

NO. 31629-7-III

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

STATE OF WASHINGTON, RESPONDENT

v.

LUKE MICKLE, APPELLANT

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FILED  
JAN 02, 2014  
Court of Appeals  
Division III  
State of Washington

Appeal from the Superior Court of Grant County  
The Honorable Evan E. Sperline

No. 08-1-02197-3

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**BRIEF OF RESPONDENT**

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

Did the trial court abuse its discretion in ordering the defendant to pay costs when the issue is neither preserved for appeal nor ripe for review?

**B. STATEMENT OF THE CASE.**

On April 24, 2013, trial began for Luke Mickle on the charge of malicious harassment on or about February 18, 2013. CP 3. This case was assigned for trial to the Honorable Judge Evan Sperline. After hearing all of the evidence, a jury found the defendant of felony harassment, a lesser-included offense. Mickle was sentenced April 30, 2013 by Judge Sperline to eight months, the middle of the standard range. CP 15. He was also ordered to pay \$1,450 in total financial obligations, CP 15, consisting of \$700 in mandatory costs and \$750 discretionary costs, CP 25-26.

Along with many other statements made before the judgment was determined, Mickle's lawyer stated, "Judge, my client will be hopefully gainfully employed after this; he'll be able to pay fines and fees." CP 9. Additionally, the State stated that the defendant was strong and healthy-looking, which also was not contradicted. CP 6.

**C. ARGUMENT**

*1. The issue was not preserved for appeal.*

RAP 2.5(a) grants the Appellate Court discretion in refusing to

review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (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. *Id.*

In this case, the defendant does not claim any of the three circumstances listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. CP 11-12, 15. Therefore, the defendant did not properly preserve this issue for appeal.

The Washington Court of Appeals, Division II recently decided this issue. In *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), Blazina argued that the trial court's finding that he had the future ability to pay his LFOs was in error and that the record did not support the "boilerplate finding... because there was no discussion on the record and no documentary evidence presented to support it." Blazina challenged the same fees in question here and did not object to the finding, made at sentencing, that he had the current or likely future ability to pay. *Id.* The court distinguished that case from *Bertrand*, 165 Wn. App. at 404, on grounds that Bertrand had disabilities which might affect that finding, while nothing in Blazina's case would similarly affect that finding.

Because Blazina did not object during sentencing and there was no claim of a particularized reason Blazina could not pay financial obligations, the court refused to let him raise the issue for the first time on appeal. *Id.*

Mickle has no disability or other particularized reason he cannot pay financial obligations. In fact, he is apparently strong and healthy looking. He did not object to this amount during his sentencing, and his lawyer stated he would be able to pay his financial obligations. For these reasons, the court should not consider this matter because the issue is not properly before the court.

2. *The trial court did not err in ordering the defendant to pay legal financial obligations.*

Different components of defendant's financial obligations require separate analysis. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991).

While the sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation before imposing attorney fees. *Id.*

Pursuant to RCW 10.01.160, the court may require defendants to

pay *court costs* and other assessments associated with bringing the case to trial. The statute also includes the following constitutional safeguards:

(1) A sentencing court may impose repayment of court costs only if it determines that the defendant is or will be able to pay, and

(2) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs.

RCW 10.01.160(1)(2).

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

Here, the defendant argues that the trial court erred when it concluded that he had the present or future ability to pay restitution and other LFOs. The defendant relies on *Bertrand* for the proposition that the record does not contain evidence that demonstrates the defendant's present or future ability to pay LFOs. Brief of Appellant 9, citing *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011). The Court in

**Bertrand** found error in the trial court's finding that Bertrand had the present or future ability to pay LFOs because she was disabled and the record contained no evidence to support its finding.

Respectfully, Mickle is wrong even in the most favorable reading of the law because the record *does* contain evidence that the defendant has the present or future ability to pay his LFOs. His lawyer *said* he did. CP 9. Additionally, this case is distinguishable from **Bertrand** because the record shows that the defendant is not disabled. Among other things, the record shows that the defendant is strong and healthy. CP 6.

The court should affirm the trial court's imposition of LFOs because in conjunction with statutory authority which compels the court to impose LFOs, the court properly found that the defendant has the present and future ability to pay LFOs.

3. *The issue is not ripe for review.*

The courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3).

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify

payment of costs. RCW 10.01.160(1)(2). The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009), citing *Baldwin*, 63 Wn. App. at 310-11. The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Id.*

Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. *State v. Woodward*, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of

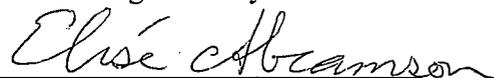
LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. The time to challenge the costs is at the time the State seeks to collect them because while the defendant may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature.

#### **D. CONCLUSION**

For the foregoing reasons, the State asks this court to affirm the judgment and sentence below.

DATED: December 31, 2013

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WSBA # 45173

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31629-7-III
	)	
vs.	)	
	)	
LUKE MICKLE,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant, containing a copy of the Brief of Respondent in the above-entitled matter.

Luke Mickle  
c/o Debra Polito  
PO Box 1942  
Moses Lake WA 98837

Dated: January 2, 2014.

  
\_\_\_\_\_  
Kaye Burns