

FILED

APRIL 8, 2015

Court of Appeals
Division III
State of Washington

NO. 32587-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CHILDS

Appellant.

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

The Honorable Scott Gallin, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. CHILDS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, appellant Benjamin Childs asserts he was denied effective assistance of counsel when defense counsel failed to renew a motion to sever during trial and failed to request a limiting instruction informing the jury it was to consider the charges separately.¹ Brief of Appellant (BOA) at 11-23. In response, the State first claims appellant made a tactical decision not to renew the motion. Brief of Respondent (BOR) at 12-13. As shown below, the record belies this.

In deciding whether counsel's performance was deficient, appellate courts will not find deficient representation if the record demonstrates counsel's actions were tied to a legitimate strategic or tactical rationale. State v. Saunders, 120 Wn. App. 800, 819, 86 P.3d 232 (2004). The State suggests that, because the motion to

¹ The State wrongly claims (without citation) that Childs is only challenging the consolidation of the two assault charges. Appellant's opening brief expressly assigned error to counsel's failure to renew the motion to sever the two cases at issue – one case encompassing both the burglary and assault charges pertaining to Perrigo and the other case encompassing both the assault and the witness tampering charges pertaining to Provost. BOA at 1-2.

sever at trial ostensibly came with significant sentencing risks, defense counsel must have made a tactical decision that severance was not a good option. BOR at 12. However, as the State points out in its brief, “Defense counsel was fully aware of such a risk, as he argued this very issue during the motion to sever prior to trial.” BOR 12 (emphasis added).

Defense counsel, aware of the sentencing risks when he decided to seek severance, obviously weighed these risks and determined there was a tactical advantage to severing the two cases. Moreover, the record demonstrates defense counsel maintained this view throughout trial and into sentencing. RP 451-52. Given this, there was no legitimate excuse for not renewing the severance motion at trial. Indeed, it was objectively unreasonable for trial counsel not to do so. See, BOA at 13-15 (detailing argument further).

Next, the State argues that because CrR 4.4(a)(2) – the court rule regarding renewal of a severance motion – is permissive rather than mandatory, defense counsel could reasonably have chosen not to renew the motion. BOR 14-15. However, while counsel may not be required by a court rule to undertake a certain action, this certainly does not prove counsel’s decision not to renew

the motion was objectively reasonable. The court rule may be permissive, but effective representation is mandatory.

Counsel was required to renew his motion if for no other reason than to preserve the issue for appeal. Case law establishes that failing to renew an unsuccessful severance motion constitutes a waiver. State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329 (1987). Given this law, when counsel believes a pretrial severance motion was wrongly denied and the client would benefit from severance – as was the case here – he has an obligation to renew that motion and preserve the issue, regardless of the permissive nature of the CrR 4.4(a)(2).

Next, the State claims defense counsel made a reasonable decision not to take a “third run at severance” because it had been twice denied and another denial was simply a fait accompli. BOR at 15. However, the State ignores the fact that the judge at trial had never considered the issue before. This was a trial judge who entertained his own questions about the pretrial process. RP 465. Given that this judge had never ruled on the issue, the prior denials were not so prophetic as to make counsel’s failure to renew the motion reasonable. Competent counsel would have renewed the

severance motion in front of this new judge rather than simply rolling over on the issue based on the prior rulings.

Turning to the question of prejudice, the State claims Childs cannot show prejudice because the renewed motion to sever would have been denied. BOR 16. This is not so. As argued in detail in appellant's opening brief, the motion likely would have been granted had it been renewed. See, BOA at 15-23 (arguing this point in detail).

Joinder was particularly prejudicial in this case. The State appears to gloss over the fact that joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Here, this inherent prejudice was amplified by the fact the jury was never given a WPIC 3.01 instruction or some other limiting instruction directing it to decide each count separately.

It is well established under Washington law that the use of a limiting instruction informing the jury it must decide each count separately is a paramount consideration when determining whether counsel's failure to request an instruction was prejudicial.² E.g.,

² The State argues only that appellant cannot show prejudice – apparently conceding that defense counsel's failure to propose such an instruction constitutes deficient performance. RP 30.

State v. Sutherby, 165 Wn.2d 870, 885, 204 P.3d 916 (2009).

Indeed, the record demonstrates that the judge who denied the motion to sever specifically contemplated that such an instruction would be used to limit the prejudicial impact of joining the cases.³

RP 12.

The State claims the giving of this instruction was unnecessary because it would have added no protection against prejudice. RP 30-31. However, the pre-trial judge clearly did not see it that way, believing the “proper course” was to give this instruction to limit the inherent prejudice. Unfortunately, trial counsel failed to follow through and make sure this happened. This constituted ineffective assistance of counsel.

For the reasons stated above and those in appellant’s opening brief, this Court should find appellant was denied effective assistance of counsel and reverse his convictions.

³ Specifically the judge stated:

I understand the cumulative evidence concerns, and that’s where the court comes into the – the appropriate jury instructions, and the instructions to the jury that just because they have multiple counts, you have to find these individually. So I think there is a proper recourse here.

RP 12.

II. THIS COURT SHOULD REMAND WITH INSTRUCTIONS FOR THE SENTENCING COURT TO MAKE AN ON-THE-RECORD INQUIRY AS TO WHETHER CHILDS HAS THE ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS (LFOs).

In his opening brief, appellant argued that the trial court erred when it failed to comply with RCW 10.01.160(3) before ordering Childs to pay a discretionary LFO. BOA at 23-41. In response, the State claims the issue is not ripe for review, citing State v. Blazina, No. 89028–5 (Wash. March 12, 2015).⁴ BOR at 34. The State misreads that decision.

Blazina does not support the proposition that an erroneously imposed LFO order is not ripe for review on direct appeal. In Blazina, the State put forth the same ripeness argument. The Washington Supreme Court summarily rejected that argument, holding that all the elements of ripeness are met in LFO challenges such as the one raised here. Appendix A at 4, n. 1.

While the issue of ripeness is not in question, this Court must still decide whether to exercise its discretion to consider an LFO challenge that is made for the first time on appeal. Appendix A at 6. Given the trial court's failure to conduct any semblance of

⁴ A copy of the opinion is attached as appendix A.

an inquiry into Childs' ability to pay and given his indigent status,⁵ this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal.

The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Appendix A at 8-9. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in reducing recidivism. Appendix A at 9.

Hence, as a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As

⁵ Appellant was appointed publically funded counsel both at trial and on appeal, based on his indigent status. Supp. CP __ (sub no. 72 "Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense."

Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider on direct appeal whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, the fact is “the state cannot collect money from defendants who cannot pay.” Appendix A at 9. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case to actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. Unquestionably, the trial court erred in imposing discretionary LFOs without making any inquiry into Childs’ ability to

pay. The Supreme Court has held that “RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay” before a court may impose legal financial obligations. Appendix A at 12. This did not happen.

The pre-formatted language used here, and in the majority of courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). Appendix A 10-11. The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of such boilerplate and remand for the trial court to follow the law.

For these reasons, this Court should exercise its discretion, accept review, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Childs' ability to pay discretionary LFOs.

B. CONCLUSION

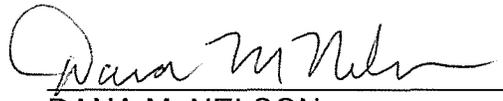
For the reasons stated above and those in appellant's opening brief, this Court should reverse appellant's conviction. Alternatively, it should vacate the LFO order and remand with instructions for the trial court to determine whether appellant has the ability, or likely future ability, to pay.

DATED this 8TH day of April, 2015.

Respectfully submitted,

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APPENDIX A

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF WASHINGTON
DATE **MAR 12 2015**
Madsen CJ
CHIEF JUSTICE

This opinion was filed for record
at 8:00 am on March 12, 2015

[Signature]
Ronald R. Carpenter
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 89028-5
)	(consol. w/No. 89109-5)
v.)	
)	
NICHOLAS PETER BLAZINA,)	
)	
Petitioner.)	En Banc
_____)	
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	
)	
MAURICIO TERRENCE PAIGE-COLTER,)	Filed <u>MAR 12 2015</u>
)	
Petitioner.)	
_____)	

MADSEN, C.J.—At sentencing, judges ordered Nicholas Blazina and Mauricio Paige-Colter to pay discretionary legal financial obligations (LFOs) under RCW 10.01.160(3). The records do not show that the trial judges considered either defendant’s ability to pay before imposing the LFOs. Neither defendant objected at the time. For the first time on appeal, however, both argued that a trial judge must make an individualized

inquiry into a defendant's ability to pay and that the judges' failure to make this inquiry warranted resentencing. Citing RAP 2.5, the Court of Appeals declined to reach the issue because the defendants failed to object at sentencing and thus failed to preserve the issue for appeal.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. In this case, we hold that the Court of Appeals did not err in declining to reach the merits. However, exercising our own RAP 2.5 discretion, we reach the merits and hold that 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 LFOs. Because the trial judges failed to make this inquiry, we remand to the trial courts for new sentence hearings.

FACTS

A. *State v. Blazina*

A jury convicted Blazina of one count of second degree assault, and the trial court sentenced him to 20 months in prison. The State also recommended that the court impose a \$500 victim penalty assessment, \$200 filing fee, \$100 DNA (deoxyribonucleic acid) sample fee, \$400 for the Pierce County Department of Assigned Counsel, and \$2,087.87 in extradition costs. Blazina did not object, and the trial court accepted the State's recommendation. The trial court, however, did not examine Blazina's ability to pay the discretionary fees on the record. Instead, Blazina's judgment and sentence included the following boilerplate language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defend[ant]'s past, 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. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

Clerk's Papers at 29.

Blazina appealed and argued that the trial court erred when it found him able to pay his LFOs. The Court of Appeals declined to consider this claim because Blazina "did not object at his sentencing hearing to the finding of his current or likely future ability to pay these obligations." *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013). We granted review. *State v. Blazina*, 178 Wn. App. 1010, 311 P.3d 27 (2013).

B. *State v. Paige-Colter*

The State charged Paige-Colter with one count of first degree assault and one count of first degree unlawful possession of a firearm. A jury convicted Paige-Colter as charged. The trial court imposed the State's recommended 360-month sentence of confinement. The State also recommended that the court "impose . . . standard legal financial obligations, \$500 crime victim penalty assessment, \$200 filing fee, \$100 fee for the DNA sample, \$1,500 Department of Assigned Counsel recoupment . . . [, and] restitution by later order." Paige-Colter Verbatim Report of Proceedings (Paige-Colter VRP) (Dec. 9, 2011) at 6. Paige-Colter made no objection. The trial court accepted the State's recommendation without examining Paige-Colter's ability to pay these fees on the record. Paige-Colter's judgment and sentence included boilerplate language stating the court considered his ability to pay the imposed legal fees.

Paige-Colter appealed and argued that the trial court erred when it imposed discretionary LFOs without first making an individualized inquiry into his ability to pay. The Court of Appeals concluded that Paige-Colter waived these claims by not objecting below. *State v. Paige-Colter*, noted at 175 Wn. App. 1010, 2013 WL 2444604, at *1. We granted review on this issue and consolidated the case with *Blazina*. *State v. Paige-Colter*, 178 Wn.2d 1018, 312 P.3d 650 (2013).

ANALYSIS

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.¹ It is well settled that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013). The text of RAP 2.5(a) clearly delineates three exceptions that allow an appeal as a matter of right. *See* RAP 2.5(a).²

Blazina and *Paige-Colter* do not argue that one of the RAP 2.5(a) exceptions applies. Instead, they cite *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999)

¹ The State argues that the issue is not ripe for review because the proper time to challenge the imposition of an LFO arises when the State seeks to collect. Suppl. Br. of Resp’t (*Blazina*) at 5-6. We disagree. “Three requirements compose a claim fit for judicial determination: if the issues are primarily legal, do not require further factual development, and the challenged action is final.” *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr’g Exam’r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). A challenge to the trial court’s entry of an LFO order under RCW 10.01.160(3) satisfies all three conditions.

² By rule, “a party may raise the following claimed errors for the first time in the appellate court: (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).

and argue that “it is well established that illegal or erroneous sentences may be challenged for the first time on appeal,” suggesting that they may challenge unpreserved LFO errors on appeal as a matter of right. Suppl. Br. of Pet’r (Blazina) at 3. In *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014), a recent unanimous decision by this court, we said that *Ford* held unpreserved sentencing errors “may be raised for the first time upon appeal because sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Jones*, 182 Wn.2d at 6. However, we find the exception created by *Ford* does not apply in this case.

Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny. As stated in *Ford* and reiterated in our subsequent cases, concern about sentence conformity motivated our decision to allow review of sentencing errors raised for the first time on appeal. *See Ford*, 137 Wn.2d at 478. We did not want to ““permit[] widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.”” *Id.* (quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)). Errors in calculating offender scores and the imposition of vague community custody requirements create this sort of sentencing error and properly fall within this narrow category. *See State v. Mendoza*, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) (prior convictions for sentencing range calculation); *Ford*, 137 Wn.2d at 475-78 (classification of out of state convictions for offender score calculation); *State v. Bahl*, 164 Wn.2d 739, 743-45, 193 P.3d 678 (2008) (community custody conditions of sentence). We thought it justifiable to review these challenges

raised for the first time on appeal because the error, if permitted to stand, would create inconsistent sentences for the same crime and because some defendants would receive unjust punishment simply because his or her attorney failed to object.

But allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way. The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case. *See* RCW 10.01.160(3). The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances. Though the statute mandates that a trial judge consider the defendant's ability to pay and, here, the trial judges erred by failing to consider, this error will not taint sentencing for similar crimes in the future. The error is unique to these defendants' circumstances, and the Court of Appeals properly exercised its discretion to decline review.

Although the Court of Appeals properly declined discretionary review, RAP 2.5(a) governs the review of issues not raised in the trial court for all appellate courts, including this one. While appellate courts normally decline to review issues raised for the first time on appeal, *see Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005), RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right.³ *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). Each

³ RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court."

appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

At a national level, organizations have chronicled problems associated with LFOs imposed against indigent defendants. These problems include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. In 2010, the American Civil Liberties Union issued a report that chronicled the problems associated with LFOs in five states—including Washington—and recommended reforms to state and to local officials. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010) (ACLU), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf. That same year, the Brennan Center for Justice at New York University School of Law published a report outlining the problems with criminal debt, most notably the impediment it creates to reentry and rehabilitation. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), *available at* <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>. Two years later, the Brennan Center followed up with “A Toolkit for Action” that proposed five specific reforms to combat the problems caused by inequitable LFO systems. ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION (2012), *available at* <http://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf>. As part of its second

proposed reform, the Brennan Center advocated that courts must determine a person's ability to pay before the court imposes LFOs. *Id.* at 14.

Washington has contributed its own voice to this national conversation. In 2008, the Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE (2008) (WASH. STATE MINORITY & JUSTICE COMM'N), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf. This conversation remains important to our state and to our court system.

As amici⁴ and the above-referenced reports point out, Washington's LFO system carries problematic consequences. To begin with, LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time. RCW 10.82.090(1); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. SOC. JUST. 963, 967 (2013). Many defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month. WASH. STATE MINORITY & JUSTICE COMM'N, *supra*, at 21. But on average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed. *Id.* at 22.

⁴ This court received a joint amici curiae brief from the Washington Defender Association, the American Civil Liberties Union of Washington, Columbia Legal Services, the Center for Justice, and the Washington Association of Criminal Defense Lawyers.

Consequently, indigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe. *See id.* at 21-22. The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs. *Id.* at 9-11; RCW 9.94A.760(4) (“For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime.”). The court’s long-term involvement in defendants’ lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. ACLU, *supra*, at 68-69. This active record can have serious negative consequences on employment, on housing, and on finances. *Id.* at 69. LFO debt also impacts credit ratings, making it more difficult to find secure housing. WASH. STATE MINORITY & JUSTICE COMM’N, *supra*, at 43. All of these reentry difficulties increase the chances of recidivism. *Id.* at 68.

Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs. *See* RCW 9.94A.030. For example, for three quarters of the cases sentenced in the first two months of 2004, less than 20 percent of LFOs had been paid three years after sentencing. WASH. STATE MINORITY & JUSTICE COMM’N, *supra*, at 20.

Significant disparities also exist in the administration of LFOs in Washington. For example, drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties. *Id.* at 28-29. Additionally, counties with smaller populations, higher violent crime rates, and smaller proportions of their budget spent on law and justice assess higher LFO penalties than other Washington counties. *Id.*

Blazina and Paige-Colter argue that, in order to impose discretionary LFOs under RCW 10.01.160(3), the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay. Suppl. Br. of Pet'r (Blazina) at 8. They also argue that the record must reflect this inquiry. We agree. By statute, "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3) (emphasis added). To determine the amount and method for paying the 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." *Id.* (emphasis added).

As a general rule, we treat the word "shall" as presumptively imperative—we presume it creates a duty rather than confers discretion. *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). Here, the statute follows this general rule. Because the legislature used the word "may" 11 times and the word "shall" eight times in RCW 10.01.160, we hold that the legislature intended the two words to have different meanings, with "shall" being imperative.

Practically speaking, this imperative under RCW 10.01.160(3) means that 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. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

CONCLUSION

At sentencing, judges ordered Blazina and Paige-Colter to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at

sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

Madsen, C.J.

WE CONCUR:

Johnson
Roberts

Wiggins, J.
Gonzalez, J.
Madhukar, J.

J.M.G.
U.F.T.

No. 89028-5

FAIRHURST, J. (concurring in the result)—I agree with the majority that RCW 10.01.160(3) requires a sentencing judge to make an individualized determination into a defendant’s current and future ability to pay before the court imposes legal financial obligations (LFOs). I also agree that the trial judges in these cases did not consider either defendant’s ability to pay before imposing LFOs. Because the error was unpreserved, I also agree that we must determine whether it should be addressed for the first time on appeal. RAP 2.5(a).

I disagree with how the majority applies RAP 2.5(a). RAP 2.5(a) contains three exceptions on which unpreserved errors can be raised for the first time on appeal. While the majority does not indicate which of the three exceptions it is applying to reach the merits, it is likely attempting to use RAP 2.5(a)(3), “manifest error affecting a constitutional right.”¹ However, the majority fails to apply the three part test from *State v. O’Hara*, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009), that established what an appellant must demonstrate for an appellate court to reach an unpreserved error under RAP 2.5(a)(3).

¹The other two exceptions, “(1) lack of trial court jurisdiction” and “(2) failure to establish facts upon which relief can be granted,” are not applicable. RAP 2.5(a).

In *O'Hara*, we found that to meet RAP 2.5(a)(3) and raise an error for the first time on appeal, an appellant must demonstrate the error is manifest and the error is truly of constitutional dimension. *Id.* at 98. Next, if a court finds a manifest constitutional error, it may still be subject to a harmless error analysis. *Id.*

Here, the error is not constitutional in nature and thus the unpreserved error cannot be reached under a RAP 2.5(a)(3) analysis. In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude but instead look at the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. *Id.*

The trial court judges in *Blazina* and *Paige-Colter* did not inquire into the defendants' ability to pay LFOs, which violates RCW 10.01.160(3). RCW 10.01.160(3) provides:

The 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.

Failing to determine a defendant's ability to pay LFOs violates the statute but does not implicate a constitutional right.

Although the unpreserved error does not meet the RAP 2.5(a)(3) standard from *O'Hara*, I would hold that this error can be reached by applying RAP 1.2(a),

which states that the “rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a) is rarely used, but this is an appropriate case for the court to exercise its discretion to reach the unpreserved error because of the widespread problems, as stated in the majority, associated with LFOs imposed against indigent defendants. Majority at 6.

The consequences of the State’s LFO system are concerning, and addressing where courts are falling short of the statute will promote justice. In *State v. Aho*, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999), we held that the supreme court “has the authority to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and to waive the rules of appellate procedure when necessary ‘to serve the ends of justice.’” (quoting RAP 1.2(c)). I agree with the majority that RCW 10.01.160(3) requires sentencing judges to take a defendant’s individual financial circumstances into account and make an individual determination into the defendant’s current and future ability to pay. In order to ensure that indigent defendants are treated as the statute requires, we should reach the unpreserved error.

For the foregoing reasons, I concur in the result only.

State v. Blazina; State v. Paige-Colter, No. 89028-5
(Fairhurst, J., concurring in the result)

Fairhurst, J.

Stephens, J.

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State v. Benjamin Childs

No. 32587-3-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 8th day of April, 2015, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 8th day of April, 2015.

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