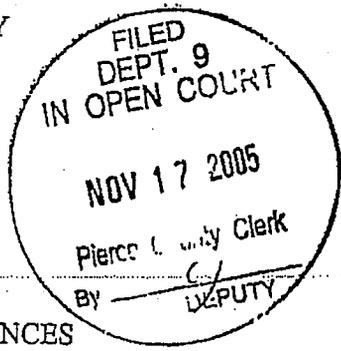
The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance.



99-1-00397-9 24082573 SVRD 11-21-05

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,
Plaintiff,
Vs.
COVELL PAUL THOMAS
Defendant.

CAUSE NO. 99-1-00397-9
SPECIAL VERDICT
AGGRAVATING CIRCUMSTANCES

We, the jury, make the following answers to the questions submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstances beyond a reasonable doubt?

(1) Did the defendant commit the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime?

ANSWER: YES
(Yes/No)

(2) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the first degree?

ANSWER: YES
(Yes/No)

(3) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the second degree?

ANSWER: YES
(Yes/No)

(4) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from residential burglary?

ANSWER: YES
(Yes/No)

Scott A Swan
PRESIDING JUROR
SCOTT SWAN

ORIGINAL

**DEFENSE THEORY OF THE CASE INSTRUCTION
PROPOSED ALTERNATIVE NUMBER 1**

INSTRUCTION NO. _____

Two persons, Edward Rembert and Covell Thomas, have been charged as accomplices to the charge of aggravated murder in the first degree.

The law requires that when two or more persons are accused of the crime of aggravated murder in the first degree, the State must prove beyond a reasonable doubt that:

- (1) the defendant was a major participant in the acts that caused the death of the victim, and
- (2) each of the aggravating circumstances specifically applies to the defendant.

The law does not allow for the motivations and intentions of one defendant to be attributed to another defendant.

Furthermore, in order to convict Covell Thomas of the alleged aggravating factors, the State must prove beyond a reasonable doubt that:

- (1) the Defendant's major participation in the acts that caused the death of Richard Geist were to conceal the commission of the crime or conceal the identity of the person committing the crime; or

(2) the Defendant's major participation in the acts that caused the death of Richard Geist

per was in furtherance of, or immediate flight from robbery; or

(3) the Defendant's major participation in the acts that caused the death of Richard Geist was in furtherance of, or immediate flight from a residential burglary.

It is the defense theory that Edward Rembert, and not Covell Thomas, intentionally shot Richard Geist, and Covell Thomas had no foreknowledge that Edward Rembert was going to shoot Richard Geist.

Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert shot Richard Geist, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.

It is also the defense theory that Covell Thomas did not share the same mental state to "intentionally rob" Richard Geist of his money or vehicle. Likewise, it is the defense theory that Covell Thomas did not enter the residence of Richard Geist with the intent to commit a crime in the residence. Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert shot Richard Geist, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.

**DEFENSE THEORY OF THE CASE INSTRUCTION
PROPOSED ALTERNATIVE NUMBER 2**

INSTRUCTION NO. _____

Two persons, Edward Rembert and Covell Thomas, have been charged as accomplices to the charge of aggravated murder in the first degree. The law does not allow for the motivations and intentions of one defendant to be attributed to another defendant.

Furthermore, in order to convict Covell Thomas of the alleged aggravating factors, the State must prove beyond a reasonable doubt that:

- (1) the Defendant caused the death of Richard Geist ^{put} ~~was~~ to conceal the commission of the crime or conceal the identity of the person committing the crime; or
- (2) the Defendant caused the death of Richard Geist in furtherance of, or immediate flight from robbery; or
- (3) the Defendant caused the death of Richard Geist ^{put} ~~was~~ in furtherance of, or immediate flight from a residential burglary.

It is the defense theory that Edward Rembert, and not Covell Thomas, intentionally shot Richard Geist, and Covell Thomas had no foreknowledge that Edward Rembert was going to shoot Richard Geist.

Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert

shot Richard Geist, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.

It is also the defense theory that Covell Thomas did not share the same mental state to "intentionally rob" Richard Geist of his money or vehicle. Likewise, it is the defense theory that Covell Thomas did not enter the residence of Richard Geist with the intent to commit a crime in the residence. Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert shot Richard Geist, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.

**DEFENSE THEORY OF THE CASE INSTRUCTION
PROPOSED ALTERNATIVE NUMBER 3-a**

INSTRUCTION NO. _____

Two persons, Edward Rembert and Covell Thomas, have been charged as accomplices to the charge of aggravated murder in the first degree. The law does not allow for the motivations and intentions of one defendant to be attributed to another defendant.

Furthermore, in order to convict Covell Thomas of the alleged aggravating factors, the State must prove beyond a reasonable doubt that:

- (1) the Defendant caused the death of Richard Geist ^{per} ~~was~~ to conceal the commission of the crime or conceal the identity of the person committing the crime; or
- (2) the Defendant caused the death of Richard Geist in furtherance of, or immediate flight from robbery; or
- (3) the Defendant caused the death of Richard Geist ^{per} ~~was~~ in furtherance of, or immediate flight from a residential burglary.

**DEFENSE THEORY OF THE CASE INSTRUCTION
PROPOSED ALTERNATIVE NUMBER 3-b**

INSTRUCTION NO. _____

It is the defense theory that Edward Rembert, and not Covell Thomas, intentionally shot Richard Geist, and Covell Thomas had no foreknowledge that Edward Rembert was going to shoot Richard Geist.

Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert shot Richard Geist for the purposed of concealing the commission of another crime or the identity of a person committing a crime, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.

**DEFENSE THEORY OF THE CASE INSTRUCTION
PROPOSED ALTERNATIVE NUMBER 3-c**

INSTRUCTION NO. _____

It is also the defense theory that Covell Thomas did not share the same mental state to "intentionally rob" Richard Geist of his money or vehicle.

Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert shot Richard Geist to intentionally rob Richard Geist, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.

**DEFENSE THEORY OF THE CASE INSTRUCTION
PROPOSED ALTERNATIVE NUMBER 3-d**

INSTRUCTION NO. _____

It is the defense theory that Covell Thomas did not enter the residence of Richard Geist with the intent to commit a crime in the residence.

Therefore, if the State has not proven beyond a reasonable doubt that Covell Thomas did act with the same intent or share the same motivation as Edward Rembert when Rembert shot Richard Geist to enter Geist's residence to commit a crime in the residence, then aggravating circumstances as set forth in Instruction Number _____ do not apply to Covell Thomas.