NO. 46933-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN ESTES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phillip Sorenson, Judge

No. 14-1-00724-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Whether Defendant failed to show ineffective assistance of counsel where he failed to show that his trial counsel's performance was deficient, and suffered no prejudice from that performance.
2. Whether Officer Pigman's testimony was proper and even if it was improper, whether it was harmless error.
3. Whether the issue of the trial court's imposition of discretionary legal financial obligations (LFOs) is properly before this court where the State has not attempted to enforce the LFOs and the issue was not preserved at trial.

B. STATEMENT OF THE CASE.

1. PROCEDURE

The State originally charged Kevin Estes, hereinafter referred to as "Defendant," with two counts of second degree assault and one count of felony harassment by information on February 19, 2014, under cause number 14-1-00724-0. CP 1-2. Each of these three counts included a deadly weapon enhancement. CP 1-2. The information was later amended on July 8, 2014, to allege an aggravating factor due to Defendant's criminal history. CP 114-116. With a second amended information, the

State added an additional second degree assault charge, again with a deadly weapon enhancement. CP 117-119. The State filed a third amended information July 31, 2014, and removed the additional assault charge. CP 206-208.

On February 27, 2014, the State filed a Persistent Offender Notice informing Defendant that he was facing a third strike offense for both second degree assault charges and the felony harassment charge. CP 381. Defendant proceeded to trial where a jury acquitted him of both second degree assault charges, but found him guilty of third degree assault (a lesser included offense) and felony harassment, both with deadly weapon enhancements. CP 331-335.

After trial but prior to sentencing, defense counsel moved to dismiss the deadly weapon enhancements. CP 341-349; RP 509-25. The trial court denied defense counsel's motion to dismiss. RP 524-5. Because the deadly weapon enhancements made each of Defendant's current conviction a strike offense, RP 504; RCW 9.94A.030(32)(t), the court sentenced Defendant to life in prison without the possibility of parole on November 21, 2014 pursuant to Washington's Persistent Offender Accountability Act (POAA). CP 368.

2. FACTS

On February 19, 2014, Defendant was drinking with his friend James Randle and Randle's roommate, Anthony Prusek, at Randle's apartment in Puyallup, Washington. RP 79-80; RP 278. Prusek's girlfriend, Ashley Stoltenberg, also stayed at the apartment frequently and was there during the evening of February 19, 2014. RP 79.

During the evening of February 19, 2014, Stoltenberg was in Prusek's room while the Defendant, Randle, and Prusek were drinking and talking out in the living room. RP 83. Defendant began to make insulting comments about Stoltenberg's appearance. RP 83-4. At that point, Stoltenberg emerged from Prusek's room and told Defendant to stop making such comments. RP 84. The record contains several accounts of what happened next. *See,* e.g., RP 86; RP 91; RP 131; RP 208; RP 281-83.

According to Stoltenberg, Defendant stood up, drew a knife from his pocket, and told her "time to die, bitch." RP 86. She then testified that Prusek grabbed Defendant, and that Defendant was thrusting the knife at Prusek's torso during the altercation. RP 91.

Randle testified that Defendant attempted to stand up, but was restrained by Prusek. RP 281. Randle also testified that he saw a knife on the floor as the two other men wrestled. RP 282.

Prusek testified that he grabbed Defendant as Defendant stood up and was attempting to "go for her," in reference to Stoltenberg. RP 131. Prusek also testified that he heard Defendant say something followed by the word "bitch" and that Defendant "flailed around" with a knife in his hand as he was being restrained. RP 132. During the altercation, Prusek suffered wounds to his right big toe and one of his pinky fingers. RP 91; RP 144-45.

After this brief struggle, Defendant was subdued and Randle took the knife and placed it on top of the refrigerator. RP 284. Defendant exited the apartment and went to sit in his car in the driveway. RP 194-5; RP 288. Officer Greg Massey of the Puyallup Police Department arrived at the scene following a 911 call from Stoltenberg. RP 91.

Officer Massey contacted Defendant who was sitting in his car outside of the residence. RP 194-5. Defendant told Officer Massey that a fight had occurred inside the residence, that he was angry with two of the people inside, and that a knife had been involved. RP 195-7. Officer Massey searched Defendant and found a knife on his person. RP 197. Defendant also told Officer Massey that the knife found on his person was not the knife used in the fight. RP 207. The knife Officer Massey found on Defendant outside the residence was taken into evidence. RP 208. This knife was introduced as evidence at trial, along with a photo showing the

knife next to a ruler. Ex.2; Ex. 6; RP 217-8. In the photo admitted as exhibit 2, the knife's blade measured over three inches. Ex. 2; RP 218.

In an interview with Officer Steve Pigman of the Puyallup Police Department, Stoltenberg indicated that the knife Randle had placed on the refrigerator was the knife used in the altercation between Defendant and Prusek. RP 256.

At trial, Officer Pigman estimated the total length of that knife to be 6 inches and asserted that it was capable of inflicting serious bodily injury. RP 269-270.

Prusek testified that the knife that was placed on the refrigerator had a blade 3.5 to 4 inches long. RP 134.

Additionally, an evidence technician for the Puyallup Police Department testified that the blade of the knife found on Defendant's person measured over three inches. RP 217-18.

The knife Randle placed on the refrigerator was not collected as evidence. RP 44.

C. ARGUMENT.

1. DEFENDANT FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE CANNOT SHOW THAT DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT OR THAT HE SUFFERED PREJUDICE FROM THAT PERFORMANCE

To demonstrate a denial of the effective assistance of counsel, Defendant must satisfy a two-prong test.

First, he must show that his attorney's performance was deficient. ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2054 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment. *Id.* Second, Mr. Estes must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***In re Davis***, 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004). A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the trial. ***Strickland***, 466 U.S. at 694.

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." ***State v. McFarland***, 127 Wn.2d 322, 335, 899

P.2d 1251 (1995). Similarly, "[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *Id.* at 337 (citing ***State v. Thomas,*** 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

a. Defendant cannot show that his attorney's performance was deficient

When asserting that an attorney's performance was deficient, a criminal defendant must show that the attorney's conduct fell below an objective standard of reasonableness. ***Strickland,*** 466 U.S. at 687-88. Judicial scrutiny of an attorney's performance must be highly deferential. *Id.* at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." *Id.* In evaluating an attorney's performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. ***Davis,*** 152 Wn.2d at 673.

On appeal, Defendant contends that his defense counsel was ineffective because his attorney allegedly did not know that if Defendant was convicted of any felony with a deadly weapon enhancement, it would constitute a strike offense under RCW 9.94A.030(32)(t). However, the

record reveals multiple instances where defense counsel attempted to rebut the State's allegation that Defendant was armed with a deadly weapon at the time of his altercation with Prusek.

Defense counsel's efforts to counter the State's allegation that Defendant was armed with a deadly weapon at the time of the altercation began prior to trial. During motions in limine, defense counsel made a motion specifically requesting that the knife found on Defendant's person outside of the residence be excluded from evidence. CP 250. Defense counsel also moved to exclude any photographs of either of the knives involved in the case. CP 250. Both of these motions were argued before the trial court and both were ultimately denied. RP 42-49.

Defense counsel's efforts to undermine the deadly weapon enhancements continued after proceeding to trial. Defense counsel conducted extensive cross-examination of several witnesses. During Prusek's testimony, defense counsel specifically inquired into his ability to recall details about the knife that was used against him. RP 186-87. Defense counsel also asked Officer Pigman what he could recall about the knife on the refrigerator, and specifically asked whether his estimation as to the knife's length pertained to the whole knife or just the blade. RP 256-57.

In addition to cross-examination regarding the knife, defense counsel also made an extensive argument in the trial court objecting to the

admission of exhibit 6 (the knife found on Defendant outside the residence). RP 199-205. Finally, during closing argument, defense counsel questioned the recollection of several witnesses regarding their descriptions of the knife used in the altercation and the manner in which it was used. RP 468-69. The record makes it clear that the deadly weapon enhancements were an area of focus for defense counsel both before and during trial.

"Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." ***Strickland,*** 466 U.S. at 688. The State's case against Defendant was subjected to a reliable adversarial testing process. Defense counsel had notice that Defendant was facing a third strike soon after the State filed the original information. CP 381. The record reveals that defense counsel tested the State's allegation that Defendant was armed with a deadly weapon on multiple occasions through pretrial motions, cross-examination, and closing argument.

On appeal, Defendant contends that his defense counsel's failure to object to portions of Officer Pigman's testimony regarding the knife on the refrigerator being a "deadly weapon" is indicative of a deficient performance at trial. Br. of App. 22. While Defendant asserts that this failure to object was due to ignorance of the law, he fails to demonstrate that it was not legitimate trial strategy, specifically a tactic employed to

avoid emphasizing the comment in front of the jury. When, as here, defense counsel's conduct can be categorized as legitimate trial strategy or tactics, performance is not deficient. ***State v. Carson,*** 179 Wn. App. 961, 976, 320 P.3d 185 (2014).

Defendant contends that his trial counsel would have more vigorously defended against testimony that the knife used in the altercation had a blade longer than three inches had he conducted additional research. Br. of App. 22-23. Specifically, on appeal Defendant contends that his defense counsel should have confronted the evidence technician with the dictionary definition of the word "blade." Br. of App. 22. Defense counsel actually did cross-examine the forensic evidence technician regarding the length of the knife's blade. RP 218-19. Just because defense counsel did not employ the trial strategy suggested on appeal does not mean his performance was deficient. On appeal, Defendant is in an advantageous position to suggest a new strategy because he has the benefit of hindsight and knowledge that the first strategy was not successful.

The record demonstrates that the State's case against Defendant was subjected to a reliable, adversarial testing process. Defendant's trial counsel addressed the issue of the size of the knife multiple times both before and during trial. Courts "defer to an attorney's strategic decisions to pursue, or forego, particular lines of defense when those strategic

decisions are reasonable given the totality of the circumstances. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has not chosen to employ." ***Riofta v. State,*** 134 Wn. App. 669, 693, 142 P.3d 193 (2006). Defendant's trial counsel chose a certain line of defense to present at trial. This line of defense was not deficient simply because it was unsuccessful.

b. Defendant has failed to show he suffered any prejudice resulting from a deficient performance by his trial counsel

To prevail on a claim for ineffective assistance of counsel, a "defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'" ***State v. Crawford,*** 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting ***Strickland,*** 466 U.S. at 693). "In doing so, 'the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*

The record in this case contains ample evidence to find that Defendant was armed with a deadly weapon at the time of his altercation with Prusek regardless of his attorney's chosen trial strategy.

A knife with a blade over three inches is a *per se* deadly weapon. ***State v. Thompson,*** 88 Wn.2d 546, 548, 564 P.2d 323 (1977).

Officer Pigman testified that the total length of the knife on the

refrigerator was about 6 inches. RP 256-57. Prusek testified that the knife used against him had a blade about 3.5 to 4 inches. RP 134. Exhibit 2 consisted of a photo of the knife Officer Massey found on Mr. Estes' person next to a ruler. Ex. 2. The forensic evidence technician testified that the blade measured over three inches in the photo. RP 217-18.

Thus, the jury was presented with testimony indicating that both knives were *per se* deadly weapons due to having blades longer than three inches, and had the opportunity to examine a photograph of one of the knives next to a ruler as exhibit two was admitted into evidence. Ex. 2; RP 218. After examining all of this evidence, the jury was convinced beyond a reasonable doubt that Defendant was armed with a deadly weapon when he threatened Stoltenberg and subsequently fought with Prusek. CP 330; CP 336; CP 338.

As an alternative to the length requirement to classify a knife as a deadly weapon, the jury could have found that Defendant was armed with a deadly weapon due to the manner in which he used the knife during his altercation with Prusek. "The character of an implement as a deadly weapon is determined by its capacity to inflict death or injury, and its use as a deadly weapon by the surrounding circumstances, such as the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." ***Thompson,*** 88 Wn.2d at 548-49. Whether a knife constituted a deadly weapon based on

the manner it was used is a question of fact for the jury to decide. *Id.* at 548.

The record contains sufficient evidence to conclude that Defendant used the knife involved in the altercation in a manner that could inflict death. Stoltenberg testified that Defendant was thrusting the knife toward Prusek's body. RP 90-91. Prusek testified that Mr. Estes was "flailing" around with the knife in his hand as they struggled and that he was stabbed on his foot and finger. RP 133-34. He also testified that the knife was capable of inflicting serious injury or death. RP 134. Mr. Randle described the knife he placed on the refrigerator as "sharp." RP 303.

The jury had sufficient evidence before it to be convinced beyond a reasonable doubt that Defendant was armed with a deadly weapon at the time of the altercation. The evidence against Defendant was such that the result of the proceeding could not reasonably have been different regardless of defense counsel's strategic decisions. Therefore, Defendant cannot show prejudice or ineffective assistance of counsel and his conviction should be affirmed.

2. OFFICER PIGMAN'S TESTIMONY REGARDING THE KNIFE HE SAW ON THE REFRIGERATOR WAS PROPER AND DID NOT INTRUDE ON THE JURY'S ROLE AS TRIER OF FACT

a. The issue of whether Officer Pigman's comment on the knife on the refrigerator was improper opinion testimony is not properly before this Court as it was not preserved at trial

Washington courts have "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." ***Bellevue Sch. Dist. 405 v. Lee***, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). "Defendants fail to preserve an issue for appeal when they do not object to impermissible opinion testimony at trial." ***State v. Embry,*** 171 Wn. App. 714, 739, 287 P.3d 648 (2012) (citing ***State v. Kirkman,*** 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

When Officer Pigman referred to the knife from the refrigerator as a "deadly weapon," defense counsel did not object. RP 270. Therefore, the issue of whether the officer's comment was improper opinion testimony was not properly preserved for appeal. This court should decline to reach the merits of Defendant's assignment of error pursuant to RAP 2.5(a).

On appeal, Defendant claims that this court should reach the merits of his assigned error because Officer Pigman's statement was a comment

on guilt that infringed on his constitutional right to a fair trial. Br. of App. at 24. However, this court has held that a failure to timely and specifically object to testimony as an improper comment on the defendant's guilt precludes raising the issue on appeal. ***Embry,*** 171 Wn. App. at 740-41 (citing ***State v. Montgomery,*** 163 Wn.2d 577, 596, 183 P.3d 267 (2008)). Regardless of whether Officer Pigman's testimony is alleged to be improper opinion testimony or a comment on the defendant's guilt, Defendant did not object at trial and therefore is precluded from assigning error on appeal based on that testimony.

b. Officer Pigman's statement that the knife on the refrigerator was a deadly weapon was proper opinion testimony

ER 701 limits lay opinion testimony to that which is "(a) rationally based on the perception of the witness [and] (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." ER 701. ER 704 states that "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Testimony that is not a direct comment on the defendant's guilt, is otherwise helpful to the jury, and is based on inferences from the evidence is proper opinion

testimony. ***City of Seattle v. Heatley,*** 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." *Id.* at 579. Whether testimony constitutes an impermissible opinion on guilt will generally depend on the specific circumstances surrounding each case. *Id.* Testimony deemed to be an opinion as to a defendant's guilt must relate to the defendant. ***State v. Wilber,*** 55 Wn. App. 294, 298, 777 P.2d 36 (1989).

On appeal, Defendant alleges that Officer Pigman made an improper comment on guilt during the following exchange:

> [Prosecutor]: So, the knife – the overall knife was approximately six inches, correct?
>
> [Pigman]: I believe so, yes.
>
> [Prosecutor]: And do you have any idea how long the blade itself was?
>
> [Pigman]: No
>
> [Prosecutor]: And if a suspect were coming at you with a knife like that, what action would you take?
>
> [Pigman]: He would probably be shot
>
> [Prosecutor]: Why would he get shot?
>
> [Pigman]: Because he's displaying a deadly weapon, coming at me with a deadly weapon.
>
> [Prosecutor]: And the knife you saw on the refrigerator, whether it

> is or isn't the knife that was brandished in this case, was very capable of causing serious bodily injury, correct?
>
> [Pigman]: Yes.

RP 269-270.

Placed in context, this exchange consists of a hypothetical question posed by the prosecutor to Officer Pigman. The prosecutor was attempting to elicit Officer Pigman's opinion on the knife and its capacity to inflict bodily injury based on his experience as a police officer. Officer Pigman does not mention Defendant, nor does he offer an opinion on whether Defendant assaulted or threatened anyone in the apartment. He simply provided his opinion on the knife's capacity to inflict bodily injury based on his perception of it as it sat on the refrigerator. The testimony did not relate to Mr. Estes, and therefore cannot be an improper comment on his guilt. ***Wilber,*** 55 Wn. App. at 298.

c. Even if Officer Pigman made a comment on the defendant's guilt, it did not prejudice the defendant and is harmless error

An error is harmless when there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. ***State v. Powell,*** 126 Wn.2d 244, 267, 893 P.2d 615 (1995). A reasonable probability exists when confidence in the outcome of the trial is undermined. *Id.*

There is no reasonable probability that the outcome of Defendant's trial would have been different had Officer Pigman not made the comments alleged to be an improper comment on guilt. The jury was properly instructed regarding the definition of "deadly weapon" as applied to knives. CP 330. The jury had evidence that the knife found on the refrigerator was a *per se* deadly weapon. RP 256-57.

The jury was also instructed that a person is armed with a deadly weapon when the weapon is easily accessible and readily available for offensive or defensive use. CP 330. The jury could have convicted Defendant of the deadly weapon enhancements if he had a knife other than the one Officer Pigman referred to as a "deadly weapon" readily accessible for offensive or defensive use.

It is undisputed that Officer Massey found a knife on Defendant's person after he arrived at the scene. RP 197. This knife was admitted as evidence at trial, along with a photo of it next to a ruler. Ex.6; Ex.2. During deliberations, the jury had these exhibits and testimony from multiple witnesses regarding the length of this knife's blade to take into account in rendering a verdict. There is sufficient evidence in the record to convict Defendant of the deadly weapon enhancements without considering the contested testimony at all as the conviction could pertain

to an entirely different knife from the one he was discussing in his testimony.

Any improper comment from Officer Pigman regarding the knife he saw on top of the refrigerator is harmless error as the record contains strong evidence that either knife involved in this case could qualify as a deadly weapon, either due to its size or the manner in which it was used. Even if defense counsel had objected to Officer Pigman's testimony and the court had stricken it, the jury could still find Mr. Estes guilty of the deadly weapon enhancements due to him being armed with the other knife at the time he threatened Ms. Stoltenberg and fought with Mr. Prusek.

3. DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED BECAUSE IT IS NOT RIPE FOR REVIEW AND WAS NOT PRESERVED AT THE TRIAL LEVEL

a. This court should decline to review the issue of legal financial obligations because the issue is not ripe for review until the State attempts enforcement.

Challenges to orders establishing LFOs are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). *See also,* ***State v. Smits***, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In the present case, there is nothing in the

record showing that the State has attempted to enforce the LFOs. Therefore, the issue is not yet ripe for review, and this court should decline to review it.

b. This court should decline to review the issue of legal financial obligations because the issue was not properly preserved for appeal.

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See* ***State v. Lindsey***, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

The appellate court may grant discretionary review for three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also*, ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); ***State v. Sisouvanh***, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). To fall under the exceptions provided in RAP 2.5(a), defendant would need to claim there was a manifest error—

requiring actual prejudice—affecting a constitutional right. *See*, ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Mr. Estes has failed to provide any evidence of prejudice required for a manifest constitutional error, so this court should decline to exercise its discretionary RAP 2.5(a) review.

When the State requested that the court impose LFOs during sentencing, defense counsel did not object. RP 530. Normally, the lack of an objection during sentencing would preclude Defendant from challenging the imposition of LFOs on appeal. RAP 2.5(a); ***Guloy,*** 104 Wn.2d at 421. Defendant relies on ***State v. Blazina*** to assert that this court should exercise discretionary review under RAP 2.5(a) and review the trial court's imposition of LFOs.

The ***Blazina*** court did choose to accept discretionary review of the claim of erroneous imposition of LFOs in that case, though it also held that "The error is unique to these defendants' circumstances, and the Court of Appeals properly exercised its discretion to decline review." ***State v. Blazina,*** 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The court's exercise of discretionary review of the issues in ***Blazina*** was based on the

individual circumstances of the defendants involved in that case. The court did not hold that lower appellate courts should exercise discretionary review of LFOs as a general rule: "Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that *this court* exercise its RAP 2.5(a) discretion and reach the merits of *this* case." *Id.* at 683 (emphasis added).

Defense counsel did not preserve the issue of discretionary LFOs at the trial level. On appeal, Defendant has not shown the requisite manifest error affecting a constitutional right to invoke discretionary review under RAP 2.5(a). The issue of whether the trial court erroneously imposed discretionary LFOs on the Defendant is not properly before this court and should not be reviewed on appeal.

D. CONCLUSION.

For the reasons outlined above, the State asks that the Defendant's convictions and sentence be affirmed.

DATED: July 10, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Brian Wasankari by K. Proctor
BRIAN WASANKARI 14841
Deputy Prosecuting Attorney
WSB # 28945

Spencer Babbit
Rule 9 Legal Intern

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.

7.10.15 Theresa Ko
Date Signature

PIERCE COUNTY PROSECUTOR

July 10, 2015 - 4:43 PM

Transmittal Letter

Document Uploaded: 4-469332-Respondent's Brief.pdf

Case Name: St. v. Estes
Court of Appeals Case Number: 46933-2

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: __Respondent's__
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

Sloanej@nwattorney.net
nielsene@nwattorney.net