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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ROGER FORD, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 17-1-00379-4

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1) Although the trial court conducted almost no on-the-record inquiry into Ford's ability to pay them before imposing $600 in discretionary LFOs at sentencing, this Court should deny review of this issue because Ford did not preserve the issue with an objection in the trial court; but, even if this Court reviews the merits of the claim, the Court should find that the trial court's inquiry was adequate for the amount of money at issue.

2) Because Ford has not, and cannot, show that there is a reasonable probability that the trial court would not have imposed $600 in discretionary LFOs if his trial attorney would have objected to them, his claim of ineffective assistance of counsel should fail.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Ford's statement of facts except where additional or contrary facts are offered below, as needed to develop the State's argument. RAP 10.3(b).

C. ARGUMENT

1) Although the trial court conducted almost no on-the-record inquiry into Ford's ability to pay them before imposing $600 in discretionary LFOs at sentencing, this Court should deny review of this issue because Ford did not preserve the issue with an objection in the trial court; but, even if this Court reviews the merits of the claim, the Court should find that the trial court's inquiry was adequate for the amount of money at issue.

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a) This court should decline to consider Ford's challenge of the trial court's imposition of LFOs because he did no preserve the issue with an objection in the trial court.

At the sentencing hearing, Ford's attorney informed the court that Ford was "employable on a limited basis because of lack of having a driver's license, probably for the next year, so I'd ask the Court to take that into consideration when determining what the LFO's are going to be." RP 10. The trial court then imposed $800 in mandatory LFOs and $600 in discretionary LFOs, to which Ford's counsel not only did not object, but instead said, "Thank you, Your Honor." RP 11.

Although Ford's attorney did not explain exactly what he meant by employment on a limited basis, the State contends that because counsel did not object or ask for the court to further inquire, he did not seem to think that Ford would have any real inability to pay the $600 in discretionary costs at issue. If he would have objected, then the court could have made further inquiry to complete the record and to support the imposition of these LFOs.

Generally, the failure to object to the sentencing court's imposition of LFOs waives the issue for appeal under RAP 2.5(a). *State v. Glover*, ___ Wn. App.2d ___, 423 P.3d 290, 292 (No. 49944-4-II, Aug. 7, 2018) (citing *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015)). Although this Court is not required to reach the merits of Ford's challenge

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of the discretionary LFOs in this case, it has the discretion to do so. *Id.* Nevertheless, given the small amount of LFOs at issue, $600, the State contends that this Court should decline to address Ford's unpreserved objection on appeal.

b) Although the trial court conducted almost no inquiry into Ford's ability to pay discretionary costs, the $600 at issue was not so substantial that it suggests that Ford lacks the ability to pay.

A claim that the trial court did not conduct an adequate inquiry into a defendant's ability to pay discretionary LFOs is reviewed de novo on appeal. *State v. Glover*, ___ Wn. App.2d ___, 423 P.3d 290, 292 (No. 49944-4-II, Aug. 7, 2018).

Here, the trial court made no inquiry into Ford's ability to pay, except that the court apparently accepted defense counsel's statement that Ford was employable, but only on a limited basis, because he had no driver's license. RP 10. But, arguably, many kinds of employment do not require a driver's license, and arguably the amount of $600 is not so oppressive that an employable defendant could not pay it.

Nevertheless, *Glover* reiterates the requirement in *Blazina* that the sentencing court conduct an individualized, on-the-record inquiry into the defendant's present and future ability to pay discretionary LFOs, to include employment history and other debts, before imposing

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discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *State v. Glover*, ___ Wn. App.2d ___, 423 P.3d 290 (No. 49944-4-II, Aug. 7, 2018). Therefore, if this Court allows Ford to bring this unpreserved claim of error for the first time on appeal, both *Blazina* and *Glover* support his claim of error. However, the State suggests that because the amount of money at issue is only $600, the trial court's inquiry was adequate to support its imposition of these discretionary LFOs, particularly where defense counsel did not object, thus indicating that the amount ordered was reasonable.

2) Because Ford has not, and cannot, show that there is a reasonable probability that the trial court would not have imposed $600 in discretionary LFOs if his trial attorney would have objected to them, his claim of ineffective assistance of counsel should fail.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would

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have been different. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Ford has not shown that there is a reasonable probability that the outcome of the sentencing hearing would have been different if his attorney would have objected to the imposition of $600 in discretionary LFOs. There is nothing in the record to show that it is reasonably probable that Ford lacks the present and future ability to pay $600 in discretionary LFOs. Instead, the record shows that Ford is employable, although temporarily on a limited basis because he temporarily lost his license due to his conviction in this case. RP 10. On these facts, Ford cannot and has not shown that his counsel was ineffective, and his claim of ineffective assistance of counsel, therefore, should be denied. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

D. CONCLUSION

The State contends that, because he failed to preserve the claim with an objection in the trial court, this Court should deny review of Ford's claim that the trial court failed to conduct an adequate, on-the-record inquiry into his ability to pay discretionary LFOs before imposing them at sentencing. However, if this Court does review Ford's claim, the

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State contends that although the trial court conducted virtually no on-the-record inquiry into Ford's present and future ability to pay discretionary LFOs at the time of sentencing, the amount of discretionary LFOs at issue was only $600, and defense counsel's representation that Ford had the ability to work and was only temporarily limited in that ability, due to a temporary suspension of his driver's license, was sufficient inquiry for the amount of money at issue.

Finally, the State contends that Ford's claim of ineffective assistance of counsel should fail because Ford has not, and cannot, show that there is a reasonable probability that the outcome would have been different if his attorney would have objected when the trial court ordered $600 in discretionary costs.

DATED: October 29, 2018.

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