

NO. 47257-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT JEROME SMILEY,

Appellant.

RESPONDENT'S BRIEF

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Rules

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Because Smiley did not object to his legal financial obligations (“LFOs”) at the time of sentencing, he failed to preserve the issue for review.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. Did Smiley waive his right to challenge the imposition of LFOs on appeal, when he did not object at the time of sentencing?**

III. STATEMENT OF THE CASE

On January 16, 2015, after a jury trial, Robert Smiley was convicted of Assault in the Second Degree – Domestic Violence and Malicious Mischief in the Third Degree – Domestic Violence for assaulting his girlfriend Christina Hilts and damaging her property.¹ RP at 314-15. On February 2, 2015, the court sentenced Smiley to the high end of his standard range for his assault conviction and an additional thirty days consecutive on his malicious mischief conviction. RP at 328-29. The court also imposed legal financial obligations (“LFOs”). RP at 328; CP at 15. Smiley did not object to the LFOs. RP at 325-332.

¹ An argument leading to the assault and the assault itself were both audio recorded. RP at 68. 156-76. The jury heard this audio recording. RP at 156-57. While it is unnecessary to restate what was said here, Smiley’s verbal abuse of Hilts was extremely cruel. RP at 158-59. The entire incident occurred in front of Hilts and Smiley’s two-and-a-half-year-old daughter, who is heard on the recording telling Smiley to stop and screaming after Hilts is assaulted. RP at 52, 163, 168-69.

IV. ARGUMENT

A. SMILEY WAIVED HIS RIGHT TO CHALLENGE HIS LEGAL FINANCIAL OBLIGATIONS BY FAILING TO OBJECT TO THEIR IMPOSITION AT THE TIME OF SENTENCING.

At the time of sentencing, Smiley did not object to the imposition of his legal financial obligations (“LFOs”); therefore he failed to preserve this issue for review. “A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Under RAP 2.5(a) an appellate court may refuse to review any claim not raised in the trial court. However, the rule does permit three types of errors to be 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) The Court of Appeals has clarified this standard: “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. We may decline to address an issue under RAP 2.5(a) sua sponte.” *State v. Kuster*, 175 Wn.App. 420, 425, 306 P.3d 1022 (2013) (internal citations omitted).

In *State v. Lyle*, 188 Wn.App. 848, 851, 355 P.3d 327 (2015), Irving Lyle was ordered to pay LFOs as part of his sentence. Although the

court failed to make an individualized determination on his ability to pay prior to imposing the LFOs, Lyle did not object to the LFOs at the time of sentencing. *Id.* at 851-52. Lyle’s sentencing hearing occurred March 14, 2014, after the Court of Appeals had issued its decision in *State v. Blazina*, 174 Wn.App. 906, 911, 301 P.3d 492 (2013), *remanded* 182 Wn.2d 827, 344 P.3d 680 (2015). *Id.* at 852. The Court of Appeals explained: “Our decision in *Blazina*, issued before Lyle’s March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal.” *Id.* Thus, because Lyle did not object to his LFOs when they were ordered, he failed to preserve the issue for appeal. *See id.*

Here, the facts presented by Smiley’s claim regarding his LFOs are nearly identical to those present in *Lyle*. Sentencing occurred February 2, 2015, after the Court of Appeals had issued its *Blazina* opinion. Smiley was on notice that if he failed to object to LFOs, he would fail to preserve the issue for review. When the court imposed LFOs as part of Smiley’s

sentence, he failed to object. Because Smiley did not object to the imposition of his LFOs, he failed to preserve the issue for review.²

V. **CONCLUSION**

For the above stated reasons, Smiley's sentence should be affirmed.

Respectfully submitted this 29th day of January, 2016.



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² It is noteworthy that Smiley appears to have the ability to pay his LFOs. If he was injured while performing military duties as he claimed at trial, then it is a near-certainty that he would qualify and receive payments as a disabled veteran. RP at 212. Additionally, Smiley testified to receiving commodities from the Cowlitz Indian Tribe. RP at 225. On the recording, Smiley indicated that he had paid for the property and food in the home. RP at 161-62. He also testified that he had money to buy groceries, owned an \$850 camera, a phone with a video recorder, and household items. RP at, 200-01, 215, 220-21.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on January 29th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 29, 2016 - 3:28 PM

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