

65277-0

65277-0

NO. 65277-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMAS BAZE,

Appellant.

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COURT OF APPEALS
DIVISION ONE
JAN 31 2012

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN C. GONZÁLEZ

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. PROCEDURAL FACTS | 1 |
| 2. SUBSTANTIVE FACTS | 3 |
| C. <u>ARGUMENT</u> | 5 |
| 1. A COMPETENCY HEARING WAS NOT REQUIRED BECAUSE NO LEGITIMATE QUESTION OF COMPETENCY EXISTED..... | 5 |
| a. Baze's Medication And The Trial Delays..... | 6 |
| b. Baze's Delay Tactics Were Not The Result Of Incompetence..... | 10 |
| 2. THE "TO CONVICT" INSTRUCTION CONTAINED EACH ESSENTIAL ELEMENT | 12 |
| a. Making A False Or Misleading Statement | 13 |
| b. Trial Court's Instructions | 14 |
| c. The "To Convict" Instruction Is Correct | 15 |
| d. Error, If Any, Is Harmless | 18 |
| D. <u>CONCLUSION</u> | 20 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Drope v. Missouri, 420 U.S. 162,
95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)..... 10

Neder v. United States, 527 U.S. 1,
119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 18, 19

Washington State:

City of Seattle v. Gordon, 39 Wn. App. 437,
693 P.2d 741 (1985)..... 11

State v. Armstead, 13 Wn. App. 59,
533 P.2d 147 (1975)..... 12

State v. Bland, 128 Wn. App. 511,
116 P.3d 428 (2005)..... 17, 18

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 18, 19

State v. Byrd, 125 Wn.2d 707,
887 P.2d 396 (1995)..... 15

State v. Eldridge, 17 Wn. App. 270,
562 P.2d 276 (1977)..... 10

State v. Emmanuel, 42 Wn.2d 799,
259 P.2d 845 (1953)..... 16

State v. Hystad, 36 Wn. App. 42,
671 P.2d 793 (1983)..... 11

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991)..... 11

| | |
|---|----|
| <u>State v. Sibert</u> , 168 Wn.2d 306, 230 P.3d 142 (2010)..... | 15 |
| <u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997)..... | 16 |

Statutes

Washington State:

| | |
|---------------------|----|
| RCW 9A.08.010 | 15 |
| RCW 9A.76.125 | 13 |
| RCW 9A.76.175 | 2 |
| RCW 10.77.010..... | 11 |
| RCW 10.77.060..... | 11 |
| RCW 26.50.110..... | 1 |

Other Authorities

| | |
|--|----|
| 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 120.04 (2d ed. 1994) | 14 |
| WPIC 10.02..... | 15 |
| WPIC 120.04.01..... | 15 |

A. ISSUES PRESENTED

1. The defendant bears the burden of establishing incompetency. Baze, pro se, argued that he was suffering from early stages of methadone withdrawal and thus too ill to proceed. The trial court verified with Baze's treatment provider that one missed dose would not interfere with mental faculties. The court further found that Baze had engaged in a pattern of behavior designed to "obstruct the orderly flow of this case." Did Baze fail to establish incompetency?

2. The "to convict" instruction contained each essential element of making a false or misleading statement to a public servant, including that the jury had to find that Baze knew his statement was false or misleading and material. Does Baze's contention, that the "to convict" instruction did not require the jury to find that Baze knew his misstatement was material, fail?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Thomas Baze, with two counts of domestic violence felony violation of a court order, contrary to RCW 26.50.110(1), (5) (counts 1 and 2), and one count

of making a false or misleading statement to a public servant, contrary to RCW 9A.76.175 (count 3). CP 6-8. Baze had two prior convictions for violating court orders.¹ 2RP 94.²

Pre-trial, Baze made a motion to discharge his court-appointed counsel. 5RP 3. The presiding judge, Honorable Sharon Armstrong, denied Baze's motion. 5RP 5.

On the trial date, Baze made a motion to continue the trial. 5RP 7. Judge Armstrong denied the motion and assigned the case to a trial court. 5RP 10.

Later that same day, Baze renewed his motion to represent himself. 1RP 5-6. The trial court determined that Baze's motion was not motivated by a true desire to represent himself, but a desire to have different counsel. 5RP 11-12, 17. Accordingly, the trial court denied Baze's motion. 5RP 11-12, 17. Baze asked the trial court to reconsider its ruling. Twice before Baze had represented himself at trial; once he was acquitted and once he was convicted. 1RP 5, 7, 18, 22; CP 10. Baze said that he is college educated, articulate, and "perfectly capable of representing

¹ At trial, the parties stipulated that Baze had two previous convictions for violating court orders. 2RP 94.

² The State adopts the appellant's designation of the verbatim report of proceedings. See Br. of Appellant at 4 n.1.

myself.” 1RP 18. The trial court advised Baze that it would not continue the trial date; the court then granted Baze's motion to reconsider. 1RP 20-22. The court found that Baze's request for self-representation was unequivocal and that he made a knowing and voluntary waiver of his right to counsel.³ 1RP 22. The court asked Baze's former counsel to remain as standby counsel. 1RP 23.

A jury convicted Baze as charged. CP 34-36; 5RP 11-14. The trial court imposed a prison-based special drug offender sentencing alternative for counts 1 and 2. CP 43. The court imposed 12 months concurrent confinement for count 3. CP 43, 50. Baze appeals. CP 55.

2. SUBSTANTIVE FACTS

By court order, Baze is prohibited from having contact with his wife, Georgeann Bayne.⁴ 2RP 82-83, 88-89.

³ After pre-trial motions and before jury selection, the trial court asked Baze if he would reconsider and allow standby counsel to represent him. Baze declined, “No, I want to go pro se. I want to speak for myself.” 1RP 65-66.

⁴ The order issued September 26, 2006, and the order expires on September 29, 2011. 2RP 89.

On September 25, 2009, Seattle Police Officer George Davisson saw Baze and Bayne walking together. 2RP 79. Davisson knew Baze and Bayne from previous contacts and he knew there was a court order that prohibited contact. 2RP 77, 80, 82. After Davisson verified that the court order had not expired, he arrested Baze. 2RP 83, 95.

On December 16, 2009, Seattle Police Officer Joseph Renick saw Baze and Bayne walking together and conversing. 2RP 105-07. Renick knew Baze and Bayne from previous contacts and he knew there was a court order that prohibited contact. 2RP 108-09. Renick verified the validity of the court order; then Renick contacted Baze. 2RP 109-11. Baze falsely identified himself to Officer Renick as either Ronald Goldsmith or Ronald Goldberg. 2RP 111. Officer Renick accessed a photograph of Baze on his patrol car computer—to be certain that the man he knew as Baze was, in fact, Baze (and the respondent on a court order prohibiting contact with Bayne). 2RP 112. When Renick confronted Baze with the photograph, Baze admitted his true identity. 2RP 112. Baze also admitted that he knew there was a court order that prohibited

him from having contact with Bayne, but Baze said the order was “bullshit.” 2RP 113. Officer Renick arrested Baze.⁵ 2RP 114.

Additional substantive and procedural facts will be discussed in the sections to which they pertain.

C. ARGUMENT

1. A COMPETENCY HEARING WAS NOT REQUIRED BECAUSE NO LEGITIMATE QUESTION OF COMPETENCY EXISTED.

Baze contends that the trial court violated his right to due process rights by failing to order a competency evaluation after there was a reason to doubt Baze's competency. This Court should reject Baze's claim. The trial court specifically found that, despite Baze 's alleged methadone withdrawal, Baze was able to proceed and was intentionally delaying the trial. Thus, because there was no reason to doubt Baze's competency, the trial court did not err by failing to order a competency evaluation.

⁵ Officer Renick also arrested Baze on a no-bail Department of Corrections escape warrant and a \$20,000 warrant for the September 2009 violation of a no contact order. 2RP 114.

a. Baze's Medication And The Trial Delays.

Baze has taken daily doses of methadone for more than 20 years. 1RP 26-27; 2RP 128-29. On the first day of trial, Baze advised the court that he had not received his daily 10:00 A.M. dose. 1RP 26-27. The trial court recessed so that Baze could take his medication, find his reading glasses (that he had apparently left in his cell) and change out of his jail clothes (Baze had not put on civilian clothes because he thought the presiding judge would grant his motion to continue). 1RP 2, 9-10, 27.

After the recess, Baze confirmed that he had received his methadone. 1RP 27. Baze also returned with a pair of reading glasses. 1RP 29. But Baze was still dressed in jail clothes; he said that he did not care if the jury saw him in jail attire. 1RP 27-28.

On the second day of trial, Baze went to court in civilian clothes, but he had not received his methadone. 2RP 70, 76. That same day, the State rested before noon. 2RP 116. Because Baze said that he was starting to feel adverse effects from his missed methadone dose, the court recessed until 1:00 P.M.⁶ 2RP 117.

When court reconvened, Baze still had not received his methadone. 2RP 118. Apparently, the Therapeutic Health

⁶ The court recessed at 11:35 A.M. 2RP 118.

Service's employee (an outside contractor that medicates the inmates who receive methadone) had arrived at the jail to provide Baze with his methadone, but declined to wait for Baze to be returned from court to the jail. 2RP 119, 126. Baze told the court that he was in the first stages of withdrawal. 2RP 118. The court asked Baze if he could continue with trial until the mid-afternoon break. 2RP 119. Baze responded, "Yeah." 2RP 119. The court asked the bailiff to coordinate with the jail to ensure that Baze's medication would be available at the next break. 2RP 119.

A short while later, Baze told the court that he was "not thinking straight at the moment." 2RP 123. The court responded, "Let's take a recess, see if we can get you your medication." 2RP 123.

A few minutes later, court reconvened. The court explained to Baze that attempts were still being made to get the methadone. 2RP 124. The court asked Baze if he could continue. 2RP 124. Baze said, "I don't think so." 2RP 124. The court said that it would recess again to try and get the woman from Therapeutic Health Services back to administer Baze's medication. 2RP 125. The court recessed at 1:20 P.M. 2RP 125.

At 2:00 P.M. court reconvened. 2RP 126. The court said,

We contacted Therapeutic Health Services . . . with a concern that the methadone dose had not been administered today. They said they would make sure that the dose was administered before court begins tomorrow. They 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. Baze disagreed. He insisted that he was “going through withdrawal.” 2RP 127. The court ruled that trial would proceed with Baze's testimony, but the court would not require Baze to rest until the next day, after Baze received his methadone. 2RP 129.

Baze resumed the witness stand and he told the jury that his reading glasses had been stolen and that he was testifying, despite not having received his medicine. 2RP 130, 136, 146. Baze said that he was in withdrawal and he refused to answer the deputy prosecutor's questions on cross examination. 2RP 147. After Baze belatedly invoked his Fifth Amendment rights, the court struck his testimony and then excused the jury for the day. 2RP 147-49.

When the trial court tried to have a jury instruction conference with the parties, Baze complained that he could not read the instructions because his eyes were blurry and his glasses

had been stolen. 2RP 150. Baze repeated that he was suffering from methadone withdrawal. 2RP 151. The court said,

My experience, Mr. Baze, is that you're working very diligently to try to find a way to avoid the end of this trial.

2RP 151. After Baze complained that he had to go to the bathroom, the court said it would recess yet again and the court advised Baze to return with his glasses. 2RP 152. Baze repeated that his glasses had been stolen. 2RP 152.

After the recess, Baze stated that he was having difficulty understanding the jury instructions. 2RP 154. The court said,

I find that Mr. Baze, by no fault of his own, did not get his methadone dose today. But that he is, nonetheless, able to proceed and is refusing to cooperate. That he is finding ways to obstruct the orderly flow of this case, such as not raising the issue of the glasses until he takes the stand. He raised the issue before and defense counsel provided him with a new pair. The Court, of course, was unaware of his assertion that they'd been stolen until he took the stand and, yet again, used that as a reason to delay this case.

2RP 154.

The court told Baze that, although it would instruct the jury that afternoon, it would not require Baze to make his closing argument until the following day--after Baze had received his

methadone. 2RP 156. The court adjourned for the day at 3:45 P.M.

2RP 162.

The next day, the trial court permitted Baze to re-open his case. 3RP 166.

Later that day, after the jury returned its verdicts, the trial court commented that,

the defendant this morning was lucid and reading without glasses, the first pair having been left in his cell the first day of trial. The second, he said that counsel, defense counsel provided to him but were stolen. Nonetheless, he was able to read the no contact order while he was on the stand and able to read his notes here and appeared to be reading without glasses or difficulty.

5RP 15-16.

b. Baze's Delay Tactics Were Not The Result Of Incompetence.

An accused in a criminal case has a fundamental right not to be tried while incompetent to stand trial. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Eldridge, 17 Wn. App. 270, 562 P.2d 276 (1977). A defendant is incompetent if he "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW

10.77.010(14); see also State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991).

A competency evaluation is required whenever “there is reason to doubt” the defendant's competency. RCW 10.77.060(1)(a). “A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge.” City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). The defense bears the burden of establishing a reason to doubt the defendant's competency. Lord, at 903.

In this case, there was never a legitimate reason to doubt Baze's competency. Baze asserted that his methadone withdrawal left him unable to proceed with trial; however, the medical professionals who administered Baze's methadone advised the trial court that missing one dose would not interfere with Baze's mental faculties. 2RP 126. The trial court specifically found that Baze was intentionally disrupting the orderly flow of the case. 2RP 154. The trial court exercised proper discretion in proceeding with the trial, despite Baze's complaints. See, e.g., State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983) (Court of Appeals rejected a defendant's unsupported claim that his plea was involuntary because of methadone-induced confusion); see also State v.

Armstead, 13 Wn. App. 59, 63-65, 533 P.2d 147 (1975) (rejecting defendant's unsupported claim that he was "drunk off barbiturates" when he pleaded guilty).

Baze claims that the trial court was acutely aware of Baze's "potential incompetency." Br. of Appellant at 14. But the trial court took appropriate action--the court contacted Therapeutic Health Services and determined that Baze's mental faculties were not compromised. 2RP 126. Moreover, the court found that Baze's antics, including his claims that he was unable to proceed because he was without either pair of his reading glasses, were deliberate attempts to delay the trial. 2RP 154. This Court should reject Baze's claim.

2. THE "TO CONVICT" INSTRUCTION CONTAINED EACH ESSENTIAL ELEMENT.

Baze next contends that the trial court's instructions to the jury were fatally flawed. Specifically, Baze claims that the "to convict" instruction for the crime of making a false or misleading statement was ambiguous because it was unclear that Baze needed to know that his statement was (1) false or misleading, and (2) material. This Court should reject the claim. The "to convict"

instruction properly informed the jury of each element that the State needed to prove beyond a reasonable doubt. Moreover, error if any was harmless: Baze admitted that he had committed the crime.

a. Making A False Or Misleading Statement.

The State charged Baze with making a false or misleading statement to a public servant, contrary to RCW 9A.76.125. The statute provides:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.125.

The Washington Pattern Jury Instruction reads:

To convict the defendant of the crime of making a false or misleading statement to a public servant, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant made a false or misleading statement to a public servant;
- (2) That the statement was material;
- (3) That the defendant knew both that the statement was material and that it was false or misleading; and

(4) That this act occurred in the State of Washington.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY

INSTRUCTIONS: CRIMINAL 120.04 (2d ed. 1994) (WPIC).

b. Trial Court's Instructions.

The trial court instructed the jury that in order to convict Baze of making a false or misleading statement to a public servant as charged in Count III, it had to find proof beyond a reasonable doubt of each of the following:

- (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 that the statement was false or misleading, and that the statement was material; and
- (4) That this act occurred in the State of Washington.

CP 29.

Count III of the amended information reads in relevant part,

That the defendant . . . on or about December 15, 2009, did *knowingly make a false or misleading material statement* to Officer Joseph Renick, a public servant, and that this statement was reasonably likely to be relied upon by the said public servant in the discharge of his official duties.

CP 7 (italics added).

Jury instruction 15 defined material “A material statement is a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” CP 31 (quoting WPIC 120.04.01).

The trial court defined knowledge in jury instruction 10. That instruction reads:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 26 (relying on RCW 9A.08.010(1)(b)(i), (ii); WPIC 10.02).

c. The “To Convict” Instruction Is Correct.

This Court reviews alleged error in jury instructions *de novo*. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). “The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Therefore, “a ‘to convict’

[jury] instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). This Court does not look to other jury instructions to supply a missing element from a "to convict" jury instruction. Smith, at 262-63.

Baze takes issue with the third element of the "to convict" instruction. He argues that based on the sentence's punctuation and grammar, the jury was not properly instructed that it had to find knowledge both of the materiality and the falsity of the statement. Br. of Appellant at 19.

Common sense and the structure of the "to convict" instruction defy Baze's argument. As written, the jury had to find that Baze knew two things: (1) that the statement was false or misleading, and (2) that the statement was material. CP 29. Unless the sentence at issue meant that Baze had to know both the falsity and the materiality of the statement, the second element--that the statement was material--would be superfluous.

Moreover, the "to convict" instruction told the jury that in order to convict Baze of the crime *as charged* in Count III, it had to

find that the State had proved the following elements. In the information, the State charged Baze with “knowingly mak[ing] a false or misleading material statement.” CP 7. This Court should reject Baze's strained reading.

Relying on State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005), Baze argues that the “to convict” instruction was defective. In Bland, the defendant was charged with second degree assault after he chased a guest around his house and into a bedroom with a gun. 128 Wn. App. at 513. The jury was instructed on the law of defense of property as follows:

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.

Bland, at 514. Following conviction, Bland argued on appeal that the jury had been improperly defined on the law of defense of property. Id. This Court found error in the instruction, because the conjunction “or” should have been inserted between the word “injured” and the phrase “in preventing.” The Court found that without the conjunction, the instruction “could be understood to

require a finding that a defendant reasonably believed that *he* was about to be injured in preventing a malicious trespass." Id. (italics added). Because such belief is not a requirement for defense of property, the Court held that the instruction muddled the distinction between self-defense and defense of property and was reversible error. Id.

Here, the jury could only have understood that the State was required to prove that Baze knew the falsity of the statement and that he knew the statement was material. Thus, here, unlike in Bland, the jury instruction was clear. The claim fails.

d. Error, If Any, Is Harmless.

If this Court finds that the instruction was ambiguous and therefore error, the error was harmless.

The failure to instruct the jury as to the State's burden of proving every element of the crime beyond a reasonable doubt is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In Brown, our Supreme Court adopted the reasoning of Neder. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). By that rationale, this Court will not reverse a jury verdict based on the failure to instruct

on the elements if the missing element is supported by uncontroverted evidence. This means that the Court will affirm if, after thoroughly examining the record, the Court is convinced beyond a reasonable doubt that “the error complained of did not contribute to the verdict obtained.” Brown, 147 Wn.2d at 344; Neder, 527 U.S. at 15. But the missing element must be supported by uncontroverted evidence. Brown, at 341; Neder, at 18.

The uncontroverted evidence in this case was that Baze gave a false name to Officer Renick. 2RP 111. Certainly Baze knew his correct name and that the name he provided Officer Renick (either Ronald Goldsmith or Ronald Goldberg) was false. Moreover, the only reason that Baze provided Officer Renick with a false name was because Baze knew that there was a no-contact order between himself and his wife--just three months earlier Baze had been arrested for violating the same no-contact order.⁷ Once Officer Renick confronted Baze with a photograph, Baze admitted who he was. 2RP 112. And, Baze admitted that he knew of the no-contact order, but he thought the order was “bullshit.” 2RP 113.

⁷ During cross-examination of Officer Renick, Baze elicited evidence that Renick arrested him not only for the then-current violation of the no-contact order, but also for the outstanding warrant on the September violation. 2RP 114.

Finally, not only was the evidence uncontroverted, twice in closing argument, Baze admitted that he was guilty of having made a false or misleading statement to Officer Renick. 3RP 195 ("I consider myself guilty of using a false name"); 3RP 203 ("I'm guilty of giving a fake name."). Consequently, error, if any, was harmless.

D. CONCLUSION

For the reasons stated above, the State asks this Court to affirm the judgment and sentence.

DATED this 31 day of January, 2011.

Respectfully submitted,

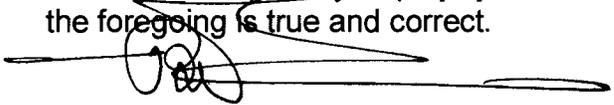
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. THOMAS STEVEN BAZE, Cause No. 65277-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington

01-31-11
Date

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