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Court of Appeals  
Division III  
State of Washington  
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36488-7-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

NATHAN NAVE, APPELLANT.

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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Prosecuting Attorney

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**INDEX**

**I. APPELLANT’S ASSIGNMENT OF ERROR..... 1**

**II. ISSUE PRESENTED..... 1**

**III. STATEMENT OF THE CASE ..... 1**

**IV. ARGUMENT ..... 1**

    A. DEFENDANT’S CLAIM IS BARRED UNDER RAP 2.5  
    BECAUSE DEFENDANT FAILED TO PRESERVE  
    ANY LEGAL FINANCIAL OBLIGATION (LFO)  
    ISSUE FOR APPEAL. .... 1

    B. MR. NAVE’S PROPER REMEDY IS TO SEEK  
    REMISSION IN THE TRIAL COURT..... 4

**V. CONCLUSION ..... 5**

**TABLE OF AUTHORITIES**

*Cases*

*State v. Crook*, 146 Wn. App. 24, 189 P.3d 811 (2008) ..... 5

*State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988) ..... 2

*State v. Shirts*, 195 Wn. App. 849, 381 P.3d 1223 (2016) ..... 5

*State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016) ..... 2, 3

*State v. Strine*, 176 Wn.2d 742, 293 P.3d 1177 (2013) ..... 2

*Statutes*

RCW 10.01.160 ..... 5

RCW 10.101.010 ..... 1, 3

RCW 10.73.160 ..... 4, 5

RCW 10.82.090 ..... 5

RCW 36.18.020 ..... 1

*Rules*

RAP 2.5 ..... 2, 4

## **I. APPELLANT’S ASSIGNMENT OF ERROR**

The court erred in imposing a \$200 criminal filing fee.

## **II. ISSUE PRESENTED**

Did the court err in imposing the \$200 criminal filing fee?

## **III. STATEMENT OF THE CASE**

A jury convicted defendant on October 3, 2018, of one count of second-degree rape, third-degree rape of a child and third-degree child molestation, with a special finding of an ongoing pattern of sexual abuse. CP 95-100. Defendant was sentenced on November 16, 2018. CP 149-165. The \$200 filing fee was imposed pursuant to RCW 36.18.020(2)(h). CP 157. The defendant timely filed a notice of appeal on November 29, 2018. CP 169-170. An order of indigency was not entered and filed until January 3, 2019. CP 174-175.

## **IV. ARGUMENT**

### **A. DEFENDANT’S CLAIM IS BARRED UNDER RAP 2.5 BECAUSE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL.**

In this case, the most recent statute limiting the levying of the \$200 filing fee on those who are indigent (RCW 36.18.020(2)(h) <sup>1</sup>) was already in effect at the time of the defendant’s sentencing.

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<sup>1</sup> Note that RCW 10.101.010(3) also includes “indigent” defendants as persons who are “(d) Unable to pay the anticipated cost of counsel for the

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, 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). The issue raised here is not constitutionally based.

Additionally, this Court should not accept review of this claim based upon an undeveloped record. As in *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), the issue now raised by defendant was not preserved

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matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.” There is nothing in this record to indicate under which subsection the defendant fell when initially appointed public defense counsel.

or developed in the trial court with supporting facts that would enable this Court to properly review the claim. In *Stoddard*, this Court emphasized:

We consider whether the record on appeal is sufficient to review Gary Stoddard's constitutional arguments. Stoddard's contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge's defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard's due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

*Id.* at 228-29.

The defendant does not establish the court committed a manifest constitutional error at the time of sentencing. There was nothing in the record to indicate whether the defendant's private counsel was acting pro bono, paid by someone else, or assigned as a conflict attorney under subsections (a) through (c), instead of (d) of RCW 10.101.010, or whether the defendant himself retained private counsel on his own. The court was not asked to waive this fee, nor was it objected to at sentencing. *See* RP 205-06, 217-20, 222-26. Upon the record presented at sentencing, the court did not err in imposing the \$200 filing fee.

The defendant had been released on bond and had been allowed to travel outside of Washington *for work* three months before trial. CP 19-20. The defendant was not found indigent until *two months after* sentencing for appeal purposes. The indigency order was based on the certificate stating defendant was unemployed with the words “incarcerated” in parentheses. CP 172.

Therefore, policy and RAP 2.5 do not favor consideration of the belatedly-raised legal financial obligations issue. Nothing presented to the trial court at the time of sentencing indicated that the \$200 filing fee could not be imposed.

**B. MR. NAVE’S PROPER REMEDY IS TO SEEK REMISSION IN THE TRIAL COURT.**

RCW 10.73.160(4) permits a defendant to petition the sentencing court for the remission of costs. That statute states:

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may *at any time after release from total confinement* petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, modify the method of payment under RCW 10.01.170, or convert the unpaid costs to community restitution hours, if the jurisdiction operates a community restitution program, at the rate of no less than the state minimum wage established in RCW 49.46.020 for each hour of community

restitution. Manifest hardship exists where the defendant or juvenile offender is indigent as defined in RCW 10.101.010(3) (a) through (c).

RCW 10.73.160(4) (emphasis added).

In order to file a petition to remit, a defendant must meet two conditions. RCW 10.01.160(4). First, the defendant was ordered to pay costs, and, second, the defendant must not be “in contumacious default.” RCW 10.01.160(4). If a defendant meets these two conditions, the defendant may file a petition to remit “at any time after release from total confinement.” RCW 10.01.160(4). *See also, State v. Shirts*, 195 Wn. App. 849, 858-59, 381 P.3d 1223 (2016); *State v. Crook*, 146 Wn. App. 24, 26, 189 P.3d 811 (2008). That remedy would be available to the defendant upon his release.<sup>2</sup>

## V. CONCLUSION

The defendant has not shown the trial court erred in imposing the \$200 criminal filing fee, and has other remedies available should payment

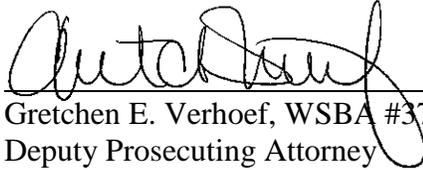
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<sup>2</sup> This fee no longer accrues interest pursuant to RCW 10.82.090, also effective June 8, 2018. Laws of 2018, ch. 269, § 1; Laws of 2018, pg. ii, “Effective Date of Laws.”

of the fee cause a manifest hardship. This Court should therefore affirm the trial court's order.

Dated this 5 day of September, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", is written over a horizontal line. The signature is fluid and cursive.

Gretchen E. Verhoef, WSBA #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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NATHAN NAVE,

Appellant,

NO. 36488-7-III

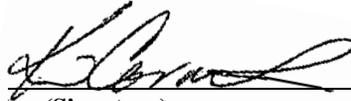
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 5, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Susan Gasch  
gaschlaw@msn.com

9/5/2019  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**September 05, 2019 - 8:34 AM**

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