SUPREME COURT NO. _____

NO. 74567-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN BLACKMON,

Petitioner.

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

The Honorable Michael T. Downes, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner John Blackmon, the appellant below, requests review of the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Blackmon requests review of the Court of Appeals decision in State v. John Blackmon, No. 74567-1-I, filed June 12, 2017 and attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Notwithstanding this Court's decisions in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016), the Court of Appeals refused to reverse the trial court's imposition of discretionary legal financial obligations (LFOs) where the trial court failed to meaningfully assess Blackmon's ability to pay with current information on the subject. Where the Court of Appeals decision conflicts with Blazina and Duncan, should this Court grant review under RAP 13.4(b)(1) and remand for resentencing with proper consideration of Blackmon's current and future ability to pay?

2. At sentencing, Blackmon moved for the trial judge's recusal based on judicial bias. That motion was denied. To support his bias claim, which Blackmon intended to include in his Statement

of Additional Grounds for Review (SAG), a Court of Appeals Commissioner granted Blackmon permission to supplement the record with thousands of pages of verbatim reports of proceedings from his trial. The Court, however, then quickly set his case for consideration and would not grant him an extension of time necessary to review the supplemented record, conduct adequate research, and write his SAG. Where the Court of Appeals decision conflicts with State v. Harvey, 175 Wn.2d 919, 288 P.3d 1111(2012), should this Court grant review under RAP 13.4(b)(1) and remand to provide Blackmon sufficient time to prepare and file his SAG for consideration in the Court of Appeals?

D. STATEMENT OF THE CASE

1. Trial Court Proceedings

In July 2013, a Snohomish County jury convicted John Blackmon of two counts of Child Molestation in the Second Degree, one count of Rape of a Child in the Third Degree, and two counts of Child Molestation in the Third Degree. CP 193. Although the State merely requested a standard range sentence on all counts, the Honorable Michael T. Downes found that – because Blackmon's offender score on each of his current offenses was 12 – an

exceptional sentence was warranted under RCW 9.94A.535(2)(c)[1] and ran one of the sentences for molestation consecutively with the other sentences for a total sentence of 176 months. CP 46-48, 195-197, 207.

Blackmon appealed and raised several challenges to his convictions and sentence. CP 30. In December 2014, the Court of Appeals rejected all arguments save one. See CP 30-53. The court agreed that the combination of prison time and 36 months community custody exceeded the authorized statutory maximum sentence for each of Blackmon's convictions. CP 51-52. Accordingly, under State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012), Blackmon's case was remanded for resentencing. CP 52-53.

At the resentencing hearing, Blackmon moved for Judge Downes' recusal, arguing that his decision at the original sentencing to impose an exceptionally high sentence, sua sponte, demonstrated his lack of impartiality in the matter. CP 243-245; 1RP[2] 3. Judge

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[1] RCW 9.94A.535(2)(c) authorizes a sentencing court to impose an exceptional sentence above the standard range where "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

[2] This petition refers to the verbatim report of proceedings as follows: 1RP – December 16, 2015; 2RP – January 6, 2016.

Downes declined to remove himself from the resentencing. 2RP 14-16.

The State asked Judge Downes to impose the same prison terms imposed at the original sentencing, resulting in an exceptional sentence of 176 months, and reduce the community custody term for each count to ensure compliance with the statutory maximum terms. 2RP 17-22, 26-32. The defense asked Judge Downes to reconsider the exceptional sentence and instead impose standard range statutory maximum sentences (including the maximum 36-month community custody period) on each count. Alternatively, if Judge Downes again imposed an exceptional sentence, the defense asked him to reduce the total amount of time to be served by reducing the sentences on the two most serious offenses (the two counts of Child Molestation in the Second Degree). 2RP 24-26, 32-33; CP 246-249.

Judge Downes imposed the same prison terms originally imposed, once again resulting in an exceptional sentence of 176 months. 2RP 36-37, 42; CP 13-15. He then reduced or eliminated the period of community custody on each count to avoid exceeding the statutory maximum sentences. 2RP 37; CP 16.

Judge Downes also addressed the matter of LFOs. At the original sentencing, he obligated Blackmon to pay $2,393.82. CP

199. In addition to mandatory LFOs for a crime victim assessment ($500) and a biological sample fee ($100), Judge Downes had imposed $1,793.82 in discretionary "court costs." CP 199. The State asked Judge Downes to impose these LFOs again. 2RP 20. The defense asked him to waive the discretionary obligations, pointing out that Blackmon had not worked for 11 or 12 years prior to his arrest, he is partially disabled, and he is not able to work. 2RP 26. The State did not contest these assertions or otherwise respond to the defense request. 2RP 33.

Judge Downes found that he had no information "in a usable form" demonstrating Blackmon was indigent and recalled from the trial years earlier that Blackmon previously had a home, there was a divorce, and "there was something to do with insurance proceeds." 2RP 42. Because Blackmon had never previously been found to be indigent and Judge Downes believed he still "very well may and likely does have access to some significant resources," Judge Downes imposed the same LFOs again. 2RP 42-43. Judge Downes added that he had no idea what happened to Blackmon's assets in the divorce and noted that Blackmon could "try to have another hearing" on the issue if appropriate. 2RP 43.

The amended judgment contains the following preprinted, boilerplate language:

> **2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS**. The 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. (RCW 10.01.160). The court finds that the defendant is an adult and is not disabled and therefore the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 13. Judge Downes ordered Blackmon to pay a minimum of $60.00 per month on his LFOs upon release, plus all interest, which began accruing immediately. CP 18-19.

In a subsequent Motion for Order of Indigency, Blackmon swore under penalty of perjury that he owned no real property, owned no personal property, that he received no money the past year (other than apparently social security disability payments that went to his children), that he has approximately $5,000.00 in debts, and that he can contribute nothing toward the expense of review in his case. CP 250-252. Judge Downes declared Blackmon indigent and authorized his appeal at public expense. CP 7-8.

2. Court of Appeals Proceedings

On appeal, in a brief filed by our office, Blackmon challenged Judge Downes' imposition of discretionary LFOs because he had not considered Blackmon's current or future ability to pay at the time of resentencing. Instead, he merely relied on vague recollections of trial testimony from years before. See Brief of Appellant.

In his SAG, Blackmon intended to exercise his rights under RAP 10.10(a) and argue that Judge Downes was biased against him, should have granted the defense motion for recusal, and should not have presided at the resentencing hearing. To support his bias claim, Blackmon obtained permission to supplement the record on appeal with the verbatim report of proceedings from the third trial (the trial that resulted in Blackmon's convictions). This report of proceedings had already been prepared for Blackmon's original appeal and was simply transferred to the current appeal. See Ruling on Motion (filed 10/5/16).[3]

Blackmon also obtained permission from the trial judge and then the Court of Appeals for preparation of the verbatim report of proceedings from the first and second trials (both of which had ended in mistrial). See Rulings on Motions (filed 11/29/16, 12/16/16,

[3] All of the motions and orders referenced in this petition are part of the appeal file and therefore available to this Court for review.

12/19/16, and 2/14/17).[4] The due date for Blackmon's SAG was set at 45 days from the date on which he was served with the supplemental reports of proceedings. Id. Blackmon was sent copies of the supplemental reports on March 23, 2017. See Affidavit of Service (filed 3/24/17).

Approximately two weeks later, on April 5, 2017, the Court of Appeals sent a letter indicating that Blackmon's case would be considered June 8, 2017 without oral argument. See Non-Oral Argument Setting Letter. On May 2, 2017 – just before the due date set for Blackmon's SAG – Blackmon filed a motion asking the Court of Appeals to stay his appeal or extend the time to file his SAG. With thousands of pages of supplemental vrp to review, he could not file a SAG by the due date. See Motion for Stay (filed 5/2/17). The motion was denied. See Ruling on Motion (filed 5/3/17). So was a motion for reconsideration. See Motion for Reconsideration (filed 5/12/17); Order on Motion for Reconsideration (filed 5/18/17).

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[4] As the Court of Appeals orders reveal, the State opposed preparation and supplementation of the record with these reports of proceedings at public expense, lodging objections both in the Superior Court and Court of Appeals. A Court of Appeals ruling filed December 16, 2016 initially granting the motion to supplement was withdrawn on December 19, 2016 and ultimately reinstated on February 14, 2017. Obtaining the supplemental record was time consuming. Approximately five months elapsed from the filing in the Court of Appeals of the motion to supplement the record with these reports of proceedings (October 24, 2016) to the completed filing of the supplemental reports (March 15, 2017).

Blackmon nonetheless continued work on his SAG as best he could and, on June 2, 2017, undersigned counsel filed a motion to extend time on his behalf, further explaining the legal and logistical hurdles Blackmon faced in completing his SAG, alerting the Court that Blackmon would soon be sending his SAG in the mail for filing, and asking the Court to accept it upon receipt. See Motion to Extend Time (filed 6/2/17). On June 6, Blackmon submitted a significantly incomplete SAG and filed another Motion to Extend Time. See SAG and Motion (filed 6/6/17).

On June 7, the Court of Appeals denied both motions and rejected the SAG for filing. See Rulings on Motions (filed 6/7/17). Five days later, the Court filed its opinion affirming imposition of the discretionary LFOs. The opinion does not address any matters contained in Blackmon's unfinished SAG.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH BLAZINA AND DUNCAN.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "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).

Judge Downes imposed two mandatory LFOs: a $500 crime victim penalty assessment and a $100 biological sample fee. CP 18; RCW 7.68.035(1)(a) (penalty assessment "shall be imposed"); RCW 43.43.7541 (every sentence "must include a fee of one hundred dollars" for collection of biological samples); State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (identifying these LFOs as mandatory). These two LFOs are not at issue. But the $1,793.82 for uncategorized "court costs" should not have been imposed in the absence of compliance with RCW 10.01.160.

RCW 10.01.160(3) is mandatory: "it creates a duty rather than confers discretion." State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (citing State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). "Practically speaking . . . the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id. (emphasis added). "Within this inquiry, the court must also consider important factors . . . such as

incarceration and a defendant's other debts . . . when determining a defendant's ability to pay." Id. (emphasis added).

The Blazina court also instructed courts to "look to the comment in court rule GR 34 for guidance." Id. The court explained that, "under the rule, courts must find a person indigent if the person establishes that he or she receives assistance form a needs-based, means-tested assistance program, such as Social Security or food stamps." Id. Under GR 34, courts must also "find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline." Id. at 838-39. "[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." Id. at 839 (emphasis added).

Judge Downes' efforts under Blazina and RCW 10.01.160 fell short. Despite being informed that Blackmon suffered from a disability and had not worked for 11 or 12 years prior to his arrest in this matter, and despite the court's duty to assess a defendant's *current* and future ability to pay LFOs, Judge Downes relied solely on what he could recall of Blackmon's finances from trial years earlier (that Blackmon once had a home and "there was something to do with insurance proceeds."). 2RP 42. But Judge Downes conceded

he had "no idea what happened" to these resources in the years since trial and in light of Blackmon's divorce. 2RP 43

Judge Downes failed to take account of Blackmon's financial resources, such as his other debts and the burden of incarceration. See Blazina, 182 Wn.2d at 838. And Judge Downes did not follow Blazina's instruction to look to GR 34 for guidance. 182 Wn.2d at 838-39. GR 34 specifies that persons who receive "assistance under a needs-based, means-tested assistance program such as" Social Security "shall be determined to be indigent." GR 34(a)(3)(A)(iii). A person whose household income is at or below 125 percent of the federal poverty level also "shall be determined to be indigent." GR 34(a)(3)(B). Blackmon is partially disabled, unable to work, and receives social security disability benefits. Moreover, he has no income and no real or personal property. Had Judge Downes engaged in a GR 34 inquiry and "seriously question[ed]" Blackmon's ability to pay LFOs as Blazina instructed, he likely would not have imposed $1,793.82 in discretionary LFOs. Judge Downes failed to comply with RCW 10.01.160 or Blazina.

This Court recently reaffirmed that a "constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements." State v. Duncan, 185 Wn.2d

430, 436, 374 P.3d 83 (2016). These requirements include that "'[r]epayment may only be ordered if the defendant is or will be able to pay,'" "'[t]he financial resources of the defendant must be taken into account,'" and "[a] repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.'" Id. (internal quotation marks omitted) (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992) (quoting State v. Eisenman, 62 Wn. App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) (citing State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976)))). These specific constitutional requirements are codified in RCW 10.01.160(3), which mandates that the sentencing judge "consider the defendant's individual financial circumstances and make individualized inquiry into the defendant's current and future ability to pay." Blazina**Error! Bookmark not defined.**, 182 Wn.2d at 837.

Despite Blazina, Duncan, and a record indicating constitutional requirements were not satisfied, the Court of Appeals nonetheless affirmed imposition of the discretionary LFOs at Blackmon's resentencing. Although calling this "a close case" and indicating Judge Downes should have inquired about Blackmon's disability and current ability to work, the Court nonetheless approved of Judge Downes' ruling, relying on information from trial years earlier,

including that Blackmon had once worked for Microsoft and had some ability years ago to do "maintenance projects at home." See Slip op., at 6-7.[5] The problem, of course, is that Blazina and Duncan require a *current* and future assessment of ability to pay. Relying on indications from many years ago suggesting an ability to work and pay, which predate the criminal charges, predate Blackmon's divorce, and predate the current impact of Blackmon's disability on his earning potential is inconsistent with Washington law.

Ultimately, the boilerplate assertions regarding Blackmon's ability to pay LFOs, found in paragraph 2.5 of the judgment and sentence, are not supported by any facts. See CP 13. It is not true that Judge Downes adequately considered Blackmon's present and future ability to pay, including his current financial resources and the likelihood this might change. It also is not true that Blackmon "is not disabled" and "therefore has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 13.

It is the legislature's clear mandate that the trial court "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.

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[5] The Court of Appeals also combed the record from the trials for examples of instances where Blackmon once had access to money. See Slip. Op., at 2 (noting gifts and offers of money to his daughter during the period charged).

Here, Judge Downes failed to do so. Review is appropriate under RAP 13.4(b)(1), and this Court should remand for compliance with RCW 10.01.160 – just as it has done in other cases. See Duncan, 185 Wn.2d at 437-438 (collecting cases).

2. THIS COURT ALSO SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' CONDUCT CONCERNING BLACKMON'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW CONFLICTS WITH THIS COURT'S DECISION IN HARVEY.

"Under article 1, section 22 of the Washington Constitution, a person who has been convicted of a crime has the right to appeal." State v. Tomal, 133 Wn.2d 985, 988, 948 P.2d 833 (1997). Moreover, "[i]t is well established that '[t]he State must provide indigent criminal defendants with means of presenting their contentions on appeal which are as good as those available to nonindigent defendants with similar contentions.'" State v. Harvey, 175 Wn.2d 919, 921, 288 P.3d 1111 (2012) (quoting State v. Giles, 148 Wn.2d 449, 450, 60 P.3d 1208 (2003) (citing Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)).

In Harvey, the defendant sought to supplement the brief filed by his appointed counsel with an argument in his SAG that the courtroom had been closed during jury selection, a possible violation

of his right to public trial under article 1, section 22 and State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Harvey, 175 Wn.2d at 921. The trial court denied Harvey's request for a supplemental report of proceedings of voir dire, a decision the Court of Appeals affirmed. And when Harvey nonetheless attempted to argue the court closure issue in his SAG, the Court of Appeals would not consider it, deeming the record inadequate. Id. at 920-921. This Court reversed, holding that – whether intended for counsel's use or merely an indigent appellant's use in a Statement of Additional Grounds for Review – an appellant has a right to expand the record on appeal once he has demonstrated a "colorable need" for that record. Id. at 921-922.

Blackmon established a "colorable need" for the report of proceedings from his three trials so that he could establish his claim of judicial bias against Judge Downes and demonstrate that Judge Downes should have recused himself for the resentencing. Unlike Harvey, Blackmon was permitted to supplement the record with additional vrp. Ultimately, however, Blackmon fared no better than Harvey because the Court of Appeals refused to provide him enough time to review the thousands of pages of supplemental transcripts

(most of which he did not previously have), conduct sufficient research on his claim, and draft his arguments.

As discussed in the motions to extend time, Blackmon is not skilled in the law, had limited access to prison legal resources, and could not reasonably submit his SAG within the 45-day deadline. Presumably because the case had been set for consideration so quickly, the panel of judges deciding Blackmon's appeal treated that deadline as firm regardless of Blackmon's circumstances or the amount of material he had to review. This hardly seems fair.

Had Blackmon not been indigent, he could have just paid for the additional vrp and obtained it far earlier in the appeals process. There would have been no need to litigate the issue for many months in the trial court and Court of Appeals, and this would have permitted him sufficient time to file a SAG well prior to the Court's consideration of his case. That Blackmon instead suffered the ill effects of indigency is inconsistent with this Court's opinion in Harvey and inconsistent with the constitutional right to appeal.

Review of this issue also is warranted under RAP 13.4(b)(1).

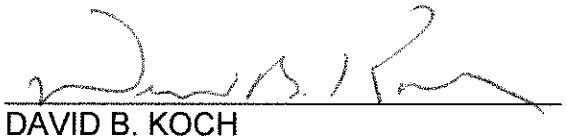
F. CONCLUSION

Because review is appropriate under RAP 13.4(b)(1), Blackmon asks that this petition be granted.

DATED this 12th day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN PATRICK BLACKMON, Appellant.	No. 74567-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 12, 2017

LEACH, J. — In his second appeal to this court, John Blackmon challenges the trial court's decision to impose discretionary legal financial obligations (LFOs).[1] Because the trial court considered whether the evidence before it showed that Blackmon had the ability to pay, it satisfied its duty to make an individualized inquiry under State v. Blazina.[2] We affirm.

BACKGROUND

The State charged John Blackmon with two counts of child molestation in the second degree, two counts of child molestation in the third degree, and one count of rape of a child. At the conclusion of a third trial, after two mistrials, a jury convicted Blackmon as charged.

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[1] The facts of Blackmon's underlying offenses are described in our opinion addressing his first appeal, State v. Blackmon, No. 70955-1-I, slip op. at 2-3 (Wash. Ct. App. Dec. 22, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/709551/pdf, review denied, 183 Wn.2d 1019 (2015).

[2] 182 Wn.2d 827, 344 P.3d 680 (2015).

Judge Michael T. Downes presided over all three trials and both sentencing hearings. During the trials, the court heard evidence bearing on Blackmon's financial circumstances. Specifically, the court heard testimony that the defendant had worked as a "tech guy" for Microsoft for 12 years before he became a "stay-at-home-dad." It also heard testimony that Blackmon offered to pay the victim, his daughter, $100 to perform oral sex on him and that he bought his daughter and his other children expensive gifts. In addition, Blackmon's own testimony about his activities around the house, when he described working in the yard, in the crawl space, and on the roof, showed that he was physically capable of working.

Initially, the court imposed an exceptional sentence of 176 months' confinement followed by 36 months in community custody.[3] The judgment included a community custody condition that required Blackmon to "[f]ind and maintain fulltime employment and/or a fulltime educational program during the period of supervision." Blackmon objected to this condition. He claimed that he had been "unable to work and receiving disability benefits for years." But he did not support this claim with any evidence, and the court imposed the condition. The trial court also imposed both mandatory and discretionary LFOs.

Blackmon appealed and raised a number of challenges to his convictions and sentence.[4] We rejected all but one of his arguments.[5] We accepted the State's concession that the trial court exceeded the statutory maximum sentence

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[3] RCW 9.94A.535(2)(c).
[4] See Blackmon, No. 70955-1-I, slip op. at 1.
[5] Blackmon, No. 70955-1-I, slip op. at 1.

when it imposed the statutory maximum term of confinement plus the term of community custody.[6] Thus, we remanded for resentencing.[7]

At the resentencing hearing, the trial court modified the sentence to comply with our decision. This reduced the amount of community custody.

Blackmon asked the court to consider his LFOs in light of Blazina, which the Supreme Court had decided after Blackmon's first sentencing hearing. Blackmon asked the court to waive discretionary LFOs, asserting that he is partially disabled and unable to work. Again, he supplied no evidence to support this claim.

The court decided that the information before it showed that Blackmon had the ability to pay court costs. It stated,

> With regard to money. Counsel, I don't have any information in front of me in any usable form that Mr. Blackmon is, in fact, indigent. The testimony at the trial involved—there was ownership of a home, there was a divorce. I don't know what the divorce settlement was. I don't know who got money. There was something to do with insurance proceeds. I don't know how much the insurance proceeds were. I don't know who they went to, what they were spent for. Given all of that, given the defendant, to my knowledge, has never been screened and found to be indigent, and that he apparently very well may and likely does have access to some significant resources, I'm going to impose the financial conditions which were requested.
>
> Now, if there's other information that I'm unaware of, and if after the sentencing hearing it's somehow or other appropriate to have another hearing on this issue, then you can try to have another hearing on the issue.
>
> But the testimony from the trial was that Mr. Blackmon, in fact, had access to resources, and I have no idea what happened. I don't even know if the divorce case is over, to tell you the truth. But I have

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[6] Blackmon, No. 70955-1-I, slip op. at 22-23.
[7] Blackmon, No. 70955-1-I, slip op. at 24.

> no idea what the split of assets would have been or what happened to them.

The court imposed $600.00 in mandatory costs and $1,793.82 in discretionary court costs to be paid in monthly installments of $60.00, starting 30 days after his release.

The amended judgment contains the following boilerplate language:

> 2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The 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. (RCW 10.01.160). The court finds that the defendant is an adult and is not disabled and therefore the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

Later, Blackmon asked the court to allow him to seek review at public expense. He filed a declaration that references an order of indigency from a civil case and an affidavit in which he stated he is permanently disabled. The affidavit also states that he has no debts other than the LFOs. The trial court granted Blackmon's request, permitting him to appeal in forma pauperis. The trial court entered a supplemental order of indigency confirming that the court had previously found the defendant to be indigent and ordering that verbatim reports of proceedings be prepared at public expense.

ANALYSIS

Blackman challenges the trial court's decision to impose discretionary LFOs. We review a decision to impose LFOs for abuse of discretion.[8] A court

[8] State v. Clark, 191 Wn. App. 369, 372, 362 P.3d 309 (2015).

abuses its discretion when it makes a decision on untenable grounds or for untenable reasons.[9]

Blackmon asserts that the trial court did not make an individualized inquiry into his ability to pay before it imposed discretionary LFOs. RCW 10.01.160(3) authorizes courts to impose discretionary costs at sentencing. But it provides that a 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.[10]

Our Supreme Court, in Blazina, clarified that a trial court must conduct "an individualized inquiry into the defendant's current and future ability to pay" before it may impose discretionary LFOs.[11] It must consider factors such as incarceration and the defendant's other debts.[12] In order for this court to affirm an imposition of discretionary LFOs, the record must reflect that the trial court made this inquiry.[13] Including boilerplate language in the judgment and sentence stating that the defendant has an ability to pay does not satisfy this requirement.[14]

The amended judgment contains standard boilerplate language. But the transcript of the resentencing hearing shows that the trial court considered Blackmon's financial circumstances.

not correct

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[9] Clark, 191 Wn. App. at 372.
[10] RCW 10.01.160(3).
[11] Blazina, 182 Wn.2d at 838.
[12] Blazina, 182 Wn.2d at 838.
[13] Blazina, 182 Wn.2d at 839.
[14] Blazina, 182 Wn.2d at 838.

Judge Downes presided over all three trials and heard all the evidence, and he indicated that he had reviewed the facts of the case before sentencing. At the sentencing hearing, the court relied on the trial testimony to find that Blackmon had access to resources.

Ideally, the court should have asked about the nature of his claimed disability or his ability to work or stated its conclusions about those questions on the record. However, because it found Blackmon had access to resources, the court had a proper basis for concluding Blackmon could afford to pay the LFOs it imposed. Although this is a close case, we find that the court made an adequate inquiry into Blackmon's ability to pay.

Blackmon also asserts that the evidence before the court does not support its findings in the judgment and sentence. Specifically, he challenges the findings that the court considered Blackmon's ability to pay and that Blackmon is not disabled and therefore "has the ability or likely future ability to pay."

Neither RCW 10.01.160 nor the constitution requires a trial court to enter specific findings about a defendant's ability to pay discretionary court costs.[15] But if the court does make any findings of fact, we review them under the clearly erroneous standard.[16] A finding of fact is clearly erroneous when, although some evidence supports it, review of all the evidence leads to a definite and firm conviction that the court has made a mistake.[17]

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[15] State v. Lundy, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).
[16] Lundy, 176 Wn. App. at 96.
[17] Lundy, 176 Wn. App. at 96.

Here, the trial court's comments at sentencing show it reviewed the record before sentencing and, based on that record, considered Blackmon's ability to pay. Thus, the court's finding that it considered Blackmon's ability to pay is not clearly erroneous.

Nor is the court's finding that Blackmon is not disabled clearly erroneous. Blackmon claims he is unable to work due to a partial disability. But contrary to Blackmon's unsupported statements that he is disabled, the record shows he had the ability to work. Blackmon maintained employment at Microsoft for 12 years, and the record suggests that his later unemployment was voluntary. In addition, Blackmon had the ability to complete maintenance projects at home. Our review of the record persuades us that the trial court's findings are not clearly erroneous.

Finally, Blackmon asks the court to deny the State appellate costs based on his indigency. We generally award appellate costs to the substantially prevailing party on review. However, when the trial court makes a finding that an offender is indigent for purposes of appeal, that finding continues throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[18] We follow the trial court and presume Blackmon is indigent. If the State has evidence indicating significant improvement in Blackmon's financial circumstances, it may file a motion for costs with the commissioner.

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[18] RAP 14.2.

CONCLUSION

We affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Spearman, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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