NO. 44445-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEFFERY THOMAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-02427-0

Brief of Respondent

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9. Whether, based upon all the information in the record, the trial court committed clear error in finding that the defendant has the ability or likely future ability to pay the legal financial obligations ordered?

B. STATEMENT OF THE CASE.

1. Procedure

On June 29, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging Jeffery Thomas, the defendant, with one count of Theft of a Motor Vehicle (TMV) and one count of theft in the third degree. CP 22-23. The case was assigned to Hon. Kathryn Nelson for trial. 1 RP 3. After hearing all the evidence, the jury found the defendant guilty as charged. CP 60-61.

On January 25, 2013, the court sentenced the defendant to 52 months in prison. CP 78. The court also ordered a total of $1300 in legal financial obligations, including $500 in defense attorney recoupment. CP

76. Upon the State's motion, the court dismissed Count II, the theft in the third degree. CP 95-96. The defendant filed a timely notice of appeal. CP 86.

2. Facts

On June 27, 2012, the defendant went to Gilchrist Buick-GMC, a car dealership in Tacoma. 3 RP 189. The defendant spoke with salesman Ibraheem al Masslawi. *Id.* The defendant asked to see a Mercedes-Benz CLS 550 on the lot. 3 RP 190. The salesman got the keys to show the car.

The salesman started the car and opened the hood to show the various features of the car. 3 RP 191. The defendant got into the driver seat and put the car in gear. *Id.* The salesman indicated and told him to stop and turn the car off. *Id.* The defendant drove off, with the hood still up. 3 RP 192. The staff at the dealership called the police to report the auto theft. 3 RP 194. The list price for the Mercedes-Benz was $76,000. 3 RP 204.

The next day, the defendant went to Landis Shell service station at the corner of North 26th and Stevens Sts. in Tacoma. 3 RP 238. The defendant was driving the Mercedes-Benz he had taken from Gilchrist Buick-GMC. *Id.* He pulled up to the full service island and ordered a fill-up. *Id.* When it came time to pay $60 for the fuel, the defendant informed the station owner that the defendant had no money. *Id.* The defendant told the owner that the defendant worked for Gilchrist, and gave her a false name and phone number. 3 RP 241. The service station staff called

Gilchrist and discovered that the defendant did not work there and the car was stolen. 3 RP 243. The defendant drove off without paying for the gasoline. 3 RP 256. The staff at the service station called the police. 3 RP 243.

A number of police officers were in the area at the time. Officer Keefer was driving south on North Stevens St. when he heard the call. 3 RP 266. He drove toward a nearby business area on North Proctor St. to see if the defendant and the car had gone in that direction. 3 RP 267. Officer Keefer spotted the car parked in the parking lot of a Safeway store on North Proctor. 3 RP 267. He reported this update. 3 RP 271.

Officer Roberts was nearby at a police substation when he heard Officer Keefer's report. 4 RP 333.

C. ARGUMENT.

1. WHERE VOIR DIRE WAS DONE IN OPEN COURT AND DEFENDANT FAILS TO SHOW ANY RULING OF THE COURT CLOSING THE COURTROOM, HE HAS FAILED TO SHOW THAT ANY CLOSURE OF THE COURTROOM OCCURRED.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington constitution, and the Sixth Amendment to the United States Constitution. Both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides

that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L Ed.2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995)(no spectators allowed in courtroom during a suppression hearing), and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all

spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***Momah***, 167 Wn.2d at 146, and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone-Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re PRP of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004). In the present case, the defendant has failed to identify any ruling of the court that closed the courtroom to any person. Instead, defendant argues that part of the process, in writing, used during peremptory challenges constituted a court room closure.

The record indicates that after the court excused jurors for cause, the court announced to all present in court that it was time for the parties to exercise their peremptory challenges:

> THE COURT: All right. We have come to the juncture where the attorneys are going to exercise those six peremptory challenges that I told you about. They're going to do that by passing a piece of paper

> back and forth between them. So for this stage in the process, you just need to sit where you presently are because this will help them remember who answered what to which questions.
> Please try to make sure that your badge number is visible, high on your collar, so that they can see that, and if you'd like to speak softly to your neighbor or pull out reading materials or stand in place and stretch before you sit back down, that's all permissible. It shouldn't take too long for this process. So sort of like when they say in the military, at ease.
> (Peremptory challenges exercised.)

2 RP 109. The court then read off the names of the jurors who would sit on the case and excused the remainder of the venire. *Id.*

The defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during voir dire proceedings. The record indicates that all voir dire was carried on in open court. 1 RP 3- 63. Peremptory challenges were made by the attorneys in open court, by a written process. 2 RP 109, CP 100. Presumably, the defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. There is no allegation of ineffective assistance of counsel or that defense counsel failed to consult with the defendant. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 100, 101-103.

None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges.

The record offers no basis to assume that anything occurred during this process other than the written communication, between counsel and to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone, whether the defendant or a member of the public, can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 100.

As the improper use of peremptory challenges can raise constitutional concerns, *see* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L Ed.2d 69 (1986); ***Georgia v. McCollum***, 505 U.S. 42, 112 S. Ct. 2348, 120 L Ed.2d 33 (1992), it is important to have a record of information as to how the peremptory challenges were exercised. The defendant fails to show how the written process used in open court in the trial below fails to serve such purpose. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 100. This document is easily understood, and it was made part of the open court record, available for public scrutiny. It is in the court file, which is available for examination in the Superior Court Clerk's Office. It is also a scanned image on the Superior Court's digital database, LINX, making it available to anyone with internet access to the court's digital file. This procedure satisfied the court's obligation to ensure the open administration of justice.

The Washington Supreme Court has observed several times recently that the right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *See, e.g.*, ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71.

To decide whether a particular process must be open to the press and the general public, the ***Sublett*** court adopted the "experience and logic" test formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L.Ed.2d 1 (1986). ***Sublett***, 176 Wn.2d at 73.

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the ***Waller*** or ***Bone–Club*** factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73.

Applying that test, the ***Sublett*** Court held that no violation of the right to a public trial occurred when the trial court considered a jury

question in chambers. *Id.*, at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.*, at 77. The defendant has the burden to satisfy the "experience and logic" test. *See*, ***In re Personal Restraint of Yates***, 177 Wn. 2d 1, 29, 296 P. 3d 872 (2013).

Recently, the Court of Appeals considered and rejected the same argument made by the defendant. In ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209 (2013), Division III applied the "experience and logic" test of ***Sublett*** in holding that peremptory challenges conducted at sidebar did not "close" the court room. ***Love***, at 1213-1214. The Court found no authority to require peremptory challenges to be conducted in public. To the contrary, the Court cited ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), where secret written peremptory challenges did not violate the right to public trial. ***Love***, at 1213. ***Love*** went on to reject the notion that a sidebar violated public policy aspect of an open trial. The Court found that, because all of the jury selection was done in open court, the public's interest in the case had been protected and that all activities were conducted aboveboard, "even if not within public earshot". *Id.*, 309 P. 3d at 1214.

Here, the only thing that did not occur in open court was the vocal announcement of each peremptory challenge as it was made. There is no

indication that the State or federal Constitutions require that everything and anything that occurs in a public trial be announced in open court.

As the Court in ***Love*** points out, Washington caselaw does not support either the "experience" or "logic" prongs. This history goes back even farther than the ***Thomas*** case cited in ***Love***. For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of jurors who might be upset if there was an objection. The decision in ***Holedger*** was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, *The Journal of the Washington State Constitutional Convention*, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991*, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled out of earshot of spectators, in a

sidebar, to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

There is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), citing Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

The defendant has failed to show that any of the values served by the public trial right is violated by using a written peremptory challenge procedure in open court during the jury selection process when the written document created in the process is also made a public record. He relies in part upon a case from California to support his argument. ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992). App. Brf. at 10-11. In ***Harris***, the peremptory challenges were exercised in chambers then

announced in open court. This is distinguishable from what happened here. The retreat of the parties and court into chambers and out of the public view and hearing may leave a public spectator without assurance that matters which should be on the public record are not being discussed in chambers.

In the defendant's case, however, a spectator could observe how the process was being conducted. The court even explained to all present what was occurring. 2 RP 109. Anyone could later ascertain which party was excusing which juror.

It should be noted that under ***McCollum***, 505 U.S. 42, both the prosecution and defense are forbidden from removing a juror for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

The defendant has failed to show that any closure, improper or otherwise, of the courtroom occurred. This issue is without merit.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEFENDANT'S STATEMENT TO POLICE.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. ***State v. Gregory***, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). A trial court's relevancy determinations are reviewed for manifest abuse of discretion. *Id.*

Evidence is presumed admissible under ER 403. ***State v. Burkins***, 94 Wn App. 677, 973 P.2d 15 (1999). The burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence. ***Carson v. Fine***, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). "'[U]nfair prejudice' is that which is more likely to arouse an emotional response than a rational decision by the jury" ***State v. Cronin***, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)(internal citation omitted). It creates an "undue tendency to suggest a decision on an improper basis". *Id.*

When deciding whether to admit evidence under ER 404(b), the trial court is required to balance the probative value and the potential prejudicial effect. *See, e.g.*, ***State v. Jackson***, 102 Wn. 2d 689, 689 P. 2d 76 (1984). However, the trial court is not required to conduct a balancing on the record in cases of general relevance objections involving ER 403

as it is when the objection is based on ER 404(b). ***Carson v. Fine***, 123 Wn.2d at 226; ***State v. Baldwin***, 109 Wn. App. 516, 528, 37 P.3d 1220 (2001).

Carson was a medical malpractice case where the defendant doctor offered the adverse opinion evidence of a treating physician against the plaintiff. 123 Wn. 2d. at 210. The plaintiff sought to exclude the evidence under ER 403 as unfairly prejudicial. The Supreme Court rejected an analysis by the Court of Appeals in favor of the general rule where the trial court has great discretion to determine relevance of evidence. *Id.*, at 226. The Court specifically rejected the notion that the trial court was required to balance the potential prejudicial effect on the record. *Id.*

Here, after hearing argument, the trial court decided that the statement was relevant and admissible. 2 RP 94. Although the defendant had objected under ER 403, the trial court obviously disagreed. The court invited the defendant to submit a limiting instruction regarding the statement. 2 RP 94. The defendant did not do so. The court did not make findings on the record, but it was not required to. The trial court committed no error.

3. WHERE THE STATE OFFERED EVIDENCE OF THE DEFENDANT'S CRIMINAL HISTORY, AND THE DEFENDANT FAILED TO "SPECIFICALLY OBJECT", THE REMEDY IS REMAND TO THE TRIAL COURT FOR A FULL HEARING.

Under RCW 9.94A, the State has the burden to prove criminal history. ***In re Personal Restraint of Williams***, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). The best evidence of a prior conviction is a certified copy of the judgment. ***State v. Ford***, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The State may also establish criminal history by introducing other comparable documents of record or transcripts of prior proceedings. *Id.* The appellate court reviews a sentencing court's calculation of an offender score de novo. ***State v. Tili***, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

Where the defendant fails to "specifically object" to the State's evidence, the remedy is to remand for resentencing, requiring the State to prove the criminal history and permitting the State to introduce new evidence, if necessary. ***State v. Bergstrom***, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); *see, also*, ***State v. Hunley***, 175 Wn.2d 901, 915-916, 287 P.3d 584 (2012); and ***State v. Tili***, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The State is only barred from offering additional evidence if the defendant "specifically object[ed] during the sentencing hearing but the State fails to produce *any* evidence of the defendant's prior convictions[.]" ***Bergstrom***, at 93 (emphasis in the original).

In the present case, the State presented certified copies of the defendant's prior convictions. These documents were entered into evidence at the sentencing hearing. Exh. #1, CP 71, 106. Although she made clear that the defendant was not going to stipulate to the criminal history, defense counsel made no specific, or any other objection to it:

> [Defense Counsel]: Well, Your Honor, in reference to Mr. Thomas's alleged offender score, I'm going to note that I just received these documents this morning, so I have not been able to look through them.
> THE COURT: Well, would you like us to recess and you sit right here and look through them at this time?
> [Defense Counsel]: Well, Your Honor *I would not be stipulating to his offender score in any case, but I don't know whether or not there are any arguments I could make out of these documents.* I do think it's up to the Court and the State to determine his offender score. Given that this was a trial, he's going to appeal, and I'm not going to be stipulating. If, in fact, his range is 43 to 57 months, I would be asking for the low end of 43 months.

6 RP 428 (emphasis added).

The defendant asserts now that some of his prior offenses "washed out" under RCW 9.94A.525(2)(b) or (c). App. Br. at 20. However, the defendant did not raise this, or any, objection at sentencing, so the trial court never made a determination. Under ***Bergstrom***, this case should be remanded for the court to fully consider the evidence, and to make the

necessary determinations, including whether any of the defendant's criminal history washed out, which the appellate court may then review de novo.

4. THE TRIAL COURT LAWFULLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.

a. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P. 3d 492 (2013), *review granted*, 178 Wn.2d 1010 (2013), the Court of Appeals declined to review the LFO issue for the first time on appeal. *See also* ***State v. Lundy***, 176 Wn. App. 96, 308 P.3d 755, 763 (2013); ***State v. Ralph***, 175 Wn. App. 814, 827, 308 P.3d 729 (2013) (Johanson, A.C.J., concurring in both cases). Division I likewise has declined to review the issue for the first time on appeal. *See*, ***State v. Calvin***, - Wn. App.-, - P.3d-(2013)(2013 WL 6332944) (republished in October, reversing the LFO holding in 176 Wn. App. 1, 302 P.3d 509 (2013)).

In this case, the defendant does not claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised

for the first time on appeal. The defendant made no objection to the imposition of LFO's. 6 RP 428. Therefore, the defendant did not properly preserve this issue for appeal. The Court of Appeals should not review this issue.

b. The trial court did not err in ordering the defendant to pay legal financial obligations.

Pursuant to RCW 10.01.160, the court may require defendants to pay court costs and other assessments associated with bringing the case to trial:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(1).

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); ***State v. Curry***, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312.

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

The defendant in the present case agrees that mandatory LFO's were properly imposed. App. Br., at 22. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *See* RCW 9.94A.505, RCW 9.94A.753(4) and (5); ***Lundy***, 176 Wn. App. at 102. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.*, ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013). In the present case, the court imposed mandatory fees: CVPA, filing fee, and DNA. CP 76. The court also ordered $500 defense attorney and costs. CP 76.

The decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. ***Baldwin***, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation. *Id.*; *see also* ***State v. Wimbs***, 68 Wn. App. 673, 847 P.2d 8

(1993), *rev'd on other grounds by*, ***State v. McGee***, 122 Wn.2d 783, 864 P.2d 912 (1993). Here, the record reflects that the court took the defendant's finances "into account" as required by statute. The amount of attorney fee recoupment imposed, $500, is almost nominal for a jury trial. The trial court did not abuse its discretion.

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Here, the judgment and sentence recites that the court considered or, in the language of the statute, "took account" of, the defendant's present and likely future financial resources:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay future legal financial obligations, including the defendant's financial resources and the likelihood that that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 75. That recitation satisfies the prerequisites for imposing financial obligations.

The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3) and ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). As the Court of Appeals observed in its original opinion in ***Calvin***, 302 P.3d at 521, and ***Lundy***, 176 Wn. App. at 106, it is unnecessary under the statute.

In ***Lundy***, the Court notes that confusion stems from a misreading of the fifth factor in ***Curry***, 118 Wn.2d at 915: "A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end." Division II points out that ***Curry*** does not say that "a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations." 176 Wn. App. at 106, n.9.

Division I also rejected this argument in ***State v. Parmelee***, 172 Wn. App. 899, 917, 292 P.3d 799 (2013), where the defendant argued that the trial court erred by imposing discretionary legal financial obligations without finding that he had any ability to pay. Division I held that the court's discretionary LFO order did not require findings (citing ***Curry***, 118 Wn.2d at 916) and that the issue of ability to pay would be considered when the State tried to collect (citing ***Blank***, 131 Wn.2d at 242). *Id.*, at 918.

Although the trial court also "found" that the defendant had the present or likely future ability to pay the financial obligations, that

conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record. *See* ***State v. Caldera***, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

The defendant has the burden to show indigence. *See* RCW 10.01.020; ***Lundy***, 176 Wn. App. at 104, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

This Court should affirm the trial court's imposition of LFOs because, in conjunction with statutory authority which compels the court to impose LFOs, the court properly considered the defendant's present or future ability to pay LFOs.

c. The issue is not ripe for review.

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(4):

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997); ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. Here, there is no record that the State has attempted to collect legal financial obligations from the defendant. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. *See* ***Lundy***, 176 Wn. App. at 108-109.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

D. CONCLUSION.

The defendant had a fair trial which was open in all respects. Where the defendant did not specifically object to the calculation and proof of his offender score, the case should be remanded for a full examination of his criminal history, with additional evidence presented, if

necessary. The trial court followed the law in imposing legal financial obligations. The State respectfully requests that the conviction be affirmed and the case remanded for full examination of the criminal history.

DATED: January 23, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

/s/ Thomas C. Roberts

Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-23-14 /s/ Therese Kay
Date Signature

PIERCE COUNTY PROSECUTOR

January 23, 2014 - 5:05 PM

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