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SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 34339-6-10

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

COVELL THOMAS,

Petitioning.

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

The Honorable Sergio Armijo, Judge

PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER**

Petitioner Covell Thomas, appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

Petitioner seeks review of the decision of the Court of Appeals, Division II, filed in this case on August 21, 2007.

A copy of the decision is in the Appendix to this petition at pages A-1 through A-16.

**C. ISSUES PRESENTED FOR REVIEW**

1. Can a defendant constitutionally be convicted, under the state and federal constitutions, of aggravated murder and sentenced to life in prison without parole where the court's instructions do not require the jury to find either that he committed the murder or that he intended that a murder be committed?

2. Where an aggravated murder case is remanded for the jury to determine whether the defendant intended the murder of the victim and whether the aggravating circumstances apply to him rather than his accomplice, do instructions

requiring the jury to accept as given that he is guilty of premeditated murder create a mandatory presumption, in violation of the state and federal constitutions, and constitute a comment on the evidence in violation of the state constitution?

3. Do the state and federal Double Jeopardy Clauses prohibit retrial for the greater crime of premeditated murder with aggravating circumstances without reversing the conviction for the lesser crime of premeditated murder?

4. Does a trial court have authority to empanel a jury to consider whether the aggravating factors to establish aggravated murder have been proven where there is no statutory authority to do so?

5. Is the state's use of a peremptory challenge to excuse the only African-American juror on the jury panel impermissible under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), where the only reason for the challenge is the juror's expression of concern over the under-representation of African Americans on the panel and the state makes no effort to clarify the juror's

comment that the state liked the under-representation?

6. If review is granted, Mr. Thomas asks that review also be granted on the issue raised in his Statement of Additional Grounds for Review: "The prosecutor's misconduct in arguing facts that were not presented as evidence at trial denied me a fair trial and my right to confront the witnesses against me. This misconduct violated my state and federal constitutional rights."

**D. STATEMENT OF THE CASE**

On mandatory review this Court reversed Mr. Thomas's aggravated murder conviction and death sentence and remanded the case for the prosecutor to elect to either impose judgment and sentence for first degree murder or to again seek to prove aggravating factors:

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 facts 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 a 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.

State v. Thomas, 150 Wn.2d 821, 876, 83 P.3d 970 (2004).

On remand, the state elected not to seek the death penalty, but tried and convicted Mr. Thomas of aggravated murder.

The defense theory was that co-defendant Edward Rembert fired the shots that killed Richard Geist and that the initial jury, given the court's instructions at the first trial, may 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 had made the factual determination that Mr. Thomas had intended to commit murder -- a fact necessary before a sentence of life without parole could be imposed-- defense counsel argued that a jury must make this determination on retrial. Accordingly, the defense proposed instructions that would inform the jury

that Mr. Thomas had been charged as an accomplice and require the jury to determine whether he intended to commit murder. The trial court, however, accepted the state's argument that it was unnecessary for the jury to make such a determination since this Court affirmed Mr. Thomas's first degree murder conviction. The court instructed the jury that Mr. Thomas was guilty of premeditated murder in the first degree.

Under the court's instructions, the jury was asked to determine only whether "[t]he defendant committed the murder to conceal the commission of a crime or to protect or conceal the identify of any person committing a crime;" or if 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." CP 181.

The jury asked during deliberations whether this instruction referred only to the defendant or all persons involved in the robbery and whether it mattered "which of these persons had the firearm or deadly weapon." CP 234-236. No clarification was provided.

Thus, Mr. Thomas was convicted of aggravated murder and sentenced to life without parole without a jury ever having found that he personally committed the *actus reus* of the crime or intended the death of the victim or that the aggravating factors applied to him rather than to an accomplice. The jury instead was asked to assume that he committed the murder and determine his reason for committing it. This is in direct conflict with the holding of this Court that these facts "must be found by a jury" if a sentence beyond a sentence for first degree murder was to be imposed. Thomas, 150 Wn.2d at 876.

On review, the Court of Appeals held that the trial court followed the decision of this Court in instructing the jury that Mr. Thomas had been convicted of first degree premeditated murder, that the trial court had the authority to empanel a jury to consider only aggravating factors and that double jeopardy was not implicated in retrial. The Court of Appeals ignored the part of this Court's decision which held that, for purpose of imposing a sentence for life without parole or death, a jury had to find that Mr. Thomas intended the murder of Geist.

The Court of Appeals never considered that the double jeopardy problem identified on appeal was a retrial after conviction or that no statute authorizes a trial court to empanel a jury to try aggravating factors to support a sentence of life without parole or death. The Court of Appeals did not consider how concern for under-representation of African Americans on the jury panel could be a race-neutral reason for exercising a peremptory challenge during voir dire.

As set out below, the issues raised in this appeal meet the criteria of RAP 13.4(b). Review should be granted for that reason.

**E. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

- 1. THE DECISION OF THE COURT OF APPEALS AFFIRMING MR. THOMAS'S CONVICTION FOR AGGRAVATED MURDER EVEN THOUGH THE JURY NEVER FOUND THAT HE INTENDED THE DEATH OF THE VICTIM AND THAT THE AGGRAVATING FACTORS APPLIED PERSONALLY TO HIM IS A CONSTITUTIONAL ISSUE AND THE DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THIS AND OTHER CASES.**

This Court reversed Mr. Thomas's conviction for aggravated murder because the court's "to-convict" instruction and aggravating factors special verdict form at the first trial did not require the jury to find that he "in particular had the intent to murder

Geist or that the aggravating factors specifically applied to him as opposed to his accomplice." Thomas, 150 Wn.2d at 876.

On remand, no "to-convict" instruction for the underlying murder charge was submitted to the jury at all, and the special verdict form required the jury to accept as given that Mr. Thomas, and not his accomplice, "committed the murder." CP 178-201.

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.

. . . . .  
CP 181.

Although the jury was instructed in the court's opening instruction that the fact of Mr. Thomas's conviction was not to be considered as proof of the questions submitted in the special interrogatory, the critical problem was that the actual instruction on the aggravating circumstances and the special

verdict form required the jury to accept as given that Mr. Thomas personally committed the murder. The only issue left for the jury was whether he did so to conceal a crime or the identity of a person who committed the crime. The instruction created a mandatory presumption that Mr. Thomas intended the death of Richard Geist in violation of Sandstrom v. Montana, 442 U.S. 510, 523-524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) and constitutional guarantees of due process of law. Further this instruction was a judicial comment on the evidence in violation of Article IV, § 16 of the Washington constitution.

At no point during the first trial or the retrial was the jury required to find that Mr. Thomas intended the death of the victim or that the aggravating factors applied personally to him as opposed to his accomplice. At no point was the jury required to find that Mr. Thomas committed the *actus reas* of the crime or had the requisite *mens rea* of the crime.

The decision of the Court of Appeals affirming Mr. Thomas's conviction is, therefore, in direct conflict with the decision of this Court. The

retrial did not remedy the constitutional infirmities which this Court found required reversal of the aggravated murder conviction. Further, the absence of jury instructions to require the jury to find that Mr. Thomas either committed the murder or intended the murder or that the aggravating factors applied personally to him rather than an accomplice, violated the state and federal constitutional right to due process and the right to a jury trial under In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000); In re the Personal Restraint Petition of Howerton, 109 Wn. App. 494, 501, 36 P.3d 565 (2001).

Review should be granted on this issue.

**2. RETRIAL ON THE AGGRAVATING FACTORS VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY; THE ISSUE IS CONSTITUTIONAL AND THE DECISION IN CONFLICT WITH OTHER DECISIONS OF THIS COURT AND THE COURT OF APPEALS.**

The retrial on the aggravating factors violated Mr. Thomas's state and federal constitutional rights to be free of double jeopardy. He was prosecuted for aggravated murder without reversing his

conviction for first degree premeditated murder; this represents a second prosecution after conviction. Just as the prohibition against double jeopardy would preclude prosecution for first degree murder after conviction for second degree murder, it prohibits prosecution for first degree murder with aggravating factors after conviction for first degree murder. See State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (erroneous jury instruction on school zone enhancement resulted in vacating enhancement, not retrial on the enhancement).

The Court of Appeals held that "double jeopardy is not implicated because the Supreme Court ordered a rehearing after Thomas's initial appeal and, therefore, Thomas's case was never final." Slip op. at 6. But this was not an instance in which an aggravated murder conviction was affirmed and remanded for a new penalty phase hearing to consider again the imposition of the death penalty. Under Washington's death penalty statute, the jury's finding of aggravating factors is part of the guilt phase of the trial. The jury must find the defendant guilty of first degree premeditated murder with

aggravating factors as a prerequisite to a penalty phase trial.

Thus, what the Court of Appeals' holding ignores is that Mr. Thomas's conviction for first degree murder was *affirmed and final* after his first appeal on mandatory review to this Court. This is analogous to a case where a first degree murder conviction is reversed, but second degree murder is affirmed and the prosecutor is allowed to either accept the second degree murder conviction or proceed to trial to prove premeditation. Both in that example and here, double jeopardy is violated by a retrial because there is a final conviction affirmed on appeal and a second prosecution for a higher crime after the conviction is final. While the state can try again to establish all the elements of a higher crime after reversal on appeal, it cannot have a trial to establish premeditation after second degree murder is affirmed on appeal or a trial for first degree murder with aggravating circumstances after conviction for first degree murder.

Under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v.

Washington, 542 U.S. 296 (2004), and Washington v. Recuenco, \_\_\_\_\_ U.S. \_\_\_\_\_, 126 S. Ct. 2546 (2006), a distinction between elements of the crime and aggravating factors in support of a longer sentence is no longer valid. "Sentencing enhancement" factors are effectively elements of the charged crime. As this Court noted in State v. Benn, No. 78094-3, filed August 23, 2007, 2007 WL 2405231, at 3, in his plurality opinion in Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), Justice Scalia, joined by Justices Thomas and Rehnquist, held that "murder plus one or more aggravating circumstances" is a separate offense from 'murder' simpliciter." Sattazahn, 537 U.S. at 108. Just as a failure to find one of several alternative means of committing a crime is not an acquittal of the crime, failure to find a particular aggravating factor is not an acquittal of the greater crime. Failure to find any aggravating factor, however, like failure to find any alternative means of committing crime would be an acquittal. Benn at 3; Sattazahn at 112.

"Aggravated murder" is a greater crime than first degree premeditated murder. Retrial in order

to find elements to support a sentence of life without parole is essentially a retrial to support a conviction for a more serious crime without reversing the conviction for a lesser included crime; a violation of the 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. V. The Washington State Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." Const. art. 1, § 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, 306-307, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984); State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

Review should be granted because, unlike an instance in which only the death sentence is reversed and the case is remanded for a new penalty

phase, and no aggravating factors must be proved on remand, a remand for retrial on elements needed to prove aggravated murder violates double jeopardy. This constitutes a second prosecution after conviction. This is precisely what happened here. The jury was instructed that Mr. Thomas had been convicted of premeditated first degree murder and was limited to consideration of whether he committed the murder to conceal his identity or the commission of the crime or in the course or furtherance of a robbery. This allowed the state to prosecute Mr. Thomas for aggravated murder after he had been convicted of premeditated first degree murder and his conviction affirmed on appeal.

Review should be granted on this issue because it is constitutional and in conflict with the many decisions of this Court and the Court of Appeals setting out the law on double jeopardy.

3. RCW CHAPTER 10.95 DOES NOT PROVIDE A MECHANISM FOR EMPANELING A JURY TO CONSIDER AGGRAVATING FACTORS AFTER A CONVICTION FOR PREMEDITATED FIRST DEGREE MURDER IS AFFIRMED; REVIEW SHOULD BE GRANTED BECAUSE THE DECISION IN THIS CASE IS IN CONFLICT WITH DECISIONS OF THIS COURT.

There is nothing in RCW 10.95 that allows for the empanelling of a jury to determine whether aggravators are present after an aggravated murder conviction is overturned but the underlying first degree murder conviction is affirmed.

RCW 10.95.050(4) permits empanelling a new jury to consider whether the death penalty should be imposed after the defendant pleads guilty to aggravated murder, a judge determines that the defendant is guilty of aggravated murder or the appellate court remands the case for a new sentencing phase hearing. There is, however, nothing in RCW 10.95.050 that authorizes the court to convene a jury solely to consider whether aggravating factors have been proven. RCW 10.95.050 is limited by its plain terms to instances in which the defendant has been "adjudicated guilty of aggravated first degree murder," whether by plea or verdict. RCW 10.95.050(1).

Further, the purpose of an RCW 10.95.050 proceeding is to determine whether, taking into consideration mitigating factors, a person convicted of aggravated first degree murder should be punished by death. This question was not an issue in Mr. Thomas's case.

No other statute provides for convening a jury in Mr. Thomas's situation. As this Court has recognized in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), it is for the legislature and not the courts to provide procedures for convening juries.

Because there is no statutory procedure for empanelling a jury on remand to consider -- not whether a death sentence should be imposed -- but whether aggravating factors have been proven, the retrial on the aggravating factors was improper. Review should be granted to consider this issue.

**4. EXCUSING AN AFRICAN-AMERICAN JUROR FOR EXPRESSING UNHAPPINESS THAT HE WAS THE ONLY AFRICAN-AMERICAN ON THE JURY PANEL IS NOT A RACE-NEUTRAL REASON UNDER BATSON.**

The prosecutor's reason for excusing the only African American on the jury panel was that the

juror was upset because of the under-representation of African Americans in the jury pool. RP 120-122. This should not be deemed to be a race-neutral reason under Batson. Although the juror made a comment implying that the prosecutors liked not having African-Americans on the jury panel, there were no other negative comments and the state failed to clarify why the juror felt this way or to establish relevant bias. RP(supp) 4.

The juror 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. He indicated that he thought O.J. Simpson was entitled to be presumed innocent, but that he was found not guilty rather than innocent. RP(supp) 3,5. His comment about the racial composition of the jury panel was made in response to what he believed to be a racist comment-- a question of whether it was human nature for a person to make a judgment when they walked into a courtroom. RP(supp) 4.

Excluding jurors to "invidiously discriminate against a person because of his gender, race or ethnicity" violates the equal protection clauses of

the state and federal constitutions. State v. Evan, 100 Wn. App. 757, 763, 998 P.2d 373 (2002), Batson, supra. Such "race-based" challenges violate both the defendant's and the excluded juror's equal protection rights. State v. Rhodes, 83 Wn. App. 192, 195, 917 P.2d 149 (1996).

If all African Americans who articulate an opinion that members of their race are not treated fairly by the criminal justice system or have an opinion that prosecutors might like not having an African American on the jury, where the defendant is African American, can be excused from juries, then few African Americans will serve on juries. The entire reason for Batson challenges is because members of minorities are discriminated against during jury selection by prosecutors.

Review should be granted to clarify that an expression of concern or unhappiness about underrepresentation on the jury pool is not a valid reason for exercising a peremptory challenge.

##### **5. ISSUE FROM STATEMENT OF ADDITIONAL GROUNDS**

The prosecutor argued in closing that "Richard Geist was murdered in the front seat and drug out the side of the van. Where he was resting was on

the passenger's side of the van." 15 RP 1697. Defense counsel objected that this argument was not based on facts introduced at trial. In response, the state argued that this was based on the testimony of Raymond Cool. 15RP 1703. But all Mr. Cool testified about was the direction of the van. 15RP 1703.

Contrary to the decision of the Court of Appeals, this was relevant to the important issue of who shot Richard Geist, and not harmless.

It violates a defendant's state and federal constitutional rights to confrontation of witnesses and to a jury trial to assert facts not in evidence. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). If review is granted, Mr. Thomas requests that review be granted on this issue.

**F. CONCLUSION**

Petitioner respectfully submits that review should be granted and his conviction for aggravated murder reversed and dismissed.

DATED this 7th day of September, 2007.

Respectfully submitted,

  
Rita J. Griffith; WSBA #14360  
Attorney for Petitioner

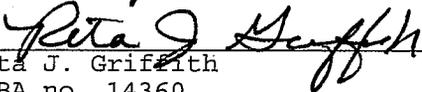
Certification of Service

I, Rita Griffith, attorney for Covell Thomas, certify that on September 7, 2007, I mailed to each of the following persons a copy of the document on which this certification appears:

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Dated this 7<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
Rita J. Griffith  
WSBA no. 14360

Seattle, WA

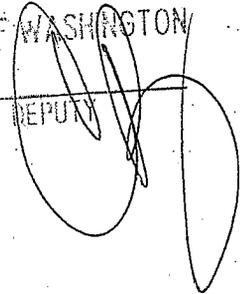
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STATE OF WASHINGTON

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

COVELL PAUL THOMAS,

Appellant.

No. 34339-8-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Covell Thomas appeals a jury determination that he committed first degree premeditated murder with aggravating circumstances and that the murder was committed to conceal the commission of burglary or to protect or conceal the identity of any person committing burglary. This is the second appeal of this case. In 2000, a jury found Thomas guilty of premeditated first degree murder and that the crime was aggravated by concealment. It also found that there were insufficient mitigating factors to merit leniency. Accordingly, the trial court sentenced him to death. Our Supreme Court affirmed Thomas's murder conviction but reversed the sentence and remanded "for a new trial on the aggravating circumstances or for resentencing in accordance with this opinion." *State v. Thomas*, 150 Wn.2d 821, 831, 83 P.3d 970 (2004).

On remand, a jury again found the murder was aggravated by concealment and furtherance of burglary and the trial court sentenced him to life in prison without the possibility of parole. On appeal, Thomas argues that (1) the trial court had no authority to empanel a jury; (2) double jeopardy barred rehearing on the aggravating circumstances; (3) the trial court erred when it ruled on the admissibility of evidence; (4) the jury instructions were faulty; (5) the prosecutor's closing arguments constituted misconduct by arguing from facts not in evidence; and (6) cumulative errors denied Thomas a fair trial. We affirm.

#### FACTS

Thomas planned an elaborate scheme to steal approximately \$5,500 from his employer, Richard Geist. Thomas solicited help with the theft and mentioned that he "might have to kill the dude." *Thomas*, 150 Wn.2d at 832. After several people refused, Thomas recruited Edward Rembert to help commit the crime. Thomas lured Geist from his home on the pretext of helping him find a girl friend. Thomas or Rembert then brutally killed Geist inside a van, dumped his body on the side of the road, burned the van, and burgled his home. The next day, Thomas proposed marriage to his girl friend. When Thomas threatened to kill his then-wife and their child, she revealed his secret. *Thomas*, 150 Wn.2d at 831-37.

The State charged Thomas with residential burglary and first degree murder with aggravating circumstances, alleging that Thomas murdered Geist in order to conceal the burglary. The State also averred that there were not sufficient mitigating facts to merit leniency and filed a notice of intent to seek the death penalty. At trial, the jury found Thomas guilty of premeditated first degree murder and that the murder was intended to conceal the burglary. It

also found there were not sufficient mitigating factors to merit leniency. Based on these verdicts, the trial court sentenced Thomas to death. *Thomas*, 150 Wn.2d at 830.

Our Supreme Court reviewed the case and held that the jury instructions on accomplice liability were deficient and that Thomas's special verdict form erroneously allowed the jury to find Thomas liable for the concealment aggravating circumstance even if it found that Thomas was an accomplice, not the principal, to the premeditated murder. See Clerk's Papers (CP) at 246 (asking "Did the defendant *or an accomplice* commit the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime?" (emphasis added)). A jury may not impose the death penalty for aggravated murder if the defendant was merely an accomplice; he must be a "major participant" in the underlying crime. *State v. Roberts*, 142 Wn.2d 471, 505, 14 P.3d 713 (2000) (citing *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)).

The court affirmed Thomas's convictions for burglary and first degree premeditated murder, holding that the faulty jury instructions could not have affected the jury's verdict on those charges and that the instructions, therefore, were harmless beyond a reasonable doubt. The court reasoned that the overwhelming uncontroverted evidence revealed that Thomas was so entrenched in planning and executing the crimes that, even if he did not personally shoot Geist, as a matter of law he was a principal in Geist's premeditated murder. *Thomas*, 150 Wn.2d at 840-50.

But the court reversed Thomas's death sentence because a reviewing court cannot find the imposition of the death penalty a harmless error.<sup>1</sup> *Thomas*, 150 Wn.2d at 847. The Supreme Court then remanded "for either a new trial on the aggravating factors or resentencing in accordance with this opinion." *Thomas*, 150 Wn.2d at 876.

On remand, the State did not seek the death penalty. But in accord with the Supreme Court order on remand, it elected to hold a new trial on the aggravating circumstances. The trial court empanelled a jury and instructed it that Thomas had been convicted of the crime of murder in the first degree, but that the jurors may not consider this finding as proof of the questions during rehearing. The jury again found the murder was committed with aggravating circumstances that murder was committed to conceal the commission of burglary and to protect or conceal the identity of any person committing burglary. The trial court accordingly sentenced Thomas to life without parole.

## ANALYSIS

### AUTHORITY TO EMPANEL JURY

Thomas argues that the trial court had no authority to empanel the jury in order to determine the presence of aggravating circumstances because chapter 10.95 RCW does not contain a mechanism to empanel a jury on remand and courts may not infer such a procedure. Under the law of the case doctrine, it is improper for us to revisit this issue because our Supreme Court ruled on it in Thomas's earlier appeal. *Thomas*, 150 Wn.2d at 848.

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<sup>1</sup> The *Thomas* court cited no authority for the proposition that the Sixth Amendment precludes application of the harmless error doctrine to deficient death penalty instructions. If the court was relying on *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), we question the holding's continued validity in light of *Washington v. Recuenco*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), in which the United States Supreme Court held that *Apprendi* errors may be harmless.

Here, the aggravated murder statute, former RCW 10.95.020 (1995), tasks the jury with decision-making power over aggravating factors. The legislature gave the court the duty and the authority to empanel a jury to determine whether Geist's murder was aggravated by any statutory factors. Washington courts have recognized that juries, not judges, are to determine the existence of aggravating circumstances. *See, e.g., State v. Hoffman*, 116 Wn.2d 51, 86, 804 P.2d 577 (1991). The aggravated murder statute sets out a bifurcated procedure in which the jury first determines whether the defendant committed premeditated first degree murder, then decides whether the State proved the existence of aggravating factors beyond a reasonable doubt. *State v. Irizarry*, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); *State v. Kincaid*, 103 Wn.2d 304, 310, 692 P.2d 823 (1985).

Thomas relies on *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled in part by Recuenco*, 126 S. Ct. 2546, but that case addresses the authority the legislature granted the trial court in the Sentencing Reform Act (SRA), chapter 9.94A RCW. Its analysis does not apply to trials for premeditated murder with aggravating circumstances under RCW 9A.32.020(1) and former RCW 10.95.020. Under those statutes, juries have always been required to find beyond a reasonable doubt that the murder was premeditated and that one or more of the aggravating factors set out in former RCW 10.95.020 exist. *See Kincaid*, 103 Wn.2d at 310, 312. In *Hughes*, our Supreme Court held that, in the face of statutory language that requires a judge to find aggravating circumstances by a preponderance of the evidence, a court may not *create* the right to empanel a jury to find such facts beyond a reasonable doubt on remand. 154 Wn.2d at 149-50. But unless a defendant waived his right to a jury trial, chapter 10.95 RCW does not allow a judge to determine the presence of aggravating circumstances, and in cases of jury trial waiver, the judge must make such findings beyond a reasonable doubt.

Because *Hughes* addresses SRA procedures, not the aggravated murder statute, the case does not control our decision here.

Instead, the Supreme Court's ruling in Thomas's first appeal, *Thomas*, 150 Wn.2d 821, controls our decision here. "[Q]uestions determined on appeal, *or which might have been determined had they been presented*, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause." *Folsom v. Spokane County*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (emphasis added) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965); *Greene v. Rothschild*, 68 Wn.2d 1, 7, 402 P.2d 356, 414 P.2d 1013 (1965)). This law of the case doctrine prevents piecemeal appeals. RAP 2.5(c). Thomas could have argued to the Supreme Court that rehearing on the aggravating factor was an impermissible remedy. He did not. The Supreme Court authorized the trial court, on remand, to sentence Thomas for premeditated murder or empanel a jury to determine the existence of aggravating factors. *Thomas*, 150 Wn.2d at 876. The Supreme Court issued its ruling on the remedy in this case and we may not revisit this ruling.

#### DOUBLE JEOPARDY

Thomas next claims that jeopardy attached at his first trial and barred rehearing on the aggravating factor. But double jeopardy is not implicated because the Supreme Court ordered a rehearing after Thomas's initial appeal and, therefore, Thomas's case was never final.

Double jeopardy does not bar rehearing when a defendant successfully appeals a conviction unless the appellate court reverses due to insufficient evidence. *State v. Brown*, 127 Wn.2d 749, 756-57, 903 P.2d 459 (1995). On remand, the State established the concealment aggravating circumstance with evidence that Thomas personally intended to murder Geist. Thomas characterizes this rehearing as a ruse for the State's real purpose to retry Thomas for

first degree premeditated murder as a principal. He argues that the original jury may have in fact acquitted Thomas for personally intending Geist's murder, instead finding him guilty as an accomplice, yet during rehearing the State sought again to prove Thomas's personal intent to murder Geist. But as to the substantive offense, an accomplice and a principal are equally liable as a matter of law. RCW 9A.08.020. Moreover, Thomas was a principal in Geist's murder:

[I]t was Thomas who: devised the plan to rob; thought about killing Geist beforehand; was friends with the victim and could lure him out on false pretenses; brought his gun with him that evening; was known to the victim and thus, had to eliminate him as a witness; [and] solicited others to help him in his plan.

*Thomas*, 150 Wn.2d at 846.

Our Supreme Court did not rule that the evidence was insufficient to support the aggravating factor. Thus, double jeopardy does not bar a rehearing on that sentencing factor.

Thomas points to several instances in which the State allegedly presented evidence that was relevant only to the underlying murder conviction and was not relevant to the aggravating circumstance. But hearings on aggravating circumstances have atypical rules of evidence. The rules of evidence do not apply. RCW 10.95.060(3). Further:

if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

RCW 10.95.060(3). This provision applies here because the jury on remand in the special sentencing proceeding was not the same one that convicted Thomas of murder. Accordingly, both parties were free to introduce evidence concerning the underlying crime. This does not amount to a retrial on a charge for which Thomas was already convicted or acquitted because, as the legislature contemplated, a sentencing jury can complete the task before it only if it knows about the underlying crime. The presentation of this evidence did not violate double jeopardy.

*BATSON*<sup>2</sup> CHALLENGE

Thomas also argues that the trial court improperly denied his challenge to the State's use of its peremptory challenge in selecting the sentencing jury. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (holding that a juror may not be stricken from the pool on the basis of race). Assuming, without holding, that Thomas made a sufficient showing of impropriety for the trial court to entertain his *Batson* challenge, the record shows that Juror No. 33 demonstrated a distrust of the legal system and an overt hostility toward the prosecution during voir dire. We agree with the trial judge that, under these circumstances, there was no reason to believe that the State improperly exercised a peremptory challenge to remove Juror No. 33 from service on this case. *See State v. Wright*, 78 Wn. App. 93, 99, 896 P.2d 713 (holding that a trial court's denial of a *Batson* challenge is clearly erroneous, and thus reversible, only if the prosecution had no earnest race-neutral explanation for striking the juror) (quoting *State v. Sanchez*, 72 Wn. App. 821, 825, 867 P.2d 638 (1994)), *review denied*, 127 Wn.2d 1024 (1995). We affirm on this ground.

EVIDENTIARY RULINGS

Thomas challenges the admission of three pieces of evidence: (1) Rembert's girl friend's testimony that Rembert said Thomas killed Geist; (2) the numbers "54" on a pager message that Thomas used to indicate that the message was from him; and (3) portions of Alexandra Toomah's testimony in which she said that she believed Thomas threatened to kill his wife and child.

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<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983).

But an error in admitting evidence is not grounds for reversal unless it prejudices the defendant. *State v. Howard*, 127 Wn. App. 862, 871, 113 P.3d 511 (2005) (citing *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)), *review denied*, 156 Wn.2d 1014 (2006). In the context of evidentiary violations, error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In his first appeal, Thomas challenged the admissibility of Rembert's girl friend's testimony. Our Supreme Court ruled that evidence of Rembert's statement to his girl friend was admissible as an excited utterance. *Thomas*, 150 Wn.2d at 853-56; *see also, Greene*, 68 Wn.2d at 10 (explaining that under the "law of the case" doctrine, the parties, the trial court, and appellate courts are bound by the holdings of the court on a prior appeal). This ruling resolved the issue.

At the rehearing, the trial court ruled that the numbers “54” in a pager message by Thomas were not assertive conduct and thus were not hearsay. We agree. The witnesses merely testified to what they had seen and where they had seen it. As such, the testimony was not hearsay.

Thomas did not preserve his last evidentiary challenge for our review. Toomah testified that she believed that Thomas threatened to kill his wife and child. Thomas objected that the testimony was hearsay, irrelevant, and that the witness lacked personal knowledge. But on appeal, Thomas claims only that ER 404(b) prohibited admission of the testimony because it is evidence of a prior bad act introduced to prove the person’s character. We do not review a challenge to the admissibility of evidence on grounds not raised at trial. And a relevancy objection does not preserve an ER 404(b) challenge. *See State v. Kendrick*, 47 Wn. App. 620, 634, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987) (ruling that a relevancy objection is insufficient to preserve appellate review based on ER 404(b)). We affirm on this ground.

#### JURY INSTRUCTIONS

Thomas also challenges the jury instructions on remand, arguing that the trial court erred because it (1) instructed the jury that Thomas was guilty of first degree premeditated murder and (2) failed to inform the jury that the aggravating factors applied specifically to Thomas instead of his accomplice. Thomas challenged the instructions at the trial court and offered his own, which he claims would have cured the errors.

#### A. HARMLESS ERROR ANALYSIS AND THE RIGHT TO JURY TRIAL

Thomas first argues that the trial court erred when it stated in Instruction No. 2: “The defendant has been found guilty of premeditated murder in the first degree.” 2 CP at 181. Judges are prohibited by article IV, section 16 from instructing a jury that “matters of fact have

been established as a matter of law.” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). Yet Thomas does not dispute that our Supreme Court affirmed his conviction for first degree premeditated murder. Instead, he claims that the high court violated his right to a jury trial because it affirmed his conviction under the harmless error doctrine. He reasons that the court engaged in impermissible judicial fact-finding when it assessed the evidence and concluded that Thomas was guilty as a principal because no rational jury could find otherwise.

Again, the law of the case doctrine bars us from considering issues that “might have been determined had they been presented” in an earlier appeal. *Folsom*, 111 Wn.2d at 263 (quoting *Adamson*, 66 Wn.2d at 339; *Greene*, 68 Wn.2d at 7). It appears certain that this argument would fail on the merits. See *Levy*, 156 Wn.2d 709 (in which a seven-justice majority rejects Justice Sanders’s assertion that the majority’s harmless error analysis constitutes judicial fact-finding). But regardless of the merits, it is improper for us to substitute our analysis for the Supreme Court’s prior decision in this case.

#### B. ACCOMPLICE LIABILITY

Next, Thomas argues that the trial court erred because it failed to specifically inform the jury that the aggravating factors applied to Thomas instead of his accomplice. A trial court errs if it fails to accurately instruct the jury on each element of a charged crime and relieves the State of its burden to prove every essential element of the crime beyond a reasonable doubt. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Neither the law nor the facts support Thomas’s argument.

Thomas asserts that the aggravating circumstances listed in former RCW 10.95.020 “cannot be established through principles of accomplice liability; aggravating factors must apply

personally to the defendant and not just to an accomplice.” Br. of Appellant at 24. This is not the law. Thomas cites *Roberts*, 142 Wn.2d 471, for this rule. But the *Roberts* court held that imposing the *death penalty* based purely on accomplice liability would violate the prohibition on cruel and unusual punishment. 142 Wn.2d at 505-06. Here, the State did not seek the death penalty. Neither the *Roberts* court nor any other has held that former RCW 10.95.020 requires that a defendant personally commit the aggravating circumstances when the State seeks a punishment of life without parole. Thomas misstates the *Roberts* ruling.

It is black letter law that an accomplice to any crime, including murder, is equally culpable as a principal. RCW 9A.08.020; *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994). But the accomplice liability statute, RCW 9A.08.020, is limited to accountability for *crimes*. Thus, “an accomplice is ‘equally liable only for the substantive crime -- any sentence enhancement must depend on the accused’s own misconduct,’” unless the legislature indicates otherwise. *Silva-Baltazar*, 125 Wn.2d at 481 (quoting *State v. McKim*, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982)): The aggravating circumstances in former RCW 10.95.020 are sentence enhancements. *Thomas*, 150 Wn.2d at 848.

The legislature indicated that a defendant may be culpable for acting as an accomplice for some, but not all, of the aggravating factors in former RCW 10.95.020. The legislature intended that an accomplice to murder be subject to chapter 10.95 RCW, indicated by the leniency factor of “[w]hether the defendant was an accomplice to a murder committed by another person where the defendant’s participation in the murder was relatively minor.” RCW 10.95.070(4). And the

legislature phrased the aggravating factors so that some require that the defendant personally engaged in the aggravating acts, while others do not.<sup>3</sup>

Here, the trial court instructed the jury that it must find that Thomas personally committed the aggravating circumstances. The trial court did this in the simplest way possible, avoiding Thomas's confusing and redundant instructions on accomplice and principal liability.

The trial court asked:

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

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<sup>3</sup> Former RCW 10.95.020, the aggravated murder statute, reads in relevant part:

*A person* is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

.....  
(9) *The person* committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act *of the person*;

(11) The murder *was committed* in the course of, in furtherance of, or in immediate flight from one of the following crimes:

- (a) Robbery in the first or second degree;
- (b) Rape in the first or second degree;
- (c) Burglary in the first or second degree or residential burglary;
- (d) Kidnapping in the first degree; or
- (e) Arson in the first degree.

(Emphasis added.) Aggravating circumstances 9 and 10 require that the defendant committed the act personally, as 9 requires that the defendant committed the murder to conceal and 10 requires that the defendant committed a common scheme or plan and victimized multiple people. In contrast, aggravating circumstance 11 omits the element of a personal act, subjecting any person guilty of premeditated first degree murder, including an accomplice, to a sentence enhancement if that murder was in the course of, in furtherance of, or in immediate flight from a listed crime. Thomas was sentenced under circumstances 9 and 11.

- (3) Did *the defendant* commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the second degree?  
.....
- (4) Did *the defendant* commit the murder in the course of, in furtherance of, or in immediate flight from residential burglary?

2 CP at 202 (emphasis added). The jury answered “yes” to each of these questions. 2 CP at 202. There was only one defendant in this proceeding: Thomas. The jury interrogatories asked the straightforward questions of whether Thomas personally committed the murder under the relevant aggravating circumstances. Again, no court has held that the defendant’s personal participation is required to prove an aggravating circumstance under former RCW 10.95.020(11). But even if that were the law, the trial court’s instructions here required the jury to find that Thomas personally committed the murder in the course of robbery or burglary. We affirm on this ground.

#### PROSECUTORIAL MISCONDUCT

In his statement of additional grounds for review (SAG),<sup>4</sup> Thomas alleges misconduct during closing argument, asserting that the prosecutor argued from information that was not before the jury. Specifically, the prosecutor said, “You’ll also remember that Richard Geist was murdered in the front driver’s seat and drug out the side of the van. Where he was resting was on the passenger’s side of the van.” 15 Report of Proceedings (RP) at 1697. Thomas’s attorney objected and argued that this information was introduced during the first trial but was not

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<sup>4</sup> RAP 10.10.

evidence during the rehearing. The State argued that this evidence could be inferred from Raymond Cool's testimony.<sup>5</sup> The trial court overruled the objection.

To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). To prevail on the prejudice prong, there must be a substantial likelihood the misconduct affected the jury's verdict. *Korum*, 157 Wn.2d at 650. We view the allegedly improper statements within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. Generally, it is improper for an attorney to assert facts not in evidence during his closing arguments. *See State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Although Cool's testimony does not contain an explicit statement about where the men sat in the van, it is possible to infer from his testimony that Geist sat in the driver's seat. More importantly, Thomas has not demonstrated how this alleged misstatement was significant or how, in light of the other evidence presented to the jury, the statement improperly affected the jury's verdict. The court instructed the jury to consider only the evidence admitted during trial and not to consider as evidence the party's closing arguments. We presume the jury did so. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (the jury is presumed to follow the court's instructions). And where Geist sat or how his body was dumped has no bearing on the

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<sup>5</sup> The prosecutor argued:

What I said was Raymond Cool saw the van pointed in a certain direction. The north side of the road is here where the body is, the passenger's side is here. It's logical that the body is dragged out the passenger's side onto the side of the road. That's what I said. I have never said Edward Rembert said such and such. I'm arguing from the evidence that was presented in this case and the reasonable inferences therefrom.

15 RP at 1703.

verdict in this case. Thomas has not demonstrated that the prosecutor's statement prejudiced him.

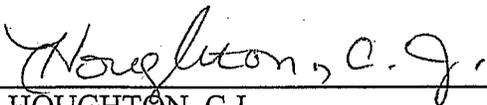
CUMULATIVE ERROR

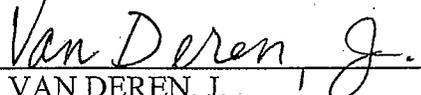
Thomas also argues that cumulative errors deprived him of his right to a fair trial. An accumulation of errors that do not individually require reversal may still require reversal if, in total, the errors deny a defendant a fair trial. *Perrett*, 86 Wn. App. at 322. But the doctrine of cumulative error does not apply here because we find no error to accumulate. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
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QUINN-BRINTNALL, J.

We concur:

  
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HOUGHTON, C.J.

  
\_\_\_\_\_  
VAN DEREN, J.