

**NO. 44813-1**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BENJAMIN THOMAS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson, Judge

No. 11-1-02866-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Although the issue is not ripe for review and was not properly preserved at trial, did the trial court properly exercise its discretion in ordering legal financial obligations when defendant's future ability to pay was established by a standard form language finding in the judgment and sentence, and the evidence showed defendant was able-bodied with discretionary income?

B. STATEMENT OF THE CASE.

1. Procedure

On July 15, 2011, the Pierce County Prosecuting Attorney's Office charged Benjamin Jerome Thomas ("defendant") by information with one count of assault in the first degree with a deadly weapon enhancement. CP 1-2.

The case proceeded to a jury trial on February 26, 2013, before the Honorable Frank Cuthbertson. 1 RP 1.<sup>1</sup> The State withdrew the deadly

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<sup>1</sup> The verbatim report of proceedings consists of 12 volumes, each titled by its corresponding date. The 7 volumes that contain the trial and sentencing transcript are consecutively paginated and will be referred to as follows:

February 25, 2013 as "1 RP;"  
February 26, 2013 as "2 RP;"  
February 27, 2013 as "3 RP;"  
March 4, 2013 as "4 RP;"  
March 5, 2013 as "5 RP;"  
March 6, 2013 as "6 RP;" and  
April 19, 2013 as "7 RP."

The remaining volumes non-sequentially paginated will be referred to by date.

weapon enhancement. 5 RP 328. The jury was instructed on assault in the first degree, as well as the lesser crimes of assault in the second degree and assault in the third degree. CP 90, 95, 99. Defendant was found guilty of the lesser included assault in the second degree. CP 109.

On April 19, 2013, the court sentenced defendant to a standard range sentence of 17 months confinement and 18 months community custody based on his offender score of three. CP 238-249. The court also imposed \$2300 of legal financial obligations, consisting of a mandatory \$500 crime victim assessment, \$100 DNA database fee, \$200 criminal filing fee, as well as a discretionary \$1500 to recoup the cost of defendant's court appointed attorney and defense. *Id.* Defendant timely filed his notice of appeal. CP 231.

## 2. Facts

On June 21, 2011, victim Gregory Mitchell played four games of pool with defendant at Latitude 84, a bar in Tacoma, Washington. 2 RP 23, 26-27. As they played, defendant, who appeared intoxicated, made verbally aggressive comments, claiming he was going to beat Mr. Mitchell at pool and "whoop [his] ass." 2 RP 27-29. Mitchell attempted to avoid confrontation by reminding defendant they were merely playing a practice game. 2 RP 29.

Defendant nevertheless continued to antagonize Mitchell, even after Mitchell had moved on to play pool with other people. 2 RP 30.

When Mitchell finally responded to defendant's aggressions, defendant broke the bar glass he was holding across Mitchell's face. 2 RP 31. Mitchell watched his blood gush onto his shirt. *Id.* He was restrained by bar staff before he could defend himself against further violence. *Id.*

Several witnesses contacted during the subsequent investigation confirmed defendant had been antagonizing and swearing at Mitchell and other bar patrons before they heard the glass break. 3 RP 112, 4 RP 245-46. The witnesses observed blood gushing from Mitchell's face, defendant's hand bleeding, and saw defendant leave the bar before the police arrived. 3 RP 112-114, 144-45, 150-51, 167, 172; 4 RP 246-47. At trial, defendant alleged he hit Mitchell in self defense. 5 RP 342-43. However, his testimony was contradicted by the inconsistent explanation he gave for his injury to a treating nurse, and further refuted by the credible evidence adduced from the other witnesses. 4 RP 232, 234-35; 5 RP 346.

Mitchell suffered a complex left facial laceration 15 centimeters long, 2 centimeters wide, and 2 centimeters deep. 3 RP 94. He received treatment from both a trauma surgeon and plastic surgeon at St. Joseph's Hospital. 3 RP 95-97. Yet, by the time of trial, one year and seven months later, he still had a visible scar and suffered fluid build up potentially requiring additional surgery. 2 RP 42-43.

C. ARGUMENT.

1. THIS COURT SHOULD REJECT DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE IT WAS NOT PRESERVED FOR APPEAL, IS NOT RIPE FOR REVIEW, AND FAILS ON ITS MERITS.

The sentencing court's authority to impose court costs and fees is statutory. See *State v. Hathaway*, 161 Wn. App. 634, 652, 251 P.3d 253 (2011). While the question of whether a trial court had statutory authority to impose legal financial obligations (LFOs) is reviewed *de novo*, the court's determination of a defendant's ability to pay discretionary LFOs is reviewed under the clearly erroneous standard. See *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992); *State v. Bertrand*, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1992)), *review denied*, 175 Wn.2d 1014 (2012). Such findings are only clearly erroneous when a review of all the evidence results in a definite conviction a mistake has been made. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

In this case, the sentencing hearing occurred on April 19, 2013, before the Honorable Frank Cuthbertson. 7 RP 402. The State requested the court to impose the mandatory \$500 crime victim penalty assessment, \$200 court costs, and \$100 DNA sample fee, as well as a discretionary



sum of \$1,500 for DAC recoupment. 7 RP 411. The court followed the State's recommendation and imposed a total of \$2,300 in LFOs. 7 RP 415; CP 240. Paragraph 2.5 of defendant's judgment and sentence contains the following, standard form language finding of defendant's ability to pay LFOs:

This court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood 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 240. Defendant did not object to the imposition of LFOs or offer any information contradicting the court's assessment of his ability to pay. 7 RP 411-17.

There is no evidence the State has attempted to collect LFOs from defendant. Nor does the record indicate an express payment commencement date.

a. The issue is not ripe for review.

The time to challenge an order establishing LFOs that does not limit a defendant's liberty is when the State attempts to curtail a defendant's liberty by enforcing them. *Lundy*, 176 Wn. App. at 108; *Baldwin*, 63 Wn. App. at 310; *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009); *see also State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). 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*, 63 Wn. App. 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.

Nothing in the record indicates the State has sought to collect costs from defendant or when defendant is expected to begin payment. Compare with *State v. Bertrand*, 165 Wn. App. 393, 404-405, 267 P.3d 511 (2011) (reviewing the merits of the trial court's sentencing conditions because a disabled defendant was ordered to commence payment of LFOs within 60 days of entry of judgment and sentence while still incarcerated). 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 provided by statute at the time the State seeks to collect the costs and petition the court to modify the

costs imposed. RCW 10.01.160(4).<sup>2</sup> Therefore, defendant's challenge to the imposed LFOs is not ripe for review.

b. 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.* This Court has consistently declined to allow a defendant to challenge the imposition of legal financial obligations for the first time on appeal. E.g., *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *rev. granted*, *State v. Blazina*, Wn.2d 1010, 311 P.3d 27 (2013).

Defendant did not object to the imposition of LFOs at trial. 7 RP 411-417. Nor did he 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 purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals."

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<sup>2</sup> 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.

*State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014).

Allowing defendant to challenge the LFOs for the first time on appeal would undermine that purpose since the trial court was better situated to resolve disagreements about defendant's ability to pay. Both defendant and his counsel were given an opportunity to allocute at sentencing; neither objected to the imposition of LFOs. Judicial resources should not be wasted because defendant did not bother to raise the issue below. His unpreserved challenge to the lawfully imposed LFOs should be rejected without review.

- c. The trial court acted within its statutory authority when it imposed LFOs on defendant.

Sentencing courts are vested with statutory authority to impose court costs and fees on convicted defendants. A number of LFOs are mandatory. *See e.g.*, RCW 7.68.035(1)(a) (crime victim assessment fee). The court may also impose discretionary fines pursuant to RCW 10.01.160.

On appeal, defendant argues the sentencing court acted outside its statutory authority in ordering defendant to pay \$2300 in LFOs. Br.App. 6. Yet, defendant fails to make the necessary distinction between

mandatory and discretionary LFOs. The trial court's imposition of restitution was not challenged. Br.App. 5.<sup>3</sup>

i. **Defendant's meritless claim the trial court abused its discretion by imposing mandatory fines should be rejected.**

It is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: a criminal filing fee, a crime victim assessment fee, and a DNA database fee. RCW 36.18.020(h)<sup>4</sup>; RCW 7.68.035<sup>5</sup>; RCW 43.43.754;<sup>6</sup> RCW 43.43.7541<sup>7</sup>. The court is also mandated by statute to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5); *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2006).

Mandatory financial obligations are required by statute and do not permit the trial court to consider the offender's past, present, or future

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<sup>3</sup> The \$2,300 of LFOs challenged by defendant is the sum total of the fees and costs listed in the judgment and sentence, and does not include the restitution which is listed as "TBD." CP 240.

<sup>4</sup> RCW 36.18.020(1): Clerks of superior courts shall collect the following fees for their official services: . . . (h) Upon conviction or plea of guilty . . . a defendant in a criminal case shall be liable for a fee of two hundred dollars.

<sup>5</sup> RCW 7.68.035(1)(a): When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment. The assessment . . . shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony . . .

<sup>6</sup> RCW 43.43.754(1) A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult . . . convicted of a felony . . .

<sup>7</sup> RCW 43.43.7541: Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

ability to pay. *Lundy*, 176 Wn. App at 102; *State v. Kuster*, 175 Wn. App 420, 424, 306 P.3d 1022 (2013). Mandatory obligations are constitutional as long as "there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants." *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (emphasis in original).

Defendant was convicted of assault in the second degree, a class B felony. RCW 9A.36.021. Thus, the trial court properly imposed the \$800 in mandatory fees, including the \$500 crime victim assessment fee, the \$100 DNA database fee, and the \$200 criminal filing fee as required by statute. As a result, the review on appeal only concerns the discretionary imposition of the \$1500 DAC recoupment.

ii. **Defendant's meritless challenge to the properly imposed discretionary LFOs should also be rejected.**

RCW 10.01.160 authorizes the sentencing court to require a convicted defendant to pay court costs and other assessments incurred in prosecuting the defendant:

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(2). The imposition of these costs is a factual matter within the trial court's discretion. *Curry*, 62 Wn.2d at 916; *State v. Calvin*, \_\_\_ Wn. App. \_\_\_, 316 P.3d 496 (2013).

Before imposing discretionary LFOs, the trial court is required 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.

RCW 10.01.160(3).

Although a formal finding of a defendant's ability to pay is unnecessary, where such a finding is made, it is reviewed under the clearly erroneous standard. *Lundy*, 308 P.3d at 760; *Baldwin*, 63 Wn. App. at 312. "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

In this case, the trial court imposed a \$1500 discretionary fee pursuant to RCW 10.01.160 to recoup the costs for defendant's court-appointed attorney and defense, having found in paragraph 2.5 of the judgment and sentence defendant was able to pay for those services. CP 240; RP 415.

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 the burden of his obligation before imposing attorney fees. *Id.* In very limited situations, the court has found the imposition of LFOs was clearly erroneous because the defendant's ability to pay was not supported in the record. *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011) (holding the trial court's finding that defendant, a disabled person, had the present or future ability to pay LFOs was clearly erroneous).

A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. *Blank*, 131 Wn.2d at 241, quoting *Curry*, 118 Wn.2d at 918. While a court may not incarcerate an offender who truly cannot pay LFOs, every offender must make a good faith effort to satisfy these obligations by seeking employment, borrowing money, or otherwise legally acquiring resources to pay their court ordered financial obligations. *State v. Woodward*, 116 Wn. App. 697, 703-704, P.3d 530 (2003). Furthermore, defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs. *Id.* at 704.

The trial court's finding defendant had the ability to pay the costs of his defense was supported by the evidence adduced at trial.<sup>8</sup> Defendant admitted he used to go to Latitute 84 two to three times a week to shoot

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<sup>8</sup> The Honorable Frank Cuthbertson presided over all proceedings related to this case, including pre-trial, trial, and sentencing proceedings. As a result, he was capable of taking judicial notice of the adjudicative facts adduced at trial in deciding an appropriate sentence. *See* ER 201.



pool, and have two or three drinks. 5 RP 335-36. Witness Brittany Berry explained defendant was also a patron at Black Star Pub and Grill, where she worked as a bartender. 3 RP 138. Defendant did not claim the imposition of LFOs would be an undue burden on his financial resources or ability to pay living expenses. Furthermore, he possessed the physical capacity to violently assault Mr. Mitchell and regularly play pool. Thus, he demonstrated himself to be an able bodied man with sufficient discretionary income to spend on alcohol and recreation.

Defendant did not present any evidence to call the trial court's well supported finding into question, which is undoubtedly why he rightly does not claim an inability to pay on appeal. As a result, the trial court did not enter findings of any extraordinary circumstances which would make restitution or payment of nonmandatory LFOs inappropriate on the Judgment and Sentence. CP 240. Unlike *Bertrand*, there was no evidence defendant suffered from any mental or physical disabilities which might limit his present or future ability to earn income. *See e.g.*, 165 Wn. App. at 404-05. The absence of such a record renders defendant's citation to the ACLU study on the impact of LFOs on people incapable of providing for life's necessities an irrelevant distraction from the relevant facts and issues of this case.

The finding defendant had the present or likely future ability to pay LFOs was not clearly erroneous because it is was well supported by the uncontroverted evidence adduced at trial. There is no evidence to suggest a mistake was made. The trial court did not abuse its discretion in imposing \$1500 for attorney fee recoupment.

- iii. **The trial court's well supported finding of defendant's ability to pay was not transformed into a clearly erroneous decision by the mere fact it was communicated through unobjected to standard form language in defendant's J&S.**

Neither RCW 10.01.160 "nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. Under the statute, the trial court must only "take account" of the defendant's ability to pay and the burden that payment of costs will impose. RCW 10.01.160(3). In similar cases, the appellate courts have never found the standard form language finding of defendant's ability to pay LFOs to be clearly erroneous. *See e.g. Lundy*, 176 Wn. App. at 108; *Blazina*, 174 Wn. App. at 911; *Calvin*, 316 P.3d at 508. Rather, the courts consistently emphasize the record must be sufficient to review on appeal whether the trial court considered the

defendant's financial resources. *Bertrand*, 165 Wn. App. at 404; *Calvin*, 316 P.3d at 508 (noting that "striking the boilerplate finding would not require reversal of the court's discretionary decision unless the record affirmatively showed the defendant had an inability to pay both at present and in the future").<sup>9</sup>

In this case, the inclusion of paragraph 2.5 in the Judgment and Sentence is innocuous because it is supported by the record. It demonstrates the trial court did "take account" of defendant's present or likely future ability to pay LFOs. Since there is no legal requirement for the trial court to enter formal findings, there is nothing improper about its decision to enter a factually supported finding by adopting the language provided in court-approved judgment and sentence document. The court had the authority and opportunity to strike or modify paragraph 2.5 if it was inconsistent with its determination of defendant's ability to pay costs. The unaltered quality of paragraph 2.5 and the absence of an objection or discussion on the record evidences the trial court was convinced defendant had the ability to reimburse the community for the defense it paid for him to receive.

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<sup>9</sup> At worst, the standard form language finding of defendant's ability to pay would be more appropriately placed on a subsequent order to pay than on a judgment and sentence, as noted by this Court in *State v. Lundy*. 176 Wn. App. at 105, n. 7.

Contrary to defendant's negative characterization of paragraph 2.5, in practice, it provides an additional safeguard by ensuring the trial court always considers a defendant's ability to pay. In the absence of a statutory requirement for a formal finding, paragraph 2.5 reminds judges and litigants to take account of the defendant's ability to pay in every case and encourages them to address the issue at the trial court before the judgment and sentence is entered, thereby promoting judicial efficiency.

In this case, paragraph 2.5 reflects the evidence adduced at trial and fulfils the trial court's statutory requirement to consider the defendant's ability to pay LFOs.

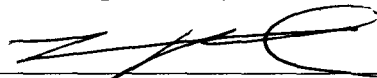
D. CONCLUSION.

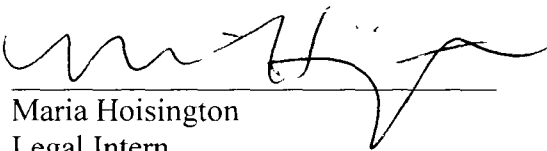
The trial court acted within its statutory authority when it ordered defendant to pay \$2300 of mandatory and discretionary LFOs. The issue is not ripe for review because the State has not sought to enforce the order and collect costs from defendant. As defendant did not object to the imposition of LFOs at trial, the issue was not preserved for review. Furthermore, the trial court did not clearly err in finding the defendant had

the present or future ability to pay his LFOs and did not abuse its discretion in imposing \$1500 of discretionary attorney's fees.

DATED: September 12, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by US 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.

9/16/14 thea ka  
Date Signature

**PIERCE COUNTY PROSECUTOR**

**September 15, 2014 - 9:48 AM**

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