

No. 47152-3-II

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

STATE OF WASHINGTON, RESPONDENT

V.

SARAH OLIVAS, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni. A. Sheldon, Judge

No. 14-1-00318-8

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The absence of self-defense is not an element of the offense of premeditated murder in the first degree; instead, the State is only required to disprove the defense of self-defense if there is competent evidence of self-defense. Therefore, when accepting the defendant's plea of guilty the court was not required to address the hypothetical defense of self-defense where there was no evidence of self-defense at the time that the court accepted the plea.
2. While a trial court's finding of a factual basis for a plea is useful for determining that a defendant's guilty plea is knowing, voluntarily, and intelligently made as constitutionally required under the due process clause, such a finding is not in itself constitutionally required. Instead, the finding of a factual basis for the plea is a court-rule based procedural requirement under CrR 4.2(d); therefore, an allegation of error premised upon this procedural requirement may not be raised for the first time on appeal. Because Olivas did not object in the trial court, this Court should decline review of this issue.
3. The trial court erred when it ordered Olivas to pay discretionary LFOs without first conducting an on-the-record, individualized inquiry into her ability to pay, as required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and RCW 10.01.160(3). But Olivas did not preserve this review of this issue by entering an objection in the trial court; therefore, the State contends that this Court should decline review. However, if this Court nevertheless invokes its discretion under RAP 2.5(a) to review this issue, then the State asks that the case be remanded to the trial court for the trial court to resentencing Salters after engaging in the required inquiry.

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B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Salters' statement of facts. RAP 10.3(b).

On July 17, 2014, deputies with the Mason County Sheriff's Office responded to a report of a shooting that occurred at a house in Allyn, Washington. CP 42. When deputies arrived at the house, they found the homeowner, Patrick Frender, dead from an apparent gunshot wound to the head. *Id.*

Witnesses identified the defendant, Sarah Olivas, as the shooter. *Id.* The witnesses told the deputies that Olivas was on the porch smoking a cigarette when they heard her say she was going to kill them all. *Id.* They said she then entered the house, went to a back bedroom and got a shotgun, and then came back and shot the victim in the head, killing him dead. *Id.* A deputy took Olivas into custody, at which point she said: "I know I did it. I'm sorry, I did it. I'm sorry." RP 6.

The State charged Olivas with premeditated first-degree murder with a firearm enhancement. CP 38-39. In exchange for the State's agreement to drop the firearm enhancement, to not file a withheld charge of unlawful possession of a firearm, and to recommend a standard range sentence, Olivas pled guilty to premeditated first-degree murder. RP 18-

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27; CP 18-19, 20-24. The guilty plea hearing occurred on January 5, 2015. RP 18.

When accepting the plea, the trial court engaged in a colloquy with Olivas about her guilty plea, and the court stated the charge and then specifically asked Olivas whether she needed any additional time to speak with her attorney and whether she understood what the charge was about, to which Olivas answered, "I do your Honor." RP 19. The trial court then asked Olivas, "Have you gone over the elements of the crime so you know what it is the State would have to prove at a trial?" RP 19. Olivas answered, "I do, your Honor." RP 19.

In her statement of defendant on plea of guilty, Olivas stated: "On July 17, 2014, in Mason County, Washington, I premeditated and intentionally shot and killed Patrick Frender." CP 24; RP 23. The trial court judge read this statement aloud and asked Olivas whether it was true, to which Olivas answered:

It is, your Honor. I guess I – I was – I was informed that I – by raising the gun is premeditation. So I guess – I guess so. I – it wasn't something that I planned, it wasn't something that I had thought about. It wasn't something that I had set out to do. There was some other circumstances that were going on in the home and – but yes, yes. Yes, your Honor.

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RP 23-24. The trial court then inquired, "So it was a moment in time, however short, that you thought about it, is that correct?" Olivas answered, "That's correct, your Honor." RP 24.

To verify the factual basis for the guilty plea, the court considered Olivas's statement and also considered the declaration of probable cause filed in the case. RP 25; CP 40-43. The trial court stated on the record that it did find a factual basis to support the plea, and the court then accepted the plea and found Olivas guilty of premeditated murder in the first degree. RP 25; CP 18-19. The court scheduled sentencing to occur eleven days later, on January 16. RP 26.

At the January 16 sentencing hearing, Olivas's attorney informed the court that Olivas had "been diagnosed in the past with... post traumatic stress disorder due to a history of sexual abuse." RP 28, 40. Asking for leniency in sentencing, Olivas's trial counsel then addressed the court, in part, as follows:

... But I know that from Ms. Olivas's perspective, that PTSD starts to simmer. And she's staying in that house. And we can watch -- we can watch it in the statements of Mr. Frender's friends and family and neighbors. As she stays there, she gets worse, and worse, and worse, and worse, until finally this happens. And she is driven to the point where she makes the decision to end Mr. Frender's life.

That doesn't justify what she did. It's not a diminished capacity defense because she knew what she was doing when she

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made that choice. But there is certainly a great deal of mental health issues running around in this case.

RP 40.

Olivas then spoke for herself, and stated, in part, as follows:

... I was on my Dilantin. I wasn't on my anti-psychotic. Something wasn't right though. Something was not right. ...

But he [the victim] – he mentioned something to me about this Insane Clown Posse gang that practices involved in drugging their victims, raping them with foreign objects. This happened to me. On July 2<sup>nd</sup> I had – I had a friend take me to Harrison Hospital for a blood transfusion. I was bleeding internally, which I believe is public record. To be honest, I didn't know why I went back, except that all my belongings were there.

On this day he tied me up again. I was in fear for my life. I was able to escape. There was chaos in the house and I remembered where the shotgun had been stashed. The shooting occurred. ...

RP 44. In response, the prosecutor informed the court, in part, as follows:

... Ms. Olivas, quite frankly, has oscillated from the moment this happened between some semblance of – of an expression of – call it remorse if you will... To indicating that she didn't have anything to do with this, and that the police needed to be looking for someone else, to accusing [the witnesses or victim survivors] of having committed the crime, to alleging that she committed this crime because she was somehow held captive and suffered some series of sexual assaults.

RP 45.

The trial court judge imposed a standard range sentence 361 months at the top end of the range and ordered Olivas to pay standard

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legal financial obligation that included a filing fee of \$200.00, sheriff's return of service fees of \$866.50, crime victim's assessment of \$500.00, a \$100.00 DNA fee, and court appointed counsel reimbursement of \$600.00. RP 46-47; CP 7, 9. The judgment and sentence includes an additional fee of \$100.00 designated as a crime lab fee. CP 9. The total of LFOs imposed is \$2,386.50. CP 9. The court ordered Olivas to make payments at the rate of \$25.00 per month with the first payment due within 60 days of her release from confinement. RP 47; CP 10. The court did not engage in any inquiry into Olivas's ability to pay, and there was no discussion by any party about her ability to pay. RP 46-47. Nor did any party object to the costs imposed or the lack of an inquiry into Olivas's ability to pay. *Id.*

C. ARGUMENT

1. The absence of self-defense is not an element of the offense of premeditated murder in the first degree; instead, the State is only required to disprove the defense of self-defense if there is competent evidence of self-defense. Therefore, when accepting the defendant's plea of guilty the court was not required to address the hypothetical defense of self-defense where there was no evidence of self-defense at the time that the court accepted the plea.

“Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily.” *State v. Robinson*, 172 Wn.2d 783,

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790, 263 P.3d 1233, 1236 (2011), citing *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010) (citing *In re Pers. Restraint of Mendoza Montoya*, 109 Wn.2d 270, 277, 744 P.2d 340 (1987); *Boykin v. Alabama*, 395 U.S. 238, 242–43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

To support her arguments on this point, Olivas makes a series of factual assertions without citation to the record. Br. of Appellant at 5. Without citation to the record, Olivas states that “Sarah Olivas said she was afraid for her life on the day she shot Frender.” *Id.* Perhaps Olivas is referring to page 44 of the verbatim report, where Olivas gave a statement at sentencing eleven days after the trial court had already accepted her guilty plea. In this statement, Olivas refers to things she alleged to have occurred on July 2 (a date which was 15 days before she murdered Patrick Frender), and she then states: “On this day he tied me up again. I was in fear for my life. I was able to escape.” RP 44.

Thus, it is unclear whether Olivas is referring to July 2 or whether she is referring to July 17, which is the day she murdered Patrick Frender. What is clear, however, is that if her statement is believed it is clear that she had escaped and that it was afterward that she decided to kill Patrick Frender, and while she alleges that she was in fear for her life prior to her

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alleged escape, the alleged facts do not indicate that she was in fear for her life after her escape or when she committed the killing. *Id.*

Contrary to Olivas's assertions, "the absence of justification is not a true 'element' of murder...." *State v. Jordan*, 158 Wn. App. 297, 301, 241 P.3d 464 (2010) *aff'd*, 180 Wn.2d 456, 325 P.3d 181 (2014) (citation omitted). "References to the absence of self-defense as an element serve as shorthand for the principle that the State bears the burden to disprove the defense once it is properly raised." *Id.* The State contends that Olivas has not properly raised a self-defense claim merely because, in a statement made 11 days after she pled guilty and her plea was accepted by the court, she alleged that at some time prior the murder she had been in fear for her life.

In *In re Personal Restraint of Montoya*, 109 Wn.2d 270, 744 P.2d 340 (1987), our Supreme Court rejected the argument that the court must inform a defendant of the State's burden to disprove self-defense where there was no evidence to support a self-defense claim in that case. *Id.* at 279-80. The court stated, "[t]he trial court certainly had no obligation to inform Montoya of the burden of proof on a purely hypothetical claim." *Id.* at 280. The *Montoya* Court never held that the trial court must inform the defendant of this burden if there is evidence to support the claim.

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Similarly, in *State v. Haydel*, 122 Wn. App. 365, 95 P.3d 760 (2004), the court held that the State had no obligation to inform the defendant of its burden of proof on self-defense where he presented no evidence of self-defense. *Id.* at 371. Again, the court did not hold that the opposite is true where there is evidence of self-defense.

At the time when the instant court took Olivas's guilty plea, there was no evidence in the record to support a self-defense claim. On this point, the instant case is factually to *State v. Haydel*, wherein the court declared that "[n]o case holds that either the plea form or colloquy must cover self-defense when there is no evidence of self-defense." *Id.* at 369. The *Haydel* court held that because the defendant presented no evidence of self-defense when the trial court took the plea, the State was not required to inform the defendant of the State's burden of proof on the "purely hypothetical claim" of self-defense. *Id.* at 763.

The State contends that the reasoning and holding of the *Haydel* court should apply in the instant case. Olivas did not raise a self-defense claim or present evidence of self-defense before the trial court took her plea. RP 18-27. The statement that Olivas now contends was an assertion of self-defense was not uttered until 11 days after the trial court had accepted her plea. RP 28, 44. Still more, Olivas's tardy utterance was no

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more than an explanation of her motive for killing Patrick Frender. RP 44. Her statement was that she had feared him in the past, but she had escaped. *Id.* Sometime afterward – regardless whether it was 15 days later or whether it was later on the same day – she then went to a back bedroom, got a gun, and then returned to find the victim and kill him. CP 42. These facts do not support a claim of self-defense.

2. While a trial court's finding of a factual basis for a plea is useful for determining that a defendant's guilty plea is knowing, voluntarily, and intelligently made as constitutionally required under the due process clause, such a finding is not in itself constitutionally required. Instead, the finding of a factual basis for the plea is a court-rule based procedural requirement under CrR 4.2(d); therefore, an allegation of error premised upon this procedural requirement may not be raised for the first time on appeal. Because Olivas did not object in the trial court, this Court should decline review of this issue.

Olivas did not challenge the factual basis for her plea or enter an objection on this point in the trial court.

The requirement that a trial judge determine whether there is a factual basis for a plea is found in CrR 4.2(d):

The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

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But “strict adherence to the rule is not a constitutionally mandated procedure.” *In re Pers. Restraint of Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985) (internal quotation marks omitted) (citation omitted). “The duty imposed by court rule that the judge must be satisfied of the plea's factual basis should not be confused with the constitutional requirement that the accused have an understanding of the nature of the charge.” *Id.* at 727.

Thus, an alleged violation of CrR 4.2(d) is not by itself an issue of constitutional magnitude that may be raised for the first time on appeal. *See State v. Zumwalt*, 79 Wn. App. 124, 129, 901 P.2d 319 (1995) (challenge to factual basis of plea appealable only because raised in the trial court). Rather, it “is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea.” *Matter of Hews*, 108 Wn.2d 579, 592, 741 P.2d 983, 990 (1987). As discussed above, there is no basis in the record for Olivas's claim that she did not understand her plea, and she fails to otherwise demonstrate that the lack of facts in her plea statement is a manifest error affecting a constitutional right that she may raise for the first time on appeal.

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3. The trial court erred when it ordered Olivas to pay discretionary LFOs without first conducting an on-the-record, individualized inquiry into her ability to pay, as required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and RCW 10.01.160(3). But Olivas did not preserve this review of this issue by entering an objection in the trial court; therefore, the State contends that this Court should decline review. However, if this Court nevertheless invokes its discretion under RAP 2.5(a) to review this issue, then the State asks that the case be remanded to the trial court for the trial court to resentence Salters after engaging in the required inquiry.

It appears from the record that at sentencing the trial court imposed discretionary legal financial obligations against Olivas without first conducting an on-the-record, individualized inquiry into her ability to pay. RP 283-84. Such an inquiry, however, is statutorily required by RCW 10.01.160(3), and mere reference to boilerplate language in the judgment and sentence is inadequate to substitute for the required individualized inquiry. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Additionally:

Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

RCW 9.94A.777(1). Olivas contends that “[s]he has PTSD and other mental health conditions” and that she “has no hope of ever paying any amount” of the LFOs imposed by the trial court. Br. of Appellant at 8.

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But Olivas's citations to the record to support her contention that she has a disabling mental condition are merely citations to her own arguments to the trial court. To be relieved from the obligation to pay court-imposed LFOs a defendant must have...

been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777(2). Olivas's citations to the record do not support an assertion that she has a mental health condition as defined by RCW 9.94A.777, and Olivas provides no explanation for why she did not make this assertion at the appropriate time in the trial court.

However, the State concedes that under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the trial court erred by failing to conduct the required inquiry into Olivas's ability pay discretionary LFOs. *Id.* However, Olivas did not object to the court's imposition of LFOs, and "[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote omitted). Nevertheless, although it is not required to do so, under RAP 2.5 this

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Court may accept review of this issue even though Olivas failed to preserve the issue with an objection in the trial court. *Blazina* at 834-35.

If this Court accepts review on this issue, the State contends that because the trial court did not engage in an on-the-record, individualized inquiry into Olivas's ability to pay LFOs, the proper remedy is to remand to the trial court for resentencing, where the trial court may then undergo the required inquiry. *Id.* at 685.

D. CONCLUSION

The absence of self-defense is not an element of the crime of premeditated murder in the first degree. Instead, the State is required to disprove the defense of self-defense only if there is evidence of self-defense. At the time that Olivas's plea of guilty to the charge of premeditated murder in the first degree was accepted by the trial court, there was no evidence before the trial court to suggest that the hypothetical defense of self-defense was a viable defense to the charge. The statements that Olivas made at the time of sentencing, which she now contends are evidence of self-defense, were not made until 11 days after the court had accepted her plea of guilty -- and, in any event, Olivas's statements were an explanation of her motive rather than statements establishing the

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defense of self-defense. Therefore, the trial court did not err by not engaging Olivas in a colloquy about self-defense before accepting her plea of guilty.

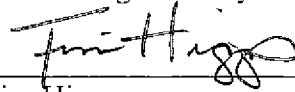
Constitutional due process requires that a defendant's plea be voluntary, knowing and intelligent, and the trial court's finding of a factual basis for a plea can be useful for establishing that a plea is knowing, voluntary and intelligent, but there is no separate constitutional requirement that the trial court make the factual finding. Instead, the requirement for a factual finding by the trial court is a court-rule based requirement created by CrR 4.2(d). Because the requirement is rule-based rather than constitutional, it may not be raised for the first time on appeal. Because Olivas did not raise an objection in the trial court, this Court should decline review of this issue.

Finally, the trial court did not engage in the statutorily required colloquy into Olivas's ability pay discretionary legal financial obligations before imposing them. However, Olivas did not preserve review of this error by entering an objection in the trial court. Therefore, this Court should decline review of this issue. If, however, this Court exercises its discretion and authority to accept review, then this case should be

remanded for the trial court to engage in the proper colloquy into Olivas's ability to pay before discretionary costs are imposed.

DATED: September 10, 2015.

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**MASON COUNTY PROSECUTOR**

**September 10, 2015 - 4:22 PM**

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