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Division III
State of Washington
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consolidated with 33744-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MARIO TORRES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 15-1-00003-2

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The defendant's recantation does not entitle the defendant to a new trial.
- B. Trial counsel did not violate the defendant's Sixth Amendment right to effective counsel.
- C. The trial court did not violate the defendant's fundamental right to parent when it entered a no-contact order preventing him from having contact with his minor child.
- D. The trial court did not err in concluding the defendant had the present and future ability to pay his discretionary legal financial obligations.
- E. The Court should award appellate costs in the event the State substantially prevails on appeal.

II. STATEMENT OF FACTS

On the afternoon of December 22, 2014, Nicole Bernal went shopping and left her two-year-old son, N.B. with his father, defendant Mario Torres. CP 8. The next day, Nicole and her mother, Deanna Torres, took N.B. to Trios after they found him unresponsive. CP 7. The defendant also went to Trios. CP 7. After being questioned by the doctor, he left the hospital with his two other sons, eleven-year-old M.T. and one-year-old E.T. CP 7. N.B. was taken to Sacred Heart Hospital in Spokane. CP 7.

At Sacred Heart, Teresa Forshag, Advanced Registered Nurse Practitioner, discovered various injuries to N.B. which included intracranial bleeding; retinal hemorrhages; an old healing right humeral fracture; an abrasion to his right ear that was consistent with blunt force trauma; an upper lip bruise consistent with a blow to the mouth; and apparent bite marks on the right inner upper arm, left outer upper shoulder, right lower back, and right lower leg. CP 7.

N.B. died at Sacred Heart Hospital on December 26, 2014. CP 7. An autopsy was done and the preliminary determination was that N.B. died as the result of a homicide. CP 7-8. That preliminary determination was given to the Kennewick Police Department which initiated an investigation into the death of N.B. CP 7-8.

On January 1, 2015, a child forensic interviewer spoke with the defendant's son, M.T., who had been staying with the defendant and Nicole on December 22-23, 2014. CP 8. M.T. told the interviewer that N.B. was responsive while in his father's care and that N.B. had eaten some chicken nuggets during this time. CP 8. Later in the same interview, M.T. changed his description of what happened. CP 8. M.T. said he heard a loud bang while his father was taking care of N.B., and then heard N.B. crying loudly. CP 8. M.T. also said that his father told him that he had accidentally stepped on N.B.'s leg, causing him to fall hard and strike his

head on the bedpost. CP 8. M.T. said that N.B. never got up after this. CP 8.

M.T. told the interviewer that earlier in the day, the defendant and Nicole spoke with him about being interviewed by the police. CP 8. The defendant told M.T. not to say that N.B. had bumped his head and to make up a story that N.B. had eaten chicken nuggets the evening of December 22, 2014. CP 8. The defendant told M.T. to just make up lies. CP 8.

On January 2, 2015, the defendant was interviewed by law enforcement. CP 8. The defendant denied causing the injuries to N.B.; however, he stated that N.B. fell and struck his head on the side of the bed, causing the swelling to his upper lip. CP 8. He admitted that he did not want M.T. to talk to the police, and that he had told M.T. what to say to police. CP 8. The defendant told M.T. to tell the truth and to say that the defendant did not do anything to N.B. CP 8.

On January 6, 2015, the defendant was charged with Tampering with a Witness for speaking with M.T. who may have been called as a witness in a criminal investigation of the abuse or neglect of a minor. CP 5. The defendant entered an *Alford* plea to the charge of attempting to induce another, whom he had reason to believe was about to be called as a witness, to withhold from law enforcement information that is relevant to a criminal investigation regarding abuse or neglect of a minor child. CP

23-32; RP¹ at 17-18; *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). During sentencing, the court conducted the following colloquy with the defendant:

THE COURT: . . . Sir, have you had chance to go over the statement with your attorney?
MR. TORRES: Yes, your Honor.
THE COURT: Do you understand it, sir?
MR. TORRES: Yes, I do.
THE COURT: Do you have any questions about it?
MR. TORRES: No, I don't.
THE COURT: Did you sign this document?
MR. TORRES: Yes, I did.
THE COURT: Indicates on page 9, paragraph 11, "This is my statement. I do not believe I am guilty of this offense. However, if I proceed to trial and the jury believes all the evidence presented by the state, there is a chance I would be found guilty. So in order to take advantage of the prosecutor's recommendation, I could put my time and energy on other pursuits. I wish to enter this plea." Is that your agreement?
MR. TORRES: Yes, your Honor.

RP at 18.

The court then asked the State for a factual basis. RP at 18. The State asked the court to incorporate the probable cause affidavit and the court did so. RP at 18-19. When asked whether anyone made any threats against the defendant or promises, other than the recommendation that the State agreed to make, the defendant said "no." RP at 19. As part of the

¹ Unless otherwise indicated, "RP" refers to the verbatim report of proceedings reported by Joseph D. King for dates January 2, 2015, January 7, 2015, and February 25, 2015.

plea agreement, the State recommended six months total confinement. RP at 19. The court imposed a sentence consisting of six months of total confinement and legal financial obligations (hereinafter “LFOs”) in the amount of \$1,960.00. CP 36, 43; RP at 23. In assessing the defendant’s ability to pay legal financial obligations, the court asked the defendant whether he was capable of working. RP at 23. The defendant replied that he was. RP at 23.

Additionally, the court entered a no-contact order preventing the defendant from having contact with his minor child, M.T. CP 55; RP at 23. The no-contact order allowed for the defendant to communicate via mail correspondence so long as the letters were reviewed by M.T.’s mother prior to it being provided to M.T. CP 55; RP at 23. The order was set to expire on its own terms on February 24, 2020, unless modified or terminated sooner. CP 55; RP at 23-24.

The defendant filed a Personal Restraint Petition on May 4, 2015, which included a Motion for Recantation. *See* Personal Restraint Petition (hereinafter “PRP”), COA No. 33744-8. In that motion, the defendant admits that he did tell detectives on January 2, 2015, that he told M.T. to lie. PRP, Ex. 1 at 3. He simply alleges that he did so because of coercion. *Id.* Even in his “recantation,” he never denies talking to his son, M.T.,

about what M.T. should tell the police. His recantation motion does not include the transcript of his interview with the police.

III. ARGUMENT

A. THE DEFENDANT'S POST-GUILTY PLEA RECONTATION DOES NOT ENTITLE THE DEFENDANT TO RELIEF FROM JUDGMENT.

The defendant argues that the guilty plea should be vacated because he has now recanted part of his original statement to police. He bases this on CrR 7.8(b) and argues that his recantation is newly discovered evidence under CrR 7.8(b). PRP at 15.

However, the defendant's recantation does not qualify. CrR 7.8(b)(2) requires that the evidence is newly discovered and by due diligence could not have been discovered in time to move for a new trial under CrR 7.5.

Here, the defendant was aware of his original statements to the police and any issues as to their voluntariness when he pleaded guilty. Therefore, the defendant does not meet the newly discovered evidence requirement of CrR 7.8(b)(2).

Also, the defendant is not entitled to withdraw his guilty plea by reason of his recantation because his original statement is corroborated by the statement of M.T. This is shown by *In re Clements*, 125 Wn. App. 634, 106 P.3d 244 (2005).

In *Clements*, the defendant entered an *Alford* plea to residential burglary and fourth degree assault. 125 Wn. App. at 638. Before sentencing, the victim gave a videotaped statement retracting some of her allegations. *Id.* The defendant moved to withdraw his plea, arguing there was no longer a factual basis for the plea. *Id.* at 639. The trial court denied the motion. *Id.* On appeal, the court noted that independent evidence existed to establish the factual basis for the plea. *Id.* at 644. Thus, because Clements's plea did not rest solely on the victim's retracted evidence, Clements was not entitled to withdraw his plea. *Id.* at 644-45.

Similarly, in *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996), the defendant argued that because the victim's recantation was the sole evidence used to convict him, the trial court abused its discretion in denying his motion to vacate judgment. In discussing the inherent questionability of recantation, the court noted that it is for the trial court to determine the reliability and credibility of a recanting witness and whether the jury's verdict was likely influenced by it. *Id.* at 801. The trial court determined that the victim's recantation was unreliable in view of the total circumstances. *Id.* at 803. However, it is not likely the recantation would have changed the outcome of the trial. *Id.* The court found sufficient evidence corroborating the victim's original testimony. *Id.* at 800.

In *State v. D.T.M.*, 78 Wn. App. 216, 218, 896 P.2d 108 (1995), the

defendant entered an *Alford* plea to first degree child molestation. D.T.M. sought to withdraw his plea after the victim recanted. *Id.* The trial court denied the motion. *Id.* at 219. On appeal, the court noted that:

A defendant considering an *Alford* plea undertakes a risk-benefit analysis. After considering the quantity and quality of the evidence against him, and acknowledging the likelihood of conviction if he goes to trial, he agrees to plead guilty despite his protestation of innocence to take advantage of plea bargaining. Because the defendant professes innocence, the court must be particularly careful to establish a factual basis for the plea. Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions. With an *Alford* plea, however, the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt.

Id. at 220 (citations omitted).

In *D.T.M.*, the victim's statements constituted the sole evidence establishing a factual basis for the plea. *Id.* The court observed that under the holding in *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds by Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975), where a defendant has been convicted solely on the basis of the testimony of a later recanting witness, "it is an abuse of discretion not to grant a new trial." *Id.* at 220. The court concluded that the victim's recantation, if true, met all five criteria of *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981), and would have justified withdrawal of the *Alford* plea. *Id.* at 221.

In *State v. Arnold*, 81 Wn. App. 379, 381, 914 P.2d 762 (1996), the defendant pleaded guilty to two counts of fourth degree assault. Prior to sentencing, Arnold moved to withdraw his guilty plea after one of the victims provided an affidavit indicating that her statement to police had been untrue. *Id.* The trial court denied the motion. *Id.* at 382. On appeal, the court distinguished *D.T.M.* on two grounds: (1) the defendant in *Arnold* pleaded guilty instead of entering an *Alford* plea; and (2) there was evidence other than the statement of the recanting witness which provided independent evidence of Arnold's guilt. *Id.* at 386. The court also noted that not only had Arnold failed to demonstrate manifest injustice, he had also failed to persuade the trial court of the credibility or reliability of the victim's recantation. *Id.* at 387.

In re Clements, Macon, Arnold, and the present case are different from *D.T.M.* and *Rolax*. In *D.T.M.* and *Rolax*, the recanted statements were uncorroborated and were the sole basis for conviction. Also, in *D.T.M.* and *Rolax*, the recanted statement met the newly discovered evidence requirement.

In the instant case, like in *Clements, Macon, and Arnold*, independent evidence exists to support the plea in the form of M.T.'s statements to police. The defendant was aware of M.T.'s statements made to the child forensic interviewer, which inculpated the defendant. M.T.'s

statements were in the probable cause affidavit and therefore incorporated into the factual basis of his plea. RP at 18-19. The defendant's original statements were not the sole evidence establishing a factual basis for the plea. Thus, the defendant is not entitled to withdraw his plea.

Therefore, since the alleged recantation was not timely and because M.T.'s statement corroborated the defendant's confession, the defendant is not entitled to withdraw his guilty plea.

B. TRIAL COUNSEL DID NOT VIOLATE THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The first prong requires a showing that "counsel's representation

fell below an objective standard of reasonableness based on consideration of all of the circumstances.” *Thomas*, 109 Wn.2d at 226. Courts will indulge in a strong presumption that counsel’s representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336.

Under the second prong, prejudice is shown when the defendant can establish with reasonable probability that, but for counsel’s error, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

1. Trial counsel’s performance was not deficient because there was no actual conflict of interest.

The defendant first argues that trial counsel’s performance was deficient because there were actual conflicts of interest depriving the defendant of effective assistance of counsel. However, he does not give any specific actual conflicts other than disagreements between his attorney and him, such as trial counsel not believing defendant’s story, denying the

defendant's request to file motions, and requesting the defendant waive his speedy trial rights. PRP at 5. The disagreements were not actual conflicts of interest.

The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). An attorney's conflict of interest may create reversible error in two situations without a showing of actual prejudice. *In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983). First, "reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance." *Id.* at 677. Second, a trial court commits reversible error if it "knows or reasonably should know of a particular conflict into which it fails to inquire." *Id.* The defendant asserts that an actual conflict adversely affected his lawyer's performance, thus denying him effective assistance of counsel.

To determine whether an actual conflict of interest deprived a defendant of effective assistance of counsel, the court engages in a two-part inquiry: (1) was there an actual conflict of interest; and (2) if so, did the conflict adversely affect the performance of the defendant's attorney? *State v. White*, 80 Wn. App. 406, 907 P.2d 310 (1995). The rule in conflict cases is "not quite the per se rule of prejudice that exists for [other] Sixth

Amendment claims” *Strickland*, 466 U.S. at 692. Possible or theoretical conflicts of interest are “insufficient to impugn a criminal conviction.” *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

An actual conflict of interest is if “. . . during the course of the representation, the defendants’ interests diverge with respect to a material factual or legal issue or to a course of action.” *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir. 1983). The actual conflict must be “readily apparent.” *State v. James*, 48 Wn. App. 353, 365, 739 P.2d 1161 (1987). “Prejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.” *State v. Davis*, 141 Wn.2d 798, 864, 10 P.3d 977 (2000) (quoting *Strickland*, 466 U.S. at 692 (citing *Cuyler*, 446 U.S. at 348-50)). Each of the two prongs must be met. *State v. Tjeerdsma*, 104 Wn. App. 878, 882, 17 P.3d 678 (2001). To demonstrate that counsel’s performance was “adversely affected” by the actual conflict, the defendant must show the conflict “hampered his defense.” *State v. Lingo*, 32 Wn. App. 638, 646, 649 P.2d 130 (1982). The conflict “must cause some lapse in representation contrary to the defendant’s interests,” *Sullivan*, 723 F.2d at 1086, or have “likely” affected counsel’s conduct of particular aspects of the trial counsel’s advocacy on behalf of the

defendant. *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992).

In *Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001), Lockhart was charged with murder and attempted murder. Prosecutors presented evidence that Lockhart had committed a second, earlier murder. *Id.* at 1226. The record showed that Lockhart's trial counsel was also representing another defendant, Galbert, in the earlier homicide. *Id.* The court found that an actual conflict of interest existed because, while Lockhart and Galbert were not co-defendants, it was in Galbert's interest to have Lockhart convicted because of the connection between both killings. *Id.* The court also found that the actual conflict adversely affected his defense and that likely could be attributed to trial counsel's conflict of interest. *Id.* at 1231. Lockhart had identified a number of actions and inactions that adversely affected his defense such as: trial counsel failing to interview or subpoena the identified tipster, failing to investigate the tipster, and failing to inform the jury that another defendant had actually been accused of shooting the victim. *Id.* at 1232. Since this actual conflict of interest impaired Lockhart's defense, the court reversed his conviction. *Id.* at 1233.

In contrast, in *State v. Graham*, 78 Wn. App. 44, 46-48, 896 P.2d 704 (1995), Graham was tried jointly with three other co-defendants for delivery of marijuana and possession of marijuana with intent to deliver,

all of whom were represented by the same appointed attorney. Graham was found guilty on both counts. *Id.* at 50. Graham appealed, claiming that the trial court erred in allowing trial counsel to jointly represent four co-defendants and that the record reflected an actual conflict of interest adversely affected his trial counsel's performance. *Id.* at 53-54. Graham argued that trial counsel failed to move for severance or object to joinder, and failed to object to the evidence on marijuana identification, scales and cash. *Id.* at 56. The court found nothing in the record to "show an actual conflict of interest that adversely affected trial counsel's performance" resulting in prejudice. *Id.* at 56-57.

In the instant case, like *Graham*, the defendant cannot meet both prongs required to show prejudice. There is no indication whatsoever that trial counsel actively represented conflicting interests which adversely affected his lawyer's performance. As such, trial court's performance was not deficient.

2. **Trial counsel did not violate the defendant's right to effective assistance of counsel by electing not to interview potential lay witnesses and conduct further investigation.**
 - a. **Trial counsel's performance was not deficient because trial counsel's performance did not fall below an objective standard of reasonableness.**

The defendant argues that trial counsel's trial preparation fell

below an objective standard of reasonableness by failing to interview Nicole Bernal, Deanna Torres, Angelica Farias, Dolores Torres, Catarino Torres, and Kristy Torres, and by failing to conduct further investigation into Child Protective Services (“CPS”) and detectives involved in the case. The defendant asserts that had his trial counsel acted effectively, it would have revealed that CPS and the officers of the court were prejudiced. The defendant cannot show that trial counsel was deficient by failing to interview witnesses and conduct further investigation, which resulted in prejudice to the defendant.

In *In re Clements*, the defendant argued that he was denied effective assistance of counsel because counsel failed to interview two witnesses prior to advising Clements to plead guilty to residential burglary and fourth degree assault. 125 Wn. App. at 646. Clements asserts that had trial counsel interviewed these witnesses, it would have provided “a more optimistic assessment” of his trial chances and he would not have pleaded guilty. *Id.* at 647. Clements submitted affidavits from two witnesses: one witness was his current girlfriend and the other was a friend who had been living with Clements during the alleged offense. *Id.* Neither witness was present during the alleged unlawful entry. *Id.* Given the circumstances and the witnesses’ close relationships to Clements, the court determined that trial counsel could have reasonably concluded that their testimony would

not be helpful at trial. *Id.* Clements failed to demonstrate that trial counsel acted deficiently for failing to interview the two witnesses. *Id.*

Additionally, Clements was fully aware of the potential testimony of both witnesses when he pleaded guilty. *Id.* The court held that Clements failed to show that had trial counsel interviewed the witnesses, there was a reasonable probability that he would have proceeded to trial. *Id.*

In *Matter of Pirtle*, 136 Wn.2d 467, 487-88, 965 P.2d 593 (1998), Pirtle first asserted that he was prejudiced because his trial counsel failed to interview the four investigating police officers, relying instead on the police reports themselves. The court noted that while having formal interviews with these witnesses may have been helpful, there is no absolute requirement that defense counsel interview witnesses before trial. *Id.* at 488. The Supreme Court has previously held that “the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics . . . [including], in some instances, whether to interview some witnesses before trial . . .” *Id.* (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)). The court held that while there were no formal interviews, trial counsel was not ineffective because there was considerable time spent reviewing evidence and obtaining answers to various questions with detectives. 136 Wn.2d at 488. Pirtle next argued that counsel was deficient for failing to interview two alleged jailhouse

informants. *Id.* He alleged that secret inducements were given to both informants and that an interview of these witnesses would have revealed such an inducement, allowing for impeachment. *Id.* The court ruled that no prejudicial error occurred because declarations of detectives support the fact that there were no undisclosed inducements to either witness. *Id.*

Clements is analogous to the present case. The defendant argues that trial counsel's failure to interview potential lay witnesses violated his right to effective assistance of counsel. The defendant offers no proof that interviews of potential witnesses would have resulted in the discovery of mitigating or exculpatory evidence. Additionally, the defendant was aware of the potential testimony of these witnesses and decided to plead guilty. The record does not show whether trial counsel conducted a formal interview with detectives. Similar to the holding in *Pirtle*, even if trial counsel had failed to interview the detectives involved, she was not ineffective for relying on police reports.

The defendant fails to show that trial counsel acted deficiently by failing to interview potential witnesses and conduct further investigation. The State's evidence supports the assertion that trial counsel's performance was not deficient and did not fall below an objective standard of reasonableness.

- b. If this Court finds that trial counsel's performance was deficient for failing to interview potential lay witnesses and conducting further investigation, the defendant cannot show he suffered actual prejudice.**

If this Court determines that trial counsel's performance was deficient, the defendant has still failed to show he suffered actual prejudice to warrant setting aside the conviction. Trial counsel's decision not to interview witnesses and conduct further investigation did not prejudice the defendant because trial counsel's decision was a legitimate trial strategy. Additionally, because the defendant offers no evidence or authority to support his allegations, the defendant cannot show that he suffered actual prejudice.

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to the defendant affirmatively proving prejudice. *Strickland*, 466 U.S. at 693. To make a showing of prejudice, the standard requires that the defendant show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 322.

The defendant argues that trial counsel failed to interview several witnesses. The defendant offers no allegation that any of the witnesses now say anything different from what they originally told police. The

defendant also does not show that any of the witnesses would have any relevant information as to what the defendant told M.T. to say to the police. The defendant also argues that trial counsel failed to adequately investigate the credibility of CPS and the detectives involved in the case. The defendant gives no explanation as to how CPS was not credible and offers no explanation regarding the alleged coercion by detectives.

The presumption of counsel's competence can be overcome by a showing that counsel failed to conduct an appropriate investigation, either factual or legal, to determine what matters of defense were available. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Even if the defendant shows that the particular error of counsel was unreasonable, the defendant must show that it actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. It is not enough for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. *Id.* Virtually every act or omission of counsel would meet that test, cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-67, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. *Strickland*, 466 U.S. at 693. Generally, the decision not to call a witness is a matter of trial tactic and will not support a claim of ineffectiveness of counsel. *In re Davis*, 152

Wn.2d 647, 742, 101 P.3d 1 (2004).

The trial record demonstrates that even if counsel had interviewed the potential lay witnesses and conducted further investigation, the outcome would not have been any different. The child forensic interview of M.T. revealed that on January 1, 2015, the defendant told M.T. to make up lies about what happened to N.B. CP 8. When confronted with M.T.'s disclosure, the defendant admitted to law enforcement that he spoke with M.T. and outlined what M.T. would say to the police. CP 8. The defendant stated that he told M.T. to tell law enforcement the truth, that the defendant did not do anything to N.B. CP 8. The evidence in this case was overwhelming. Had trial counsel interviewed the potential lay witnesses, the outcome would not have been any different. Additionally, the defendant cannot show that further investigation into CPS and detectives would have revealed anything of significance. There is nothing in the record to suggest that CPS or law enforcement acted improperly in conducting their investigations. Therefore, the defendant suffered no prejudice resulting from trial counsel's decision not to interview witnesses requested by the defendant or failing to conduct further investigation. While the defendant may disagree with trial counsel's tactical decisions not to interview potential lay witnesses or conduct further investigation, it is not a basis for an ineffective assistance of counsel claim.

The defendant failed to meet the two prongs required for a valid claim of ineffective assistance of counsel. First, the defendant failed to show that trial counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant failed to show that the alleged deficient performance prejudiced the defendant in such a way as to deprive him of a fair trial. Considering all of the circumstances, trial counsel’s performance was not deficient.

- 3. Trial counsel did not violate the defendant’s rights when she conceded to the admissibility of the defendant’s statements to law enforcement.**
 - a. Trial counsel’s performance was not deficient because it was a legitimate trial tactic.**

The defendant claims that trial counsel was ineffective when she conceded to the admissibility of the defendant’s tape-recorded statement to law enforcement. The defendant asserts that the custodial interrogation was coerced and should have been suppressed. Additionally, the defendant argues that trial counsel failed to introduce evidence showing that the defendant was interrogated numerous times without first being advised of his right to refuse consent.

The defendant argues that his confession was obtained involuntarily because his statements to police were coerced. A confession

must be voluntary to be admissible at trial. *State v. Riley*, 17 Wn. App. 732, 735, 565 P.2d 105 (1977). To determine whether a confession was made voluntarily, the court must apply the totality-of-the-circumstances test. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Circumstances that are potentially relevant in the totality-of-the-circumstances analysis include the “crucial element of police coercion”; the length of the interrogation; its location; its continuity; the defendant’s maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and have counsel present during custodial interrogation. *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993).

In *State v. McFarland*, 73 Wn. App. 57, 867 P.2d 660 (1994), McFarland appealed his conviction on the basis of ineffective assistance of counsel for counsel’s failure to move for suppression of evidence obtained following a warrantless arrest. The Court of Appeals found no legitimate tactical reasons for counsel’s failure to move for suppression of evidence obtained following a warrantless arrest. *Id.* at 72-73. The court will not presume a CrR 3.6 hearing is required in every case, so that failure to move for a suppression hearing is per se deficient representation. *McFarland*, 127 Wn.2d at 336. In order to prove ineffective assistance of counsel, the defendant is required to show in the record the absence of

legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Id.*

Here, unlike *McFarland*, there is no evidence to suggest that the defendant's statements were obtained unlawfully. The defendant does not assert that *Miranda* warnings were not given, but rather that detectives used coercive tactics to induce a confession. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The defendant provides no basis for the alleged coerced confession, other than to assert his statements were coerced. The defendant does not allege that law enforcement made promises or threats in order to obtain his statements, used a threatening tone, badgered the defendant, or attempted to intimidate him; that questioning was of a long duration; or that he was deprived of necessities such a food, water, or access to bathroom facilities.

Here, the record reveals that the defendant's statements to law enforcement were made voluntarily. Considering all of the circumstances, trial counsel likely determined that the statements made to law enforcement were made voluntarily and did not move to suppress the custodial statements. The defendant fails to point out anything in the record to show the absence of legitimate strategic or tactical reasons in counsel's failure to move for a suppression hearing. Thus, trial counsel was not deficient by failing to move for the suppression of the statements

because it was a legitimate trial tactic.

- b. If this Court finds that trial counsel's performance was deficient for failing to move for the suppression of the defendant's statements, the defendant cannot show he suffered actual prejudice.**

If this Court determines that trial counsel's performance was deficient, the defendant cannot show that he suffered actual prejudice. Based on the voluntariness of the statements made by the defendant, there were legitimate tactical reasons for counsel's failure to move for a suppression hearing. Additionally, the defendant cannot show that, had trial counsel moved to suppress the statement, the trial court likely would have granted a motion to suppress.

In *State v. Fisher*, 74 Wn. App. 804, 810, 874 P.2d 1381 (1994), Fisher argued that trial counsel was ineffective for failing to move for a suppression hearing based on a warrantless arrest. The Court of Appeals held that trial counsel's performance was deficient because there could be no tactical reason for counsel's failure to bring a motion to suppress evidence. *Id.* at 811. The court then addressed whether trial counsel's deficient performance prejudiced Fisher. *Id.* Whether this decision reflects a legitimate trial strategy or tactic cannot be determined from the record, but the existence of exigencies provides a plausible reason for trial counsel to have decided not to move for suppression. *Id.*

In the instant case, the defendant suffered no prejudice from trial counsel's stipulation to the admissibility of the statements. *See Bailey v. Newland*, 263 F.3d 1022, 1029 (9th Cir. 2001) (“[I]n order to show prejudice when a suppression issue provides the basis for an ineffectiveness claim, the petitioner must show that he would have prevailed on the suppression motion, and that there is a reasonable probability that the successful motion would have affected the outcome.” (citations omitted)), *cert. denied*, 535 U.S. 995, 122 S. Ct. 1556, 152 L. Ed. 2d 479 (2002). The record demonstrates that even if counsel had moved for the suppression of the statements, the outcome would not have been any different. The court reasonably could have determined that the defendant's statements were made voluntarily and denied trial counsel's motion to suppress. Therefore, there was no resulting prejudice because trial counsel failed to move for the suppression of the defendant's statements.

The defendant cannot show that trial counsel acted deficiently by failing to move for a suppression hearing, resulting in prejudice. Thus, the defendant's claim of ineffective assistance of counsel fails.

C. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S FUNDAMENTAL RIGHT TO PARENT WHEN IT ENTERED A NO-CONTACT ORDER PREVENTING HIM FROM HAVING CONTACT WITH HIS MINOR CHILD.

The defendant contends that the no-contact order imposed as a condition of his criminal sentence violates his fundamental right to parent. In addition to imposing six months total confinement, the sentencing court ordered a five-year no-contact order preventing the defendant from having contact with his minor child, M.T. CP 37-38, 55; RP at 23. The trial court did not err in entering the no contact order because the prohibition was reasonably crime-related.

The Sentencing Reform Act of 1981, RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions" as a condition of sentence. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). "Crime-related prohibitions" are orders directly related to "the circumstances of the crime." RCW 9.94A.030(10). Sentencing conditions are reviewed for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A court abuses its discretion if, when imposing a crime-related prohibition, it applies the

wrong legal standard. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

Parents have a fundamental liberty interest in the care, custody, and control of their children. *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). However, parental rights are not absolute and may be subject to reasonable regulation. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Limitations on fundamental rights must be “reasonably necessary to accomplish the essential needs of the state and the public order.” *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). Sentencing courts can restrict fundamental parenting rights by imposing conditions of a criminal sentence if it is reasonably necessary to further the State’s compelling interest in preventing harm to the children. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). Therefore, the court must determine whether the record supports the proposition that prohibiting the defendant from contact with his minor child is reasonably necessary to protect him. *Ancira*, 107 Wn. App. at 654. A defendant’s fundamental rights limit the sentencing court’s ability to impose sentencing conditions: “[c]onditions that interfere with fundamental rights must be sensitively imposed” so that they are “reasonably necessary to accomplish the essential needs of the State and public order.” *Warren*, 165 Wn.2d at 32.

1. The State has a compelling interest in protecting the minor child.

The no-contact order does not prohibit the defendant's fundamental right to parent because it is reasonably necessary to achieve a compelling state interest, namely the protection of the minor child. The minor child, M.T., was a potential witness in a pending criminal investigation into the death of N.B. The State's interest in protecting the minor child is compelling. *See Warren*, 165 Wn.2d at 35 (holding that the protection of the two victims and their mother, a witness to the crime, was a compelling state interest).

The record in this case indicates that the defendant had direct contact with his child and induced him into fabricating a story regarding the death of the defendant's son. Although the court entered a no-contact order preventing him from having contact with M.T. until 2020, it allows for the defendant to communicate with the child through the mail.

RCW 9.94A.505(9) authorizes the trial court to impose a no-contact order as a condition of a sentence that directly relates to the circumstances of the crime for which the offender has been convicted. "No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime." *Ancira*, 107 Wn. App. at 657 (quoting *State v. Llamas-Villa*,

67 Wn. App. 448, 456, 836 P.2d 239 (1992)). M.T., as the witness of the crime, was directly connected to the circumstances of the crime.

The trial court may have been concerned about the pending matters in superior court as well as the matter in Yakima County, along with the fact that he attempted to manipulate his own son into lying in a criminal investigation. The no-contact order preventing the defendant from contacting M.T. was properly entered because he was the witness in the present case as well as a potential witness in the pending homicide investigation. The State has a compelling interest in protecting the minor child.

2. The no contact order preventing contact with the minor child was reasonably necessary.

The no-contact order is reasonably necessary to protect M.T.'s emotional welfare. The defendant used his position of trust to manipulate his minor child into lying for him to law enforcement during a pending criminal investigation. The five-year no-contact order is appropriate in both scope and duration given the circumstances.

A restriction imposed on a fundamental right must be reasonably necessary in both scope and duration. *In re Rainey*, 168 Wn.2d 367, 377-81, 229 P.3d 686 (2010). "As to the 'reasonable necessity' requirement, the interplay of sentencing conditions and fundamental rights is delicate

and fact-specific, not lending itself to broad statements and bright line rules.” *Id.* at 377.

In *Riles*, the defendant was convicted of first degree child rape for raping a minor child. 135 Wn.2d at 332. In addition to a punishment of total confinement, the sentencing court imposed conditions which prevented him from having contact with any minor children. *Id.* at 333. The court concluded that a prohibition on a convicted sex offender’s contact with minors was not a justified limitation on freedom of association rights where the victim was not a minor. *Id.* at 352.

In *Ancira*, the court struck down a no-contact order because the children could be protected through indirect contact by phone or mail, or supervised visitation outside the presence of their mother (who was the victim of the domestic violence). 107 Wn. App. at 645-55. Thus, it was not reasonably necessary to cut off all contact with the children. *Id.*

In the instant case, the no-contact order does not prohibit all contact, but rather allows for the defendant to communicate with M.T. indirectly through the mail so long as it is reviewed by M.T.’s mother beforehand. The sentencing conditions, which still allow the defendant to have contact with his minor child through the mail, do not unduly burden the defendant’s fundamental right to parent and are valid crime-related prohibitions for tampering with a witness.

Considering the facts of the case in light of the State's interest in protecting the minor child, it was not an abuse of discretion for the sentencing court to conclude that a no-contact order of some duration was appropriate. The no-contact order does not violate the defendant's fundamental right to parent because it is necessary to achieve a compelling state interest, namely the protection of the minor child.

D. THE TRIAL COURT DID NOT ERR IN CONCLUDING THE DEFENDANT HAD THE PRESENT AND FUTURE ABILITY TO PAY HIS DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

- 1. A review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.**

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

The defendant contends an inadequate inquiry under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), can be raised for the first time on review under RAP 2.5(a)(2) because insufficient facts support the finding of ability to pay; however, a review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of

ability to pay. A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. *Id.* at 832. RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges “failure to establish facts upon which relief can be granted.” The exception applies where the proof of particular facts at trial is required to sustain a claim. *Mukilteo Ret. Apts., L.L.C. v. Mukilteo Investors L.P.*, 176 Wn. App. 244, 246, 310 P.3d 814 (2013). This exception “is fitting inasmuch as ‘[a]ppeal is the first time sufficiency of evidence may realistically be raised.’” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)).

The court in *Blazina* noted that some challenges raised for the first time on appeal are appropriate 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. 182 Wn.2d at 834. However, allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way. *Id.* The court held that the trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on particular facts of the defendant’s case. *Id.* at 834.

Following the *Blazina* decision, in *State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015), the court determined that Lyle's failure to challenge the trial court's imposition of LFOs at sentencing precluded him from raising the issue on appeal.

Lyle is directly analogous to the present case. Here, not only did the defendant fail to challenge the trial court's imposition of LFOs at sentencing, he indicated that there was no reason precluding him from paying his legal financial obligations. RP at 23. While the appellate court has the discretion to review the matter, the trial court properly considered the defendant's current and future ability to pay his LFOs. The trial court's findings are supported by substantial evidence in the record; therefore, a review under RAP 2.5(a) is not appropriate.

2. The trial court sufficiently inquired into the defendant's present and future ability to pay.

The defendant requests the Court reverse his sentence and remand the case to strike the ability to pay LFOs. The trial court imposed LFOs, including a \$500 crime victim assessment, \$500 fine, \$100 felony DNA fee, and \$860 court costs. CP 36, 43; RP at 23. The crime victim assessment and felony DNA fee are mandatory, regardless of the defendant's ability to pay. RCW 7.68.035; RCW 43.43.7541. Therefore, at

issue is whether the trial court properly inquired into the defendant's present and future ability to pay the \$500 fine and \$860 in court costs.

Under RCW 10.01.160(3), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. However, the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering the payment of court costs. *Id.*

The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.2d 123 (2000)).

In *Baldwin*, the court determined that the burden imposed by RCW 10.01.160 was met by a single sentence in a presentence report that the defendant did not object to. 63 Wn. App. at 311. The presentence report

contained the following statement, “Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense.” *Id.* Baldwin made no objection to this assertion at the time of sentencing. *Id.* Therefore, the court determined that when the presentencing report establishes a factual basis for the defendant’s future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied. *Id.* at 312.

In *State v. Bertrand*, 165 Wn. App. 393, 404 n.15, 267 P.3d 511 (2011), the record revealed that the trial court failed to consider when the defendant could pay LFOs and also showed that “in light of Bertrand’s disability, her ability to pay LFOs now or in the near future is arguably in question.” Therefore, under *Bertrand*, a repayment obligation may not be imposed “if it appears there is no likelihood the defendant’s indigency will end.” *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

In *Blazina*, the Supreme Court of Washington ruled that trial courts must hold an on-record hearing where judges must inquire into a defendant’s current and future ability to pay before imposing discretionary LFOs. 182 Wn.2d at 838. When making the inquiry, trial courts must also consider other factors such as incarceration, as well as the defendant’s other debts, including restitution. *Id.* at 839.

The *Blazina* court also determined RCW 10.01.160(3) requires the trial court to “do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Id.* at 838. Instead “[t]he record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Id.* This inquiry includes consideration of factors such as the defendant’s financial resources, incarceration, and other debts, including restitution. *Id.*

In the present case, the only discretionary LFOs imposed in this case was a \$500 fine and \$860 in court costs. CP 36, 43; RP at 23. Contrary to the defendant’s assertions, evidence in the record supports the trial court’s finding that he had the present and future ability to pay these fees. In addition, the trial court asked the defendant if he was capable of working, and the defendant stated that he was. RP at 23. This colloquy allowed the defendant to reveal any other debts that would prevent him from paying his LFOs. Unlike the defendant in *Bertrand*, here the defendant has no known disabilities that preclude the possibility of him working in the future. 165 Wn. App. at 404 n.15.

Moreover, there is nothing in the record to suggest that the defendant’s indigency would extend indefinitely. Unlike the situation in *Bertrand* where the evidence suggested that there was no likelihood that

the disabled defendant could begin payment of LFOs within 60 days of entry of the judgment and sentence while still incarcerated, the situation here more closely approximates that of the defendant in *Baldwin*.

The trial court's inquiry addressed the factors specifically identified by the *Blazina* court as mandatory. As such, this Court should affirm the trial court's imposition of the legal financial obligations.

E. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE CONVICTION.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the court can decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In

1976², the legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate or even “chill” the right to counsel. *Id.* at 818.

In 1995, the legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, the Supreme Court held this statute constitutional, affirming the court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-42, 910 P.2d 545 (1996). 131 Wn.2d at 239.

Nolan noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Nolan*, 141 Wn.2d at 623.

Nolan examined RCW 10.73.160 in detail. The court pointed out that under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The court also rejected the concept or

² Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

belief espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, 141 Wn.2d at 624-25, 628.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *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. *Baldwin*, 63 Wn. App. at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-42; *see also State v. Wright*, 97 Wn. App. 382, 985 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See Lundy*, 176 Wn. App. at 104 n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to

contribute to the cost of representation. *See Blank*, 131 Wn.2d at 236-37 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)).

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 (1983); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts of late. In *Blazina*, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The court wrote that “[t]he 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.” 182 Wn.2d at 834. The court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.* at 835-37. The court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.* at 838-39.

By enacting RCW 10.01.160 and RCW 10.73.160, the legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted

in 1976 and RCW 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burdens of persons convicted of crimes, the legislature has yet to show any shift toward eliminating the imposition of financial obligation on indigent defendants.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the legislature did not include such a provision in RCW 10.73.160. 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

Certainly, in fairness, an appellate court should also take into account the defendant’s financial circumstances before exercising its

discretion. Ideally, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determinations about appellate costs. Until such time as more and more trial courts make such a record, the appellate court may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

During sentencing, the record reflects that the defendant had the present and future ability to pay. RP at 23. The defendant was asked “Sir, are you capable of working?” to which the defendant replied “Yes, sir.” RP at 23. There is nothing in the record to support the assertion that the defendant will never be able to pay the appellate costs associated with this case.

In this case, the State submits that it has “substantially prevailed.” Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should exercise discretion to impose appellate costs.

IV. CONCLUSION

Based upon on the aforementioned facts and authorities, the defendant’s consolidated appeal should be denied and the conviction affirmed. The legal financial obligations were properly imposed because the court conducted an individualized inquiry into the defendant’s present

and future ability to pay. The State respectfully requests that costs be taxed as requested by the State.

RESPECTFULLY SUBMITTED this 18th day of November, 2016.


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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

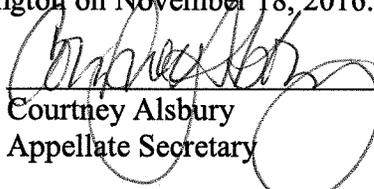
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Signed at Kennewick, Washington on November 18, 2016.



Courtney Alsbury
Appellate Secretary