

NO. 47257-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SMILEY,

Appellant.

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

The Honorable Marilyn Haan, Judge

**CORRECTED
BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. The sentencing court imposed discretionary legal financial obligations without considering Mr. Smiley's present or future ability to pay them.

2. The sentencing court erred in entering Section 2.5 of the Judgment and Sentence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court abused its discretion when it imposed discretionary legal financial obligations on Mr. Smiley without considering Mr. Smiley's individualized present or future ability to pay them?

C. STATEMENT OF THE CASE

Jerome Smiley is a veteran with a disability that prevents him from performing ordinary self-care tasks like getting dressed or putting on his shoes and causes him intense back pain. RP2¹ 199. He was in a romantic relationship with Christina Hilts that lasted approximately five years. RP1 52; RP2 198. They have a two-and-a-half year-old daughter together in addition to their own children. RP1 52. They lived together sometimes, but Mr. Smiley maintained a separate residence at his parents' house and would go back and forth when there were problems in the relationship.

¹ There are two volumes of verbatim report of proceedings for this appeal. Volume 1 is cited as "RP1" (pages 1-141) and Volume 2 as "RP2" (pages 142-333).

RP2 197-98. Ms. Hilts has her own apartment in Kelso, Washington. RP1 53.

The couple had ongoing disagreements related to their finances and other matters. Around July 8, 2014, Mr. Smiley punched a hole in Ms. Hilts's kitchen wall. RP1 54-55. A few days later, on July 11, Mr. Smiley and Ms. Hilts got into another argument, which centered on the couple's finances and division of child-care responsibilities. RP1 55.

Mr. Smiley was upset that Ms. Hilts had not paid the cable bill and that she did not have time to go shopping—or to let him go shopping—before she attended an event involving one of her children. RP1 56-59: RP2 199. Mr. Smiley needed to get food and other items from the store before he took his narcotic pain medications, which made it impossible for him to drive. RP2 199-201. Mr. Smiley felt that, by refusing to go shopping or watch their daughter while he went shopping, Ms. Hilts was being inconsiderate of him and the daily difficulties brought about by his disability. RP2 201.

After Ms. Hilts left for the event, Mr. Smiley texted her saying that he had spanked their daughter because he was so upset with Ms. Hilts and calling her a profane name. RP1 60-61. Ms. Hilts responded by asking him to take their daughter to daycare. RP1 60. When Ms. Hilts returned home, they continued to verbally argue. RP1 62. The argument and ensuing

altercation occurred while the child was present. RP1 74. Mr. Smiley recorded the confrontation using his cell phone's video camera. RP1 68.

During the argument, Mr. Smiley damaged Ms. Hilts's microwave with a wooden paddle. RP1 62-63. Mr. Smiley also threatened to take back some groceries he had given to her. RP1 66. She responded by taking the food and dumping it in the driveway. RP1 67. As the argument escalated, Mr. Smiley insulted Ms. Hilts by recounting damaging events from her childhood and telling her she was worthless. RP1 68. Mr. Smiley took her engagement ring and pretended to swallow it; later he said he loved her and tried to put the ring on her finger and hug her. RP1 69. She told him to get off of her, and he pushed her. She fell backwards over the couch and onto the floor. RP1 69. She was crying. RP1 70.

A struggle over Mr. Smiley's camera—which contained a memory card belonging to Ms. Hilts—ensued. RP1 72. Ms. Hilts attempted to retrieve the memory card from the camera, which had some of her work-related photographs on it. RP1 70-72. Ms. Hilts reached for the camera, and Mr. Smiley refused to give it to her. RP1 71. According to Ms. Hilts, Mr. Smiley punched her in the face with his right fist. RP1 72-73. She fell backwards, hitting the back of her head on the kitchen floor. RP1 74. She thinks she may have lost consciousness for a couple of seconds. RP1 74-75.

When she came to, their daughter was lying on top of her screaming. RP1 75. While on the floor, Ms. Hilts noticed that she had trouble moving her jaw. RP1 75-76, 99. It hurt to close her mouth, chew, and talk. RP1 81. It felt like her jaw was off center. RP1 81. She also felt nauseous. RP1 75-76.

Mr. Smiley continued packing and talking, and, at one point, offered to help her get off the floor. RP1 76. She told him he had really hurt her and asked him to leave the house. RP1 76. He did not leave immediately but kept packing and continued to argue with her. RP1 76. She eventually got up and went to the neighbors' home with their daughter. RP1 77. While there, she lay on the floor and vomited. RP1 77-78.

The neighbors helped Ms. Hilts call her sister, who came over and called the police. RP1 77, 97-98. Kelso police officer Douglas Lane responded to the call and arrived at about the same time as another officer, Daryl Stair. RP1 102-04, 126, 128-29. Officer Lane went to the neighbors' home and saw Ms. Hilts lying on the floor. RP1 107. She appeared to be in pain. RP1 110-11. When Officer Stair saw her, Ms. Hilts was crying and had trouble talking. RP1 130. She told him she thought her jaw was either broken or dislocated. RP1 131.

After talking to the police briefly, Ms. Hilts was taken to St. John Medical Center's emergency room. RP1 79-80, 98. Dr. Heidi Solberg-Shankle examined her. RP2 179, 181. Ms. Hilts told Dr. Solberg-Shankle she had been punched in the jaw and had fallen down, hit her head, and been knocked out. RP2 182. She complained of headaches, pain in her jaw, head, and neck, and nausea. RP2 182. Dr. Solberg-Shankle observed that Ms. Hilts's jaw was quite tender on both sides. RP2 183. She ordered a CT scan to see if Ms. Hilts's jaw had been fractured. After seeing the CT scan, she concluded it had not. RP2 184. She also concluded it was not dislocated at the time of the CT scan, though she left open the possibility it might have been dislocated at some earlier point. RP2 186-87. Dr. Solberg-Shankle diagnosed Ms. Hilts with physical assault, contusion of the face, probable concussion, and mild anemia. RP2 186. Although Ms. Hilts's injuries were consistent with physical assault, Dr. Solberg-Shankle acknowledged they might have been caused by another type of incident. RP2 189. These diagnoses were based in part on Ms. Hilts's account of what had happened. RP 190. Dr. Solberg-Shankle did not observe any dental injuries, or any "battle signs" or "raccoon eyes," two injuries that result from skull fractures. RP2 184, 190-91.

While Ms. Hilts was being treated, Officer Stair sent other officers to locate Mr. Smiley. RP1 132. They found him and took him into

custody. Officer Stair spoke to him at the jail. RP1 133. Mr. Smiley told Officer Stair he had damaged Ms. Hilts's microwave, and gave Officer Stair the recording he had made of their altercation. RP1 133. Officer Stair listened to the recording and had his police department make a copy of it. RP1 134. During his conversation with Mr. Smiley, he examined Mr. Smiley's hands and did not notice any marks on them. RP2 177.

The next day, Officer Stair went to Ms. Hilts's home and photographed the damage to her microwave and kitchen drywall. RP2 136. The same day, Ms. Hilts made a formal statement to Officer Lane at the Kelso police department. RP1 112. Officer Lane observed injuries consistent with the description above and took photographs. RP1 112-23. A few days after the injuries, Ms. Hilts no longer had trouble talking and, within two or three weeks, could eat normally again. RP1 81-82, 99. However, her headaches continued for about a month. RP1 82. She testified that her tooth was chipped and showed it to the jury. RP1 82, 85-86, 113.

Mr. Smiley was charged with Assault in the Second Degree—
Domestic Violence² and Malicious Mischief in the Third Degree—
Domestic Violence. CP 1-5.

² For the assault charge, the amended information alleged that Mr. Smiley "did intentionally assault Christina Hilts, a family or household member, a human being, and thereby recklessly inflicted substantial bodily harm, to wit: fractured tooth, jaw injury,

During the ensuing jury trial, the state introduced evidence consistent with the facts described above, including photographs of Ms. Hilts's injuries, the recording of the altercation Mr. Smiley had provided to police, and testimony from Ms. Hilts, her neighbor, police officers involved in the investigation, and the emergency room doctor who examined Ms. Hilts. RP1 50-86, 92-98, 101-25, 126-41.

After the state rested its case, Mr. Smiley testified in his own defense. His account of the incident differed sharply from Ms. Hilts's. He testified that he never punched her. RP2 207. Instead, Ms. Hilts fell while struggling with Mr. Smiley over a camera bag. RP2 202-05. According to Mr. Smiley, during this struggle, Ms. Hilts grabbed the bag and Mr. Smiley's body, slapped him repeatedly, and hurt him. RP2 205-07, 223-24. Because she would not stop hurting him and he was afraid she would destroy the camera, he swiped her hands off the bag so that he could get away from her. RP2 206-07, 221. Ms. Hilts lost her balance, pushed a table and chair out of the way, and fell backward and collapsed, smacking her chin on a half wall that separated the home's living and dining rooms. RP2 206, 211. Mr. Smiley tried to help her get up. RP2 207. He observed

loss of consciousness, and/or concussion, upon such person contrary to RCW 9A.36.021(1)(a) and RCW 10.99.020 and RCW 26.50.010(1) and against the peace and dignity of the State of Washington." CP 3.

her during the duration of the accident, and it did not appear to him that she had lost consciousness at any point. RP2 207, 211.

To prove that he did not hit Ms. Hilts, Mr. Smiley also testified that his disabilities and ensuing surgery made it painful for him to throw a punch. RP2 212. While on military duty, he had been ejected from a vehicle and injured his spine in a way that prevented him from making certain movements—including turning movements—without risking nerve pain that was so intense it would cause him to collapse. RP2 212-13.

After considering the evidence, the jury found Mr. Smiley guilty on both counts. RP2 314-17.

The court heard sentencing on February 2, 2015. RP2 320-32. It sentenced Mr. Smiley to nine months in jail on the second-degree assault and to 364 days (with 334 days suspended) on the third-degree malicious mischief count. RP2 329-29; CP 12-13. The two sentences were to be served consecutively. CP 12-13. It also ordered him to serve 18 months in community custody, an order it later amended to 12 months. RP2 329; CP 14; Supplemental Designation of Clerk's Papers, Order Modifying Sentence (sub. nom 41). Finally, the court imposed both mandatory and discretionary legal financial obligations. CP 14-15. However, the court never made individualized findings regarding Mr. Smiley's ability to pay

those obligations. RP2 320-332. Mr. Smiley timely filed a notice of appeal. CP 21-33.

D. ARGUMENT

The court violated statutory mandate in failing to consider Mr. Smiley's ability to pay discretionary legal financial obligations.

The court ordered Mr. Smiley to pay these discretionary legal financial obligations (LFOs): (1) \$100 domestic violence assessment; (2) \$250 jury demand fee; (3) \$150 incarceration fee; and (4) \$825 court-appointed attorney fee.³ CP 15. The court erred in imposing these LFOs because it failed to make an individualized inquiry into Mr. Smiley's current and future ability to pay them.

The court may order a defendant to pay costs under RCW 10.01.160. However, the statute also provides “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

A trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. *State v. Blazina*, 182 Wn.2d 827, 834,

³ The court also ordered a \$500 victim assessment, a \$200 criminal filing fee, and a \$100 DNA fee. CP 15. Those fees are not at issue on appeal because they are mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

344 P.3d 680 (2015); *State v. Rivas*, ____P.3d ____, 2015 WL 5166741 at *1 (Mem.) (Wn. Sept. 2, 2015). The record reflects no consideration here. RP2 320-332.

In the judgment and sentence, this pre-printed, generic language appears:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's 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).

CP 11.

Mr. Smiley challenges this finding on the ground that the court did not consider his individual financial resources and the burden of imposing such obligations on him. The boilerplate finding regarding ability to pay lacks support in the record. RP2 320-32.

Further, "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." *Blazina*, 344 P.3d at 683. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentencing hearing. *Id.*

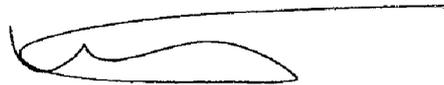
The issue is ripe for review. *Id.* And although defense counsel did not object, an appellate court may reach this error consistent with RAP 2.5. *Id.* at 682. Mr. Smiley requests this Court reach the merits. The LFO system is broken.⁴ *Id.* at 683. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing thereby sending a clear signal to trial judges about the importance of individualized inquiry into ability to pay legal financial obligations.

E. CONCLUSION

Mr. Smiley's case should be remanded to the trial to hold a hearing to determine Mr. Smiley's individualized ability to pay LFOs.

Respectfully submitted this 29th day of September 2015.

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⁴ Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Blazina*, 344 P.3d at 684.

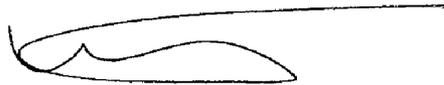
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Corrected Brief of Appellant to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Robert Smiley, P.O. Box 181, Castle Rock, WA 98611.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 29, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Robert Smiley, Appellant

COWLITZ COUNTY ASSIGNED COUNSEL

September 29, 2015 - 2:45 PM

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