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NO. 65277-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,  
v.  
Thomas Steven Baze,  
Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Thomas Baze's trial suffered from two errors of constitutional dimension. First, the trial court had reason to doubt Mr. Baze's competency to stand trial and represent himself pro se but failed to hold a competency hearing. Mr. Baze takes a strong daily dose of methadone. During the trial, his medication was not administered. Mr. Baze alerted the court to the problem and listed the adverse effects on his mental and physical health repeatedly. The trial court did not hold a hearing to further inquire into Mr. Baze's competency. This error violated Mr. Baze's constitutional rights to due process and self-representation and requires reversal.

Second, the "to convict" jury instruction on count III was ambiguous. The State was required to prove beyond a reasonable doubt that Mr. Baze knew the statement he made to a public servant was both misleading and material. But the instruction as submitted could have been interpreted to only require knowledge as to the falsity of the statement. The error violated Mr. Baze's constitutional due process rights and requires reversal of that count.

**B. ASSIGNMENTS OF ERROR**

1. The trial court erred when it failed to conduct a hearing to determine whether Mr. Baze was competent to stand trial without administration of his medication.

2. The trial court erred when it failed to conduct a hearing to determine whether Mr. Baze was competent to proceed pro se without administration of his medication.

3. The trial court denied Mr. Baze his constitutional right to a fair trial when it submitted instruction number 13 to the jury, which states in relevant part:

To convict the defendant of the crime of Making a False or Misleading Statement to a Public Servant, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:  
... (3) That the defendant knew the statement was false or misleading, and that the statement was material . . . .

CP 29.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A court is required to make a competency determination if it has reason to doubt the defendant's competence to stand trial or proceed pro se. Once there is reason to doubt the competency of a defendant, the procedures outlined in the competency statute, RCW 10.77, must be followed. If the procedures adequate to

protect a defendant's right not to be tried or proceed pro se while incompetent are not followed, the defendant is denied due process and reversal is required. Where there was reason to doubt defendant's competency because he had not been provided critical medication and reported his serious mental and physical symptoms to the court but it did not conduct a competency hearing, should the convictions be reversed?

2. An accused person has the due process right to jury instructions that accurately state the law and make the relevant standard manifestly apparent to the jury. A criminal defendant also has a constitutional right to a fair trial. An ambiguous instruction on an essential ingredient of the crime requires reversal of the conviction without regard to the sufficiency of the evidence. Where the "to convict" instruction submitted to the jury ambiguously set forth whether the jury had to find knowledge of falsity and knowledge of materiality, as mandated by the statute, is reversal of Mr. Baze's conviction for making a false or misleading statement to a public officer under RCW 9A.76.175 required?

#### D. STATEMENT OF THE CASE

##### 1. Summary of Charges and Trial.

Mr. Baze was charged with two counts of felony violation of a no contact order and one count of making a false or misleading statement to a public servant under RCW 9A.76.175. CP 6-8 (amended information). The charge under RCW 9A.76.175 derived from Mr. Baze supplying an incorrect name to the police officer when he was stopped in connection with the second violation of a no contact order. CP 7; 2RP 111.<sup>1</sup>

Prior to trial, Mr. Baze moved for a continuance to hire counsel other than the court-appointed attorney. 5RP 3-6, 7. His requests were denied. 5RP 5, 10; 1RP 6. Mr. Baze ultimately decided to represent himself; the trial judge permitted him to do so and assigned the court-appointed attorney to act as standby counsel. 1RP 6, 18-19, 21-23. Mr. Baze testified at trial and conducted his own defense, at times, without the benefit of his medication. E.g., 2RP 116, 118-20, 130-31.

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<sup>1</sup> The verbatim reports of proceeding are designated throughout this brief as follows: Volume I, II and III of the March 1-3, 2010 trial are designated as 1RP, 2RP and 3RP, respectively. The March 12, 2010 transcript is designated 4RP. The single volume, consecutively-paginated transcript of the February 10, March 1 and March 3 hearings is designated as 5RP.

The State submitted proposed jury instructions, which the court accepted without significant alteration. 2RP 150-56. As to count three, making a false or misleading statement to a public officer, the “to convict” instruction states:

To convict the defendant of the crime of Making a False or Misleading Statement to a Public Servant, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 15, 2009, the defendant made a false or misleading statement to a public servant;
- (2) That the statement was material, as defined in these instructions;
- (3) That the defendant knew the statement was false or misleading, and that the statement was material; and
- (4) That the acts occurred in the State of Washington

CP 29 (the remainder of the instruction is not at issue). The third part of this “to convict” instruction differs from the Washington Pattern Jury Instruction, which states: “That the defendant knew both that the statement was material and that it was false or misleading.” 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 120.04, at 473 (Supp. 2010).

The jury convicted Mr. Baze of all three counts. CP 34-36 (verdict forms).

## 2. Lack of Medication During Trial.

Mr. Baze takes methadone daily by 10 a.m.; his dosage is 130 milligrams. 2RP 157-58. “[I]t’s a pretty high dose . . . that, um, would probably kill three people if they were to split that dose. And I take it daily, just to be normal.” 2RP 158.

On the first day of trial, standby counsel alerted the court that Mr. Baze usually takes his medication at 10 a.m. every day and he seemed to be “getting a little unwell” because it had not been administered yet that day. 1RP 26-27. The court ordered a recess until the medication was administered. 1RP 27-28.

After the State rested its case on the second day of trial, Mr. Baze informed the court that he was starting to feel “adverse effects” from his lack of medication, which had yet to be administered that day. 2RP 117. Without his medication, “as time wears on, [his] mind doesn’t – isn’t as clear as what it normally would be or should be.” *Id.* The court ordered a recess, but, upon return, Mr. Baze’s medication still had not been administered. 2RP 117-18.

Mr. Baze again told the court that he was “not feeling well.” 2RP 118. “I’m kind of starting first stages of withdrawals. I’m on a rather high dose of this medication. And, um, I’m afraid to get up

there with my eyes not focusing or my nose running and not thinking straight.” Id. Mr. Baze initially agreed to continue for a bit longer until he received his medication. 2RP 119. However, he subsequently informed the court that he was “not feeling real well at the moment. I do wish to respond to [the State’s argument], but I want to do it in a coherent, intelligent manner.” 2RP 119-21. The court maintained the proceedings and questioned the logic of Mr. Baze’s substantive position on the State’s motions, to which Mr. Baze responded only “I’m just not thinking straight at the moment.” 2RP 123.

After ruling on the motions in limine, the court again asked Mr. Baze if he was able to continue. 2RP 123. Mr. Baze responded, “I don’t think so. I really don’t think that I am.” 2RP 124. He continued, “I think it would be a miscarriage of justice to make me stand up in front of a jury with my nose running and my eyes not focusing and, um, my not being able to think clearly.” 2RP 124-25. The court ordered a further recess, stating that if the medication could not be administered today then he would hold the court in recess until the next day. 2RP 125.

The medication still had not been administered when the court returned from recess at 2 p.m. 2RP 126. The trial judge,

however, reported that the administrator of the medication, Therapeutic Health Services, “stated that the dose is sufficient that missing one day would not interfere with mental faculties, and said they see no reason why court should not proceed.” 2RP 126. The record is not clear whether it was the trial judge or his staff that spoke to Therapeutic Health Services, nor does it state the name or position of the individual at Therapeutic Health Services with whom the conversation took place. See 2RP 126. The conversation was not held on the record. See id.

Mr. Baze sharply disagreed with the court’s report of Therapeutic Health Services’ opinion. 2RP 126-27. Mr. Baze informed the court that in light of the stress he was under from trial and the dose he was on, Therapeutic Health Services’ assessment was inaccurate. 2RP 127. He reported he was “going through withdrawals . . . not going to be feeling up to snuff . . . not going to be thinking clearly . . . [and would experience] diarrhea . . . nose running . . . eyes flickering and not thinking as clearly as what I should.” 2RP 127. After the court heard the State’s position, Mr. Baze re-emphasized “But I am telling Your Honor that because of the demands placed on myself both physically and mentally through this trial, that the metabolization rate of this medication is

much higher. And I need it on a daily basis.” 2RP 129.

The court did not order further recess or a competency hearing. Rather, the court ordered the trial to proceed with Mr. Baze’s case. 2RP 129. He thus was forced to proceed in his pro se examination of himself. Id. Because he was having difficulty maintaining his train of thought and reading without the medication, Mr. Baze stopped his direct examination prematurely. 2RP 136-39. During the State’s cross-examination, Mr. Baze could finally take it no more. 2RP 146-48. He argued it was unfair to be “drilling” him when he was not able to think or see clearly and was not at his best ability to defend himself. Id. He therefore pled his Fifth Amendment right to silence and the court struck his entire testimony. Id.

While discussing planning for the next day of trial, Mr. Baze told the court “I have been on this medication for a couple decades now. And, um, it barely holds me 24 hours.” 2RP 156. “I was feeling the effects this morning by 10:00 o’clock.” 2RP 156-57. “[I]f I don’t [take the medication by 10 a.m.], I am not, um, able to intelligently [sic] and think straight. I just – that’s one of the things that happens. Your mind, you just can’t think.” 2RP 157. Referring to the State’s cross-examination of him, Mr. Baze told the court,

“when the prosecutor started firing questions at me, I wasn’t able to appropriately comprehend everything that was happening and what he was asking and intelligently defend myself.” Id.

#### E. ARGUMENT

Mr. Baze’s convictions should be reversed because he was forced to stand trial and proceed pro se without a determination of his competency. In the alternative, the conviction for making a false or misleading statement to a public servant should be reversed because it resulted from an ambiguous “to convict” jury instruction.

1. MR. BAZE’S CONVICTIONS MUST BE REVERSED BECAUSE HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO REPRESENT HIMSELF WERE DENIED WHEN THE TRIAL COURT FAILED TO CONDUCT A COMPETENCY HEARING.

a. Competence of the defendant is essential.

A criminal defendant may not be tried, convicted or sentenced unless he is competent. E.g., Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); RCW 10.77.050. The Fourteenth Amendment’s due process clause prohibits conviction of an accused while he is legally incompetent. Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d

103 (1975). Under the federal constitution, a criminal defendant is competent to stand trial when he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and to assist in his defense with “a rational[,] as well as factual[,] understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

Washington law provides even greater protection. In re the Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). In Washington, competency to stand trial is based on (1) whether the accused is capable of properly understanding the nature of the proceedings against him and (2) whether he is capable of rationally assisting his legal counsel in the defense of his cause. RCW 10.77.010(6). “[N]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050.

The Washington Constitution also expressly guarantees the right of self-representation: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . .” Const. art. 1, § 22; see State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Similarly, the Sixth Amendment to the

United States Constitution implicitly provides the right to proceed pro se.<sup>2</sup> Faretta v. California, 422 U.S. 806, 814, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The right is rooted in respect for autonomy. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991).

A court is required to make a competency determination if it has reason to doubt the defendant's competence to stand trial or to represent himself. Godinez v. Moran, 509 U.S. 389, 391, 402 n.13, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); Drope, 420 U.S. at 178-80; Pate, 383 U.S. at 377.<sup>3</sup> "The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the 'defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.'" Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)). "Where a substantial question of

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<sup>2</sup> The amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

<sup>3</sup> Though Washington courts have not held whether this State's protection of incompetent defendants has declined in keeping with the United States Supreme Court's most recent enunciation of federal law, Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), which held that a state may require that counsel represent individuals competent enough to stand trial but not to represent themselves, this Court need not decide that here. See Fleming, 142 Wn.2d at 862 (noting Washington's protection of incompetent defendants is greater than that provided under federal law). Because the trial court failed to conduct any hearing to determine Mr. Baze's competency, the degree of his competency is not properly in the record before this Court.

possible doubt exists as to the defendant's competency to stand trial, due process requires that the trial court conduct a competency hearing." State v. Hicks, 41 Wn. App. 303, 308, 704 P.2d 1206 (1985) (citing State v. Johnston, 84 Wn.2d 572, 576, 527 P.2d 1310 (1974) and State v. Wright, 19 Wn. App. 381, 575 P.2d 740 (1978)).

Once there is reason to doubt the competency of a defendant, the procedures outlined in the competency statute, RCW 10.77, must be followed. Fleming, 142 Wn.2d at 863. In other words, the trial court may not make a competency determination other than by following the procedures in RCW 10.77. See Wicklund, 96 Wn.2d at 805 (RCW 10.77.060(1)'s procedures are mandatory). As soon as a party or the court raises doubts as to the defendant's competency, the court must order an evaluation of the defendant by proper experts. RCW 10.77.060. Upon completion of the evaluation, the court must then determine the individual's competency to stand trial, plead guilty, or proceed pro se. Fleming, 142 Wn.2d at 863.

Reasonable doubt is absent where the trial court is provided with no information regarding defendant's competency and there is no irrational or concerning behavior in the courtroom. See Fleming, 142 Wn.2d at 863. In Fleming, defense counsel requested a

psychological report, which found defendant

presently able to understand the nature and purpose of the proceedings taken against him, but is presently unable to cooperate in a rational manner with counsel in presenting a defense and is not able to prepare and conduct his own defense in a rational manner without counsel and therefore is judged presently mentally incompetent to stand trial.

Id. at 862. But neither the report nor its findings were ever presented to the trial judge. Id. at 863. The defendant did not exhibit any irrational behavior in the courtroom. Id. Except for defense counsel's request to conduct the psychological examination, the trial court had no reason to doubt Mr. Fleming's competency. Id. at 863-64.<sup>4</sup> The Washington Supreme Court accordingly held that because the trial court had no reason to doubt defendant's competency at the time of trial, it did not abuse its discretion by failing to hold a competency hearing. Id. at 864.

b. The trial court failed to determine competence.

Here, the trial court was acutely aware of Mr. Baze's potential incompetency. Mr. Baze and his standby counsel

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<sup>4</sup> Defense counsel had based the need for the psychological evaluation on development of insanity and diminished capacity defenses and not on capacity to stand trial, which the Supreme Court held was "not dealing with competency during the trial." Fleming, 142 Wn.2d at 863-64 ("Even though the trial court judge granted the motions for expenditure of public funds for psychological evaluations, this was done with Fleming's counsel stating in the motion that these reports were to be used for the diminished capacity and insanity defense, which is not dealing with competency during the trial.").

informed the court on several occasions that he required his medication and was accustomed to its daily administration at 10 a.m. E.g., 1RP 26-27; 2RP 117-18. The court was well-informed by defendant that his symptoms included feeling “unwell,” an unclear mind, “not thinking straight,” “nose running,” “eyes [flickering or] not focusing,” and “diarrhea.” Id.; 2RP 121, 123-25, 127. The court remarked as well that Mr. Baze’s substantive legal arguments appeared nonsensical during this time without medication. 2RP 123. Its failure to order a competency hearing, therefore, was abuse of discretion. See, e.g., Drope, 420 U.S. at 180-81 (defendant’s demeanor at trial or irrational behavior can alone be sufficient to require further inquiry).

Despite Mr. Baze’s repeated recitation of his depleted mental state, the court did not order a competency evaluation as required under RCW 10.77 and Fleming, and it did not make a competency determination. The error violated Mr. Baze’s constitutional rights and requires reversal of the convictions resulting from the trial. See Fleming, 142 Wn.2d at 863.

2. BECAUSE JURY INSTRUCTION 13 CREATED AMBIGUITY AND FAILED TO ADEQUATELY ALLEGE EACH ELEMENT OF THE CHARGE, MR. BAZE'S CONVICTION FOR MAKING A FALSE OR MISLEADING STATEMENT TO A PUBLIC OFFICER SHOULD BE REVERSED.

a. Proper instructions are essential.

A fundamental component of due process is that the jury find every element of the crime beyond a reasonable doubt; this cannot happen unless the jury is properly instructed on every element.

U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22; Apprendi v. New Jersey, 530 U.S. 466, 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Williams, 162 Wn.2d 177, 186-87, 170 P.3d 30 (2007). In Washington, every essential element of the crime must be included in the "to convict" jury instruction. Williams, 162 Wn.2d at 186-87; State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

Because the "to convict" instruction purports to be a complete statement of every element of the crime and therefore serves as the jury's "yardstick," the jury cannot be expected to hunt for essential elements in other instructions. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 820-21, 259 P.2d 845 (1953). "It cannot be said a defendant has had a fair trial if the jury must guess at the meaning

of an essential element of the crime or if the jury might assume that an essential element need not be proved.” Smith, 131 Wn.2d at 263. “Moreover a reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The failure to include an essential element of the crime in the jury instructions is a constitutional issue that may be raised for the first time on appeal. RAP 2.5(a); State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 71 P.2d 1000 (1985); Mills, 154 Wn.2d at 6. A “to convict” instruction that does not “plainly, explicitly, and correctly” state all the elements required for conviction is “constitutionally defective.” Smith, 131 Wn.2d at 263; State v. Strasburg, 60 Wash. 106, 116-17, 110 P. 1020 (1910); McClaine v. Territory, 1 Wash. 345, 355, 25 P. 453 (1890). If the jury instructions either incorrectly define or are silent on an element of a crime, the State is relieved of its burden to prove every element of a crime and automatic reversal is required. Smith, 131 Wn.2d at 265 (error presumed to have been prejudicial; State’s burden to prove harmless beyond a reasonable doubt); State v. Gordon, 153 Wn. App. 516, 532, 223 P.3d 519 (2009), rev. granted, 169 Wn.2d 1011,

236 P.3d 896 (2010). This Court reviews jury instructions de novo. Mills, 154 Wn.2d at 7.

b. The instructions below were inadequate.

The “to convict” jury instruction for the charge of making a false or misleading statement to a public servant was ambiguous as to the knowledge element. See CP 29 (instruction 13). Because jurors lack interpretive tools and training, jury instructions are held to a higher standard of clarity than a statute. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), abrogated on other grounds by State v. O’Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009). The crime of making a false or misleading statement to a public servant requires that the defendant make a material statement knowing (i) it was false and (ii) it was material. RCW 9A.76.175; State v. Godsey, 131 Wn. App. 278, 291, 127 P.3d 11 (2006) (evidence sufficient to infer defendant knew statement was material); State v. Ou, 156 Wn. App. 899, 905 n.4, 234 P.3d 1186 (2010) (citing WPIC 120.04). The Washington Pattern Jury Instruction for the “to convict” instruction of this crime treats knowledge as a single element. WPIC 120.04. However, it uses clear language to explain that the jury must find knowledge as to materiality and falsity. Id. It

provides “(3) That the defendant knew **both** that the statement was material **and** that it was false or misleading.” *Id.* (emphasis added).

Here, the court’s instruction also treated knowledge as a single element of the crime; however, no linguistic or grammatical guideposts indicated to the jury that the defendant must have had knowledge of the materiality and knowledge of the falsity of the statement. Rather, the court’s instruction is ambiguous as to whether the jury must find (i) knowledge of the falsity of the statement and (ii) that the statement was material, or, alternatively (and as required) whether the jury must find (i) knowledge of the falsity of the statement and (ii) knowledge of the materiality of the statement. See CP 29 (instruction no. 13). The instruction merely states: “(3) that the defendant knew the statement was false or misleading, and that the statement was material.” *Id.* “Although a juror could read instruction [no. 13] to arrive at the proper law, the offending sentence lacks any grammatical signal compelling that interpretation over the alternative, conflicting, and erroneous reading.” *LeFaber*, 128 Wn.2d at 903 (emphasis added).

In *State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005), this Court reviewed a similarly ambiguous jury instruction and reversed the conviction. In *Bland*, a jury convicted Mr. Bland of

second degree assault despite his defense of property defense. Id. at 513. On appeal, Mr. Bland argued that the defense of property instruction was erroneous because it could be interpreted to require the jury to find that he was in fear of personal injury, which is not an element of the crime. Id. The instruction stated:

The use or attempt to use force upon or toward the person of another is lawful when used or attempted by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person or a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

Id. at 514. This Court found that the “lack of punctuation is problematic.” Id. Because the instruction was grammatically ambiguous, it allowed for the potential that the jury could have misunderstood the elements it was required to find:

When read literally, instruction 12 could be understood to require a finding that a defendant reasonably believed that he was about to be injured in preventing a malicious trespass: “The use or attempt to use force . . . by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent . . . a malicious trespass.” Of course, this literal interpretation would make the language concerning trespass and interference with property superfluous, because if a person acts with a reasonable belief that he is about to be injured, and uses necessary force to protect himself, he is acting in self-defense. Regardless, the instruction is unclear and therefore erroneous.

Id. This Court accordingly reversed the conviction. Id. at 517.

c. Reversal is required on Count III.

Like in Bland, Mr. Baze's jury received an ambiguous instruction. Mr. Baze's jury could have understood instruction 13 not to require it to find knowledge of materiality beyond a reasonable doubt. See State v. Clowes, 104 Wn. App. 935, 944-45, 18 P.3d 596 (2001) (reversing conviction for violation of no contact order where instruction's simplification of the elements created ambiguity), disapproved of on other grounds by State v. Nonog, 169 Wn.2d 220, 237 P.3d 250 (2010). Because the "to convict" jury instruction failed to "plainly, explicitly, and correctly" state all the elements required for conviction it is "constitutionally defective" and reversal is mandated. See, e.g., Smith, 131 Wn.2d at 263-65; Clowes, 104 Wn. App. at 945.

Harmless error analysis is not necessary here because the failure to "plainly, explicitly, and correctly" state an element of the crime renders it constitutionally defective and requires reversal. Smith, 131 Wn.2d at 263, 265 (error not harmless even if defense allowed to argue theory of case and element presented to jury in

other instructions and during case). Even if necessary, harmless error analysis would require the same result: reversal of the conviction. First, there is no affirmative evidence of harmlessness. Additionally, the State cannot not meet its burden to demonstrate harmlessness beyond a reasonable doubt because it must be presumed the jury relied on the “to convict” instruction as the correct statement of the law. See id.; Bland, 128 Wn. App. at 517 (“We cannot conclude beyond a reasonable doubt that the erroneous instruction was harmless error.”). Finally, there was no evidence at trial supporting Mr. Baze’s knowledge of the materiality of the statement, which was the element ambiguously set forth in instruction 13. See 2RP 112 (arresting officer merely testifies that Mr. Baze supplied false name); cf. State v. Pineda-Pineda, 154 Wn. App. 653, 672-73, 226 P.3d 164 (2010) (only harmless error because uncontroverted evidence plainly proved the element missing from the instruction). Thus it cannot be found beyond a reasonable doubt that the ambiguous instruction did not contribute to the conviction.

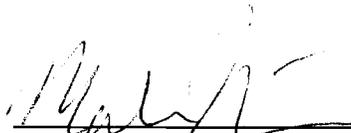
#### F. CONCLUSION

This Court should reverse the convictions because Mr. Baze was forced to stand trial and proceed pro se without a

determination of his competency. In the alternative, the conviction for making a false or misleading statement to a public servant should be reversed because it resulted from an ambiguous "to convict" jury instruction.

DATED this 3rd day of December, 2010.

Respectfully submitted,



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Washington Appellate Project  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 65277-0-I
	)	
THOMAS BAZE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3<sup>RD</sup> DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                                                                                                                                                  |                   |                                     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| <input checked="" type="checkbox"/> THOMAS BAZE<br>702342<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769                             | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF DECEMBER, 2010.

X \_\_\_\_\_ 

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