

NO. 47132-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

FOREST NAILLON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge

No. 14-1-03749-1

BRIEF OF RESPONDENT

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

1. Did the defendant fail to preserve his claim or objection to the imposition of legal financial obligations when he failed to object to the issue at the trial court?
2. Has defendant failed to show defense counsel was ineffective when he did not object to the discretionary legal financial obligations when the entirety of the record reveals the defense was effective and no prejudice resulted?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2014, Forest Naillon (“defendant”) was charged with unlawful possession of a stolen vehicle (Count I) and making or possessing motor vehicle theft tools (Count II). CP 1-2. The case proceeded to a jury trial before the Honorable Jack Nevin. 1RP 1¹; CP 69. The defendant was convicted on both counts and sentenced to 26 months of confinement on Count I and a concurrent sentence of 364 days on Count II. CP 62-63, 69, 80-84. As required by statute, the court imposed mandatory legal financial obligations consisting of a \$500 crime victim assessment, \$100 DNA fee, and a \$200 filing fee. CP 71; 3RP 13; RCW

¹ The Verbatim Report of Proceedings is found in three sections, designated as follows: 1RP (Dec. 9-10, 2014); 2RP (Dec. 15-16, 2014); 3RP (Dec. 29, 2014, Jan. 16, 2015).

7.68.035; RCW 43.43.7541; RCW 36.18.020. The court ordered the defendant to pay discretionary LFOs of \$500 for Department of Assigned Council (“DAC”) recoupment. CP 71; 3RP 13; RCW 10.01.160. The defendant timely appealed. CP 87.

2. Facts

On September 19, 2014, the defendant was found in possession of a stolen vehicle and shaved keys, a type of motor vehicle theft equipment, in Puyallup, Washington. 1RP 140-2, 150-3. The car had been stolen from a nearby gas station earlier that day. 1RP 78-80.

After the theft occurred, the defendant approached Joshua Wetherbee, a relative of the stolen car’s legitimate owner, in a Walmart parking lot. 1RP 109. Unaware that Mr. Wetherbee was related the car’s owner, the defendant asked Mr. Wetherbee for some gas money and a ride to the stolen vehicle, which the defendant described as his car and said was in a nearby Fred Meyer parking lot. 1RP 109-111. After giving the defendant the ride he requested, the relative recognized the stolen car and telephoned the police. 1RP 112. Pierce County Sheriff’s Deputies arrived on the scene, found the defendant in possession of the stolen car, shaved keys, and arrested him. 1RP 145-8,150-3, 155-6. The defendant did not testify. RP 86.

C. ARGUMENT.

1. THE DEFENDANT DID NOT PRESERVE THE ISSUE FOR REVIEW WHERE HE FAILED TO OBJECT TO THE ASSIGNMENT OF LEGAL FINANCIAL OBLIGATIONS.

A failure to object to an issue in the trial court precludes it from being reviewed on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013); *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).

During sentencing, the defense raised no objection to the sentence. 3RP 13-14. The defendant did not challenge the state's recommendation of \$500 in discretionary LFOs, which the court imposed. 3RP 13. The defendant had an opportunity to object to the court's imposition of discretionary fees, but did not. 3RP 13-15. Defendant did not preserve the issue for review on appeal.

The appellate court may review issues raised for the first time on appeal only if there is (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. 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). The defendant would have to claim there was a manifest error with actual prejudice affecting a constitutional right in order to raise it under the RAP 2.5(a) exceptions. *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 in the event that 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). Failing to make an individualized inquiry into a defendant's ability to pay LFOs does not involve a constitutional right. *State v. Blazina*, 182 Wn.2d 827, 840-41, 311 P.3d 492 (2015) (Fairhurst, J., concurring). Defendant 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.

The defendant relies on *Blazina*, 182 Wn.2d 827, to argue that this court should overlook his failure to preserve the issue through a proper objection and grant review under RAP 2.5(a). While the Supreme Court used its discretionary authority under RAP 2.5(a) to reach the merits, they

acknowledged unique circumstances led them to exercise their discretion and “...the Court of Appeals properly declined discretionary review.” *Id.* at 834-35.

In *Blazina*, the Supreme Court did not create a new standard exempting LFO claims from traditional preservation requirements; it explicitly noted “...[the assigned LFO error] will not taint sentencing for similar crimes in the future. The error is unique to these defendants’ circumstances...” *Id.* at 834. The Court reached the merits of the case because of “[n]ational and local cries for reform of broken LFO systems...”², a reason particularly suited to the Supreme Court’s unique ability to address broad policy issues of statewide or national concern. The Supreme Court did not overrule the Court of Appeals’ denial of review for failure to preserve and explicitly stated that other appellate courts are not obligated to exercise their discretion in the same way. *Id.* at 834-35. This court should decline to exercise such discretion since the defendant has failed to present an argument for why this case demands the court exercise its power of discretionary review under RAP 2.5(a).

If the court does decide to grant review, the appropriate remedy would be to remand to the trial court for an individualized inquiry into the defendant’s ability to pay his discretionary legal financial obligations. *See, Blazina*, 182 Wn.2d at 838-9.

² *Blazina*, 182 Wn.2d at 835.

2. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL'S REPRESENTATION WAS OBJECTIVELY REASONABLE AND NO PREJUDICE RESULTED.

To demonstrate ineffective assistance of counsel, a defendant must show that: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong "Strickland test" from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The burden is on the defendant alleging ineffective assistance to show deficient representation under the *Strickland* test based on the record below. *Strickland*, 466 U.S. at 667-68; *McFarland*, 127 Wn.2d at 335; *In re Davis*, 152 Wn. 2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). In the instant case, the defendant alleges that defense counsel was ineffective for failing to object to the assignment of LFOs. Amended Brief of Appellant at 1, 8-9.

- a. Defendant has failed to prove that defense counsel's overall performance was deficient.

A defendant's right to effective counsel is met when he is able to "require the prosecution's case to survive the crucible of meaningful

adversarial testing.” *U.S. v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657 (1984). The defendant must demonstrate that counsel’s unprofessional conduct or the circumstances surrounding his legal representation have deprived him of a fair, adversarial trial. *See Cronic*, 466 U.S. at 658; *U. S. v. Morrison*, 449 U.S. 361, 363, 101 S. Ct. 665, 667, 66 L. Ed. 2d 564 (1981).

The effectiveness of counsel must be judged based on a totality of the legal representation provided by counsel at all phases of the trial. *See Cronic*, 466 U.S. at 659; *See also, Avery v. State of Alabama*, 308 U.S. 444, 452, 60 S. Ct. 321, 325, 84 L. Ed. 377 (1940) (evaluating the entirety of defense counsel’s performance to be effective, despite alleged errors by defendant); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (holding that a tardy appointment of counsel is not a per se denial of effective counsel). Isolated errors by counsel do not justify setting aside a judgement, provided that the trial still adequately served its adversarial purpose. *See, Id.* at 656-57; *Strickland*, 466 U.S. at 691.

In the instant case, when the record is reviewed as a whole, it is apparent that defendant received effective assistance of counsel as guaranteed by the Sixth Amendment. U.S. Const. amend. VI. Defense counsel brought a *Knapstad* motion to dismiss the most serious charge and prevailed in an argument against the admission of State’s evidence on a

404(b) motion. 1RP 19-51. Defense counsel also prevailed on a motion in limine that excluded elements of witness testimony alluding to defendant's prior criminal record. 1RP 71. Counsel cross-examined each of the State's witnesses. 1RP 86-100, 105-06, 156-172, 174-5, 119-130, 132-3. The defense called a private investigator hired by the defense as a witness. 2RP 6.

Even if the court were to consider a failure to object to LFOs an error, it was a single error and does not negate the overwhelming effectiveness of defense counsel throughout the record. The defendant fails to show how counsel's overall trial performance was sufficiently inadequate as to deprive him of a fair and adversarial trial. The defendant's claim does not satisfy the first prong of the *Strickland* test.

b. Defendant has failed to show prejudice resulting from counsel's decision not to object to LFOs.

The *Strickland* test requires the defendant to show the prejudice resulted from counsel's deficient representation to establish a valid ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687.

Prejudice means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The defendant must show that the proceeding would have had a different outcome, but for counsel's deficient

representation. *McFarland*, 127 Wn.2d at 337; *See also, Strickland*, 466 U.S. at 687. The failure of a defendant to show either deficient performance or prejudice defeats his claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The defendant cannot show a different result would have occurred had counsel objected to his discretionary LFOs. Even if he had objected, the decision whether to impose or reduce amount of discretionary LFOs is within a trial court's discretion. The defendant fails to show that the trial court would have made a different decision. As a result, the defendant is unable to show he was prejudiced by the failure to object.

The defendant has failed to show that the totality of defense counsel's conduct was deficient and that any isolated deficient conduct was prejudicial.

D. CONCLUSION.

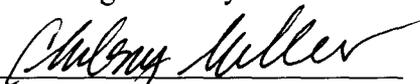
The state respectfully request that the court decline to review the defendant's challenge to legal financial obligations because he failed to preserve the alleged error for review.

Additionally, the court should deny the defendant's claim of ineffective assistance of counsel because defense counsel's overall

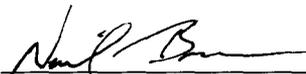
performance does not rebut the presumption of effective assistance and the defendant was not prejudiced. The defendant's convictions should be affirmed.

DATED: September 8, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



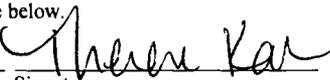
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Neil Brown
Legal Intern

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.

9.8.15 
Date Signature

PIERCE COUNTY PROSECUTOR

September 08, 2015 - 3:17 PM

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