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Court of Appeals
Division III
State of Washington

34398-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT GREGER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

2. The trial court erred in imposing a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h) without considering Scott Howard Greger's ability to pay this legal financial obligation (LFO).

II. ISSUES PRESENTED

1. Does the defendant's failure to object to the trial court's reasonable doubt instruction prevent appellate review of the instruction where he fails to establish manifest error, or any error, in the giving of an instruction that has been approved by all of our appellate courts?

2. Does the defendant's failure to object to the imposition of the mandatory \$200 filing fee limit his ability to raise the issue on appeal, and does the compulsory language contained in RCW 36.18.020(2)(h) indicate the fee is mandatory?

III. STATEMENT OF THE CASE

The defendant was found guilty, as charged, of the crime of possession of a stolen motor vehicle. CP 1, 38. He had 13 prior felony convictions in the last six years, and an offender score of 19. CP 53-55. The trial court waived the imposition of a standard range sentence (43-57 months) and imposed a prison-based drug offender alternative sentence of

25 months confinement. CP 53-55. Defendant was ordered to pay \$25 per month on his LFOs starting January 2, 2018. CP 58.

IV. ARGUMENT

A. THE DEFENDANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT THE REASONABLE DOUBT INSTRUCTION GIVEN AT HIS TRIAL WAS CONSTITUTIONALLY DEFICIENT, HAS NEITHER DEMONSTRATED THE EXISTENCE OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT NOR THAT GIVING THIS INSTRUCTION CONSTITUTES ERROR AT ALL.

Here, defendant alleges that the trial court erred by giving the jury an approved instruction on reasonable doubt, even though defendant neither proposed a different instruction nor took any exception to the instruction at trial. RP 224-229. This issue is not reviewable on appeal because the defendant fails to show that the alleged error is manifest, or that any error actually occurred.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). RAP 2.5 “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed

in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.¹ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

¹ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

No manifest error that would allow review of this unpreserved issue occurred because WPIC 4.01 has repeatedly been approved by Washington courts.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Here, any error relating to the trial court’s failure to supply an instruction on reasonable doubt other than WPIC 4.01 was not manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O’Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge hearing the case should have clearly noted that WPIC 4.01 violated defendant’s rights and *sua sponte* given another instruction.

Indeed, trial courts have been directed by our Supreme Court to give WPIC 4.01 in all criminal cases. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). There can be no obvious or flagrant error where a trial court follows a directive by the Supreme Court. Therefore, RAP 2.5 precludes review of the issue absent preservation of the issue by timely objection at trial.²

Finally, this argument is not new. It has an unremarkable history of being considered, then rejected. *See State v. Harras*, 25 Wash. 416, 421, 65 P. 774 (1901); *State v. Thompson*, 13 Wn. App. 1, 5, 533 P.2d 395 (1975). The newest formulation of the argument has repeatedly been rejected in recent years. *State v. Jenson*, 194 Wn. App. 900, 378 P.3d 270 (2016); *State v. Osman*, 192 Wn. App. 355, 375, 366 P.3d 956 (2016); *State v. Lizarrago*, 191 Wn. App. 530, 567, 364 P.3d 810 (2015); *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 (2014). The claim that WPIC 4.01 is unconstitutional is without merit.

² *See also, State v. Jimenez-Macias*, 171 Wn. App. 323, 286 P.3d 1022 (2012) (trial court erred by giving *Castle* instruction on reasonable doubt rather than WPIC 4.01, but error was unpreserved and did not constitute an error that could be reviewed for the first time on appeal).

B. BY FAILING TO RAISE THE ISSUE OF WHETHER THE \$200 FILING FEE IMPOSED AT SENTENCING IS A MANDATORY FEE, THE DEFENDANT HAS WAIVED ANY CLAIM REGARDING THIS NON-CONSTITUTIONAL ISSUE ON APPEAL.

Defendant claims that the \$200 filing fee constitutes a discretionary cost and that this court should abandon the holding in *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013), and, presumptively, in *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016).

1. The defendant provides no basis for raising this new and unreserved issue on appeal.

The defendant provides no basis for review of this unreserved issue on appeal. He does not allege manifest error, lack of trial court jurisdiction, or failure to establish facts upon which relief can be granted, as required under RAP 2.5(a)(1) and (2). A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n. 6, 158 P.3d 1144 (2007). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

2. This court's discretionary authority to accept review should not be exercised in this case.

Additionally, this issue is broadly based on *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). There, the court ruled that appellate

courts have discretionary authority to hear LFO challenges raised for the first time on appeal. *Id.* at 833-835. Although *Blazina* empowers appellate courts to consider LFO challenges where the trial court did not conduct the statutory inquiry at sentencing, it is less certain whether that discretionary authority applies to post-*Blazina* sentencings, such as this one, involving an unchallenged inquiry. This case does not warrant the exercise of that discretionary authority, assuming it does exist.

Moreover, the amount in dispute is only \$200. The defendant does not establish why this \$200 could not be paid as ordered, at the rate of \$25 per month starting January 2, 2018. Defendant is only 26 years of age at the present time. CP 51. If the financial burden is too much to bear in the future, then defendant has the alternative of seeking remission. *See* RCW 10.01.160(4).

When a party urges an appellate court to overrule an earlier decision, that party must make a clear showing that the established rule is both incorrect and harmful. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 25, 296 P.3d 872 (2013); *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Defendant Greger has failed to *clearly* demonstrate that the *Lundy* holding is incorrect, or that it is harmful.

3. The statute imposing the fee is mandatory in nature.

Defendant asserts that the “Washington Supreme Court recently appeared skeptical” that the \$200 filing fee was mandatory. Br. of Appellant at 25, citing *State v. Duncan*, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). How Defendant gleans from the full footnote³ that the State Supreme Court was *skeptical* regarding the holding in *Lundy*, is puzzling, at best. The

³ *State v. Duncan*, 185 Wn.2d at 436 n.3:

We recognize that the legislature has designated some of these fees as mandatory. *E.g.*, RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals, *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender’s ability to pay). While we have not had occasion to consider the constitutionality of all of these statutes, we have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from being sanctioned for nonwillful failure to pay. *See Curry*, 118 Wn.2d at 917, 829 P.2d 166.

mandatory nature of the filing fee statute, RCW 36.18.020 is self-evident.

It provides in pertinent part:

(2) Clerks of superior courts **shall** collect the following fees for their official services:

...

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case **shall** be liable for a fee of two hundred dollars.

(Emphasis added).

The legislative use of the words “shall” was intended. This court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). It is well settled that the word “shall” in a statute is presumptively imperative and operates to create a duty. *Crown Cascade, Inc. v. O’Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983); *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (citing *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980)). The word “shall” in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *Bryan*, 93 Wn.2d at 183 (quoting *State Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 377, 561 P.2d 195 (1977)). Therefore, the \$200 filing fee is a mandatory assessment.

Moreover, RCW 36.18.020 was amended in 2015, two years after the publication of the *Lundy* decision. However, the statute was amended *without taking any action* on the relevant portions subject to defendant's present argument. In *State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008), the Court found controlling the presumption of legislative acquiescence in judicial interpretation where the assault statute was amended following the Court's decision three years earlier in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). There, as here, the statute was amended *without taking any action* on the relevant portions subject to the earlier decision. The presumption of legislative acquiescence in judicial interpretation is a principle of statutory construction that should control this case.

C. THE IMPOSITION OF APPELLATE COSTS IS DISCRETIONARY WITH THE COURT.

After filing his initial brief, defendant filed a report of continued indigency in compliance with this court's June 10, 2016 directive. The discretionary determination of whether appellate costs should be imposed is within the province of this court.

To the extent the defendant has raised a substantive due process argument regarding the imposition of appellate costs, the argument is both premature, and without merit.

The imposition of costs on criminal appeals is addressed by RCW 10.73.160 and RAP 14.1 - RAP 14.6. RCW 10.73.160 provides:

(1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

RCW 10.73.160 (1) and (2).⁴

The Rules of Appellate Procedure provide:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. If there is no substantially prevailing party, the commissioner or clerk will not award costs to any party.

RAP 14.2.

The provisions on costs are rationally related to a legitimate state interest. RAP 18.2 provides an incentive for both criminal and civil appellants, and both indigent and non-indigent criminal defendants to

⁴ The constitutionality of RCW 10.73.160 has been considered by this court and upheld. *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997).

abandon frivolous appeals before oral argument (and certainly before the court makes any determination on the merits of the appeal.) This incentive is consistent with American Bar Association Standards for Criminal Appeals which indicate it is acceptable for there to be some financial risk associated with the pursuit of meritless appeals:

(a) Administration of a system of elective appeals presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have **identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons.**

(b) **Examples of unacceptable inducements for defendants to appeal are:**

(i) **Absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal...**

American Bar Association, Standards for Criminal Justice, 21-2.3 (emphasis added).⁵

If the court were to adopt a rule that indigent defendants need not pay costs associated with the filing of meritless appeals, the court would, in effect, confer a financial advantage on indigent defendants over nonindigent defendants. Presumably, both appointed and retained counsel discuss the merit (or lack thereof) of criminal appeals with their clients. *See* RPC 1.4.

⁵ ABA Standards for Criminal Appeals are available at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_toc.html.

The American Bar Association urges appellate attorneys to discuss the merits of a defendant's criminal appeal with their clients and encourage abandonment where an appeal is frivolous:

After examining the record and the relevant law, **counsel should provide counsel's best professional evaluation of the issues that might be presented on appeal. Counsel should advise the client about the probable and possible outcomes and consequences of a challenge to the conviction or sentence.**

...

Appellate defense counsel should not file a brief that counsel reasonably believes is devoid of merit. However, counsel should not conclude that a defense appeal lacks merit until counsel has fully examined the trial court record and the relevant legal authorities. If appellate counsel does so conclude, counsel should fully discuss that conclusion with the client, and explain the "no merit" briefing process applicable in the jurisdiction if available. Counsel should endeavor to persuade the client to abandon a frivolous appeal, and to eliminate appellate contentions lacking in substance. If the client ultimately demands that a no-merit brief not be filed, defense counsel should seek to withdraw.

American Bar Association, Fourth Edition of the Criminal Justice Standards for the Defense Function, 4.9-2 (emphasis added).⁶

⁶ ABA Standards for the Defense Function are available at: http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.

A nonindigent defendant, having had this conversation with counsel, then has the choice⁷ whether to pursue a meritless appeal (or even an appeal taken against legal advice), and must bear the financial cost of that decision, including his attorney's fees and court costs. An indigent defendant should be faced with this same choice, to either elect to abandon the appeal if, after a discussion of the merits of the appeal, the attorney so advises, or elect to bear the expense associated with its pursuit. To hold that indigent defendants are not required to pay such expenses incentivizes the pursuit of frivolous appeals for *only* indigent defendants. Such a policy amounts to an unacceptable inducement to appeal expressly disapproved by American Bar Association standards. This Court should decline to allow indigent defendants this advantage over nonindigent defendants.

If costs are imposed, the defendant may seek remission. RCW 10.01.160(4). Washington has adopted the view that “[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments “at a time when [the defendant is] unable, through no fault of his own, to comply.”” *Lundy*,

⁷ This court has already determined that the potential imposition of costs at the conclusion of an unsuccessful appeal does not unconstitutionally chill a defendant's right to appeal because a defendant's ability to pay must be assessed before enforcement or sanctions are imposed for non-payment. *Blank*, 131 Wn.2d at 246-247.

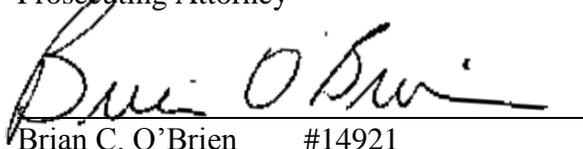
176 Wn. App. at 103 n.4 (some alterations in original) (quoting *United States v. Pagan*, 785 F.2d 378, 381-82 (2d Cir.1986)). ““It is at the point of enforced collection..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the grounds of his indigency.”” *State v. Kuster*, 175 Wn. App. 420, 424-25, 306 P.3d 1022 (2013) (quoting *Blank*, 131 Wn.2d at 241).

V. CONCLUSION

The unpreserved claim that WPIC 4.01 is unconstitutional is without merit. The belatedly brought and unpreserved claim that the filing fee is discretionary should not be considered. The filing fee collection statute is mandatory in nature. The State respectfully requests this court affirm the judgment and sentence imposed in this case.

Dated this 7 day of December, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
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Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT GREGER,

Appellant,

NO. 34398-7-III

CERTIFICATE OF MAILING

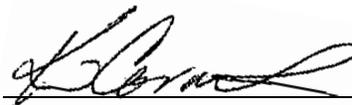
I certify under penalty of perjury under the laws of the State of Washington, that on December 7, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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12/7/2016
(Date)

Spokane, WA
(Place)



(Signature)