

65277-0

65277-0

NO. 65277-0-1

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

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

2011 JUN 17 11:55 AM
B

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

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. THE COURT'S FAILURE TO CONDUCT A
COMPETENCY HEARING WHERE REASONABLE
DOUBT OF MR. BAZE'S COMPETENCE
ABOUNDED REQUIRES REVERSAL OF THE
CONVICTIONS.

As Mr. Baze argued in his Opening Brief, the federal and state constitutions as well as statutory law guarantee a criminal defendant's right to not stand trial or proceed pro se unless he or she is competent. E.g., Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); In re Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001); State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); RCW 10.77.050.

Here, reasonable doubt abounded as to whether Mr. Baze was competent to stand trial and defend himself. See 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; Fleming, 142 Wn.2d at 863. The trial court was well aware of Mr. Baze's withdrawal symptoms, which included mental and physical manifestations: feeling "unwell," an unclear mind, "not thinking straight," "nose running," "eyes [flickering or] not focusing," and "diarrhea." 1RP 26-27; 2RP 117-

18, 121, 123-25, 127. In addition to Mr. Baze's recitation of his symptoms, Mr. Baze's courtroom presentation demonstrated reasonable doubt of his competency. 2RP 123 (remarks by court that Mr. Baze's legal argument lacked cohesiveness and coherence); 2RP 136-39 (Mr. Baze cuts short own testimony because "I'm having trouble, um, speaking to you intelligently and having a normal train of thought"); 2RP 146 (on cross-examination Mr. Baze testifies he is unable "to think clearly or see clearly" and is "not feeling well"); 2RP 147-48 (reversing course and pleading Fifth Amendment resulting in all his testimony being stricken).

Because the court was confronted with reasonable doubt as to Mr. Baze's competence, it was required to conduct a competency hearing in accordance with Chapter 10.77 RCW. State v. Hicks, 41 Wn. App. 303, 308, 704 P.2d 1206 (1985); Fleming, 142 Wn.2d at 863. The trial court's failure to comply with the competency statute violated Mr. Baze's constitutional rights and requires reversal of the convictions resulting from the trial. See Fleming, 142 Wn.2d at 863.

The trial court's unspecified, off-the-record contact with Therapeutic Health Services (THS) does not substitute for a competency hearing. E.g., id. (compliance with Chapter 10.77

RCW mandatory when reasonable doubt present). The court's report of the call, moreover, fails to dispel the evidence of reasonable doubt. The record does not establish the reliability of the court's communication with THS—for example, what questions were asked of THS, who asked the questions on behalf of court, who responded on behalf of THS (including whether the representative had any medical training or other qualifications), and whether any details regarding Mr. Baze's particular situation were provided to THS. Further minimizing the importance of the court's contact with THS, Mr. Baze sharply disagreed with THS's assessment. 2RP 126-27. The court, therefore, should have proceeded with a competency hearing under RCW 10.77.060.

The cases relied upon by the State do not sanction the court's reversible error. To support the trial court's failure to hold a competency hearing in the face of extensive evidence of potential incompetence, the State relies upon State v. Hystad, 36 Wn. App. 42, 671 P.2d 793 (1983) and State v. Armstead, 13 Wn. App. 59, 533 P.2d 147 (1975). First, both cases consider defendant's request on appeal to withdraw a guilty plea, which occurs only if necessary to correct a manifest injustice. Hystad, 36 Wn. App. at 65 ("According to CrR 4.2(f), a trial court shall allow a defendant to

withdraw a guilty plea whenever that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, and not obscure.”); Armstead, 13 Wn. App. at 63-65 (same). Here, this Court need only find that the trial court abused its discretion by failing to order a competency hearing where it was confronted with reasonable doubt. E.g., Hicks, 41 Wn. App. at 308.

Second, in Hystad, the defendant alleged that he was incapable of entering a valid plea because he was *taking* methadone. Mr. Baze, on the other hand, was denied his regular administration of medication. Therefore it was the *withdrawal from* or *lack of methadone* that created potential incompetence here.

Finally, the trial court in Armstead was presented with no evidence of the defendant’s incompetence to enter a valid plea other than the defendant’s own statement that he was “drunk off barbiturates.” 13 Wn. App. at 63. Moreover, the Armstead court had before it “ample evidence both as to defendant’s admissions of guilt and as to the guilty plea having been made knowingly and voluntarily.” Id. at 64-65. Conversely, here the trial court was confronted with extensive evidence amounting to at least reasonable doubt of Mr. Baze’s competency to stand trial and proceed pro se under the competency standard. See supra.

The trial court's failure to order a competency hearing requires reversal of Mr. Baze's convictions.

2. MR. BAZE'S CONVICTION FOR MAKING A FALSE OR MISLEADING STATEMENT TO A PUBLIC OFFICER SHOULD BE REVERSED BECAUSE THE JURY INSTRUCTION ALLEVIATED THE STATE OF ITS BURDEN.

The State fails to resurrect the improper "to convict" instruction on the charge of making a false or misleading statement to a public officer. As set forth in Mr. Baze's Opening Brief, the failure to properly instruct the jury on every element of the crime is a violation of due process. 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). A jury instruction that incorrectly defines an element of the crime relieves the State of its burden to prove every element of a crime and automatic reversal is required. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) (error presumed to have been prejudicial); State v. Gordon, 153 Wn. App. 516, 532, 223 P.3d 519 (2009), rev. granted, 169 Wn.2d 1011, 236 P.3d 896 (2010).

Here, 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). The instruction states in relevant part: “(3) that the defendant knew the statement was false or misleading, and that the statement was material.” Id. It fails to unambiguously convey that the jury must find beyond a reasonable doubt (a) that the defendant knew the statement was false or misleading *and* (b) that the defendant *knew* that the statement was *material*. See RCW 9A.76.175; 11A Washington Pattern Jury Instructions: Criminal (WPIC) 120.04.

The State’s response that the overall structure of the “to convict” instruction sufficiently delineated to the jury that it had to find knowledge as to both falsity and materiality is misplaced. Resp. Br. at 16. A jury “requires a manifestly clear instruction.” 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). This Court cannot save a jury instruction through statutory construction principles because the jury “lacks such interpretive tools.” Id.

In State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005), this Court rejected a similar argument to the State’s here. In that case, “the literal interpretation” of the jury instruction at issue would have rendered other language in the instruction “superfluous.”

Bland, 128 Wn. App. at 514. “Regardless,” this Court held, “the instruction is unclear and therefore erroneous.” Id.

The same is true here. Even if a literal reading of the instruction on knowledge would render another part of the instruction (the materiality element) superfluous, the instruction is unclear. A jury without training in and unarmed with the tools of statutory construction cannot be expected to reconstruct the instruction to fit the statute. See LeFaber, 128 Wn.2d at 903 (“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.”).

The State’s additional argument that the instruction was sufficient because it pointed to the crime “as charged” is simply wrong. Resp. Br. at 16-17. The information was not presented as an exhibit to the jury. And even if it had been, it charges Mr. Baze with “knowingly mak[ing] a false or misleading material statement.” CP 7. Accordingly, it also fails to unambiguously instruct that knowledge must be proved as to materiality as well as falsity. Compare id. with WPIC 120.04.

Moreover, the language selected for the Washington Pattern Instruction is instructive. It uses clear language to explain that the jury must find knowledge as to materiality *and* falsity. WPIC 120.04 (instructing “(3) That the defendant knew both that the statement was material and that it was false or misleading.”); cf. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) (touting the general reliability of pattern instructions). The lack of such clarity here alleviated the State’s constitutional burden. Because the instruction provided in Mr. Baze’s case created ambiguity resolvable, at best, through tools of statutory construction, and in this regard departed from the pattern instruction, the error is plain.

The State further argues that even if the instruction was erroneous, the error was harmless. Resp. Br. at 18. It is wrong on two grounds. First, 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. The “failure to instruct on an element of an offense is automatic reversible error” because it relieves the State of proving guilt beyond a reasonable doubt on every element of the crime. Id. at 265 (citing state and federal case law that holds the same).

Second, even if harmless error analysis is applicable here, the error was not harmless. It must be presumed the jury relied on the “to convict” instruction as the correct statement of the law. See Smith, 131 Wn.2d at 263, 265; Bland, 128 Wn. App. at 517. Therefore, the State must show beyond a reasonable doubt that the result would have been the same absent the erroneous instruction. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).¹ To overcome this burden, the State must show that the missing element—knowledge of materiality—was supported by uncontroverted evidence. Id.; State v. Pineda-Pineda, 154 Wn. App. 653, 672-73, 226 P.3d 164 (2010).

The State cannot meet its burden here. There was no evidence at trial supporting Mr. Baze’s knowledge of the materiality of the statement. Pineda-Pineda, 154 Wn. App. at 672-73. The only evidence derived from the arresting officer, who testified merely that Mr. Baze gave a false name. 2RP 112. The officer offered no testimony suggesting that Mr. Baze *knew* the supplying of the false name was material. The State claims that Mr. Baze admitted guilt in his closing statement. Resp. Br. at 20. However, Mr. Baze only admitted that the name was false. He presented no

¹ Our Supreme Court did not overturn Smith in the later Brown case.

evidence or argument as to his knowledge of its materiality.

Accordingly, the State cannot support its burden to show beyond a reasonable doubt that the jury would have reached the same result had it been properly instructed.

B. CONCLUSION

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

DATED this 7th day of March, 2011.

Respectfully submitted,


Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

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

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X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710