

NO. 44441-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

WILLIE LEE JOYNER, V, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 12-1-03520-4

Brief of Respondent

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

1. Whether Defendant waived the issue of the imposition of legal financial obligations by not raising this issue below.
2. Whether, assuming arguendo, that Defendant did not waive the issue of the imposition of legal financial obligations, that issue is not ripe for review.
3. Whether, assuming arguendo, the issue was not waived and is ripe, the sentencing court properly imposed legal financial obligations.

B. STATEMENT OF THE CASE.

1. Procedure

On September 17, 2012, the State charged Willie Lee Joyner, V, herein after referred to as "defendant," with one count of second degree assault, one count of felony harassment, and one count of fourth degree assault. CP 1-2.

On January 4, 2013, a jury found defendant guilty of two counts of fourth degree assault, one of which was a lesser included offense of the

second degree assault. RP (01/04/2013) 319-320¹; CP 92, 94. The court granted Defendant a suspended sentence of two years, less 125 days as credit for time served. CP 100. The court imposed \$1500 in attorney fees, the \$500 crime victim compensation penalty assessment, and \$200 in court costs, for a total \$2200 in legal financial obligations. CP 100-101.

Defendant filed a timely notice of appeal on January 18, 2013. CP 103.

2. Facts

This incident arose between Defendant and Rosalie Asis, his girlfriend and the mother of his son. On September 15, 2012, police responded to a reported domestic dispute at the residence of Rodney Dickison, Asis' stepfather. RP (01/02/2013) 68; 80.

Asis originally told police that she and Defendant had been at his sister's residence when they began to argue. RP (01/03/2013) 176. The Defendant grabbed her face, forced her on the bed, and held her down by her throat until she convinced him to let her go. RP (01/03/2013) 176; 178; 200. Asis then went to the bathroom, and defendant followed her. RP

¹ The State will refer to the Verbatim Report of Proceedings by the date followed by the page number.

(01/03/2013) 179. Defendant shoved her into the bathtub and punched her in the back of her head. RP (01/03/2013) 201-02².

After the assault, Defendant agreed to drive Asis to her mother's home. RP (01/03/2013) 180. Once there, the couple argued about Defendant leaving in Asis' car. RP (01/03/2013) 181. Asis' family members came outside and began to argue with Defendant. RP (01/03/2013) 183. Asis' stepfather stated that Defendant got out of the car, ran toward him, and threatened him. RP (01/02/2013) 75-77. Defendant also pushed and threatened Asis' stepbrother. RP (01/02/2013) 101. Police were called and took statements from Asis' family. RP (01/02/2013) 80.

C. ARGUMENT.

1. THE DEFENDANT WAIVED THE ISSUE OF THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BY NOT RAISING THIS ISSUE IN THE COURT BELOW.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court

² Shortly prior to trial Asis recanted part of her original statement and testified that she had "exaggerated" the events of that night. RP (01/03/2013) 288. Asis stated defendant did not shove or punch her, but that she fell instead. RP (01/03/2013) 202. She also stated defendant did not strangle her. RP (01/03/2013) 199.

jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the court must first determine whether the alleged error even suggests a constitutional issue. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

If it does, the defendant must show that the error is manifest; that is, that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 345. *See also State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (holding that an appellant must show that he or she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). When the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Only if the defendant can demonstrate that the error is both constitutional and manifest, does the burden shift to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011).

In the present case, Defendant did not object to the imposition of legal financial obligations (LFOs) at sentencing, and makes no showing that the issue may be raised for the first time here. Because there is no record to support defendant’s claimed inability to pay LFOs, the defendant

has not shown prejudice and the claimed error cannot be manifest. *See McFarland*, 127 Wn.2d at 333.

Therefore, Defendant may not raise this issue here, and the sentencing court's imposition of LFOs should be affirmed.

2. ASSUMING DEFENDANT DID NOT WAIVE THE ISSUE OF THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS, THAT ISSUE IS NOT RIPE FOR REVIEW.

The time to challenge the imposition of LFOs is when the State seeks to collect the obligation. *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009). *See also State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (holding that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.").

"The party presenting an issue for review has the burden of providing an adequate record to establish such error[.]" *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *See also* RAP 9.2(b). "If the appellant fails to meet this burden, the trial court[']s decision stands." *State v. Tracy*, 128 Wn. App. 388, 394–395, 1215 P.3d 381 (2005).

Here, there is no evidence that the State has sought collection of defendant's LFOs. The issue is thus not ripe for review.

3. ASSUMING THE ISSUE OF THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS NOT WAIVED AND IS RIPE, THE SENTENCING COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS UPON DEFENDANT AFTER HE WAS CONVICTED.

Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160. However,

(3) The court shall not order a defendant to pay costs unless the defendant *is or will be able* to pay them...

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

RCW 10.01.160 (emphasis added); *See* Appendix A. In light of such safeguards, the judiciary is not required to provide the added protection of formal findings to support the assessment of court costs. *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). *See also State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55 (1991); *State v. Suttle*, 61 Wn. App. 703, 812 P.2d 119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings of fact).

A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997)(quoting *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992)). While a court may not incarcerate an

offender who truly cannot pay LFOs, every offender must make a good faith effort to satisfy these obligations by seeking employment, borrowing money, or otherwise legally acquiring resources to pay their court ordered financial obligations. *State v. Woodward*, 116 Wn. App. 697, 703-704, P.3d 530 (2003). Furthermore, defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs. *Id* at 704.

Appellate Courts review a sentencing court's determination of a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991) (reasoning that the erroneous standard applies because defendant's ability to pay and financial status are essentially factual findings); *State v. Calvin*, ___ P.3d ___ (2013 WL 2325121). "The inquiry is whether the court's determination is supported by the record." *Baldwin*, 63 Wn. App. at 312, fn 27.

In the present case, the court found that defendant was able to pay his LFOs. Defendant's conditions on suspended sentence stated that

The court finds that the defendant is able to pay said fee without undue financial hardship.

CP 100.

Not only did the trial court formally state that it considered defendant's ability to pay, but defendant and his counsel acknowledged as much by signing the conditions on suspended sentence which contained the finding. CP 102.

Moreover, the record contains sufficient evidence from which the trial court could determine that defendant had the present *or future* ability to pay LFOs.

Defendant is 22 years old³. There is no evidence presented that Defendant has any physical impairments that would hinder his future ability to obtain employment or pay LFOs⁴. Additionally, at sentencing, Defendant's attorney articulated defendant's willingness to obtain employment and stated that "Mr. Joyner needs to make some money and start paying some child support and helping Ms. Asis out with that...he wants to support his baby and wants to be reunited with this family." RP (01/18/2013) 7.

Because Defendant was age 22 at trial, expressed an intent to look for work, and has no physical impairments that would prevent him from obtaining employment, the trial court's imposition of LFOs was supported

³ RP (01/18/2013) 7.

⁴ Defendant repeatedly charged at Asis' stepfather and vigorously tackled Asis. RP (01/03/2013) 200; (RP (01/02/2013) 75-77. This indicates defendant has no physical impairments that would prevent him from obtaining employment to pay his LFOs.

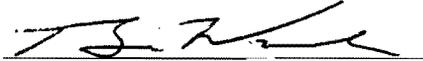
by the record. Therefore, the court's order imposing LFOs was not clearly erroneous and should be affirmed.

D. CONCLUSION.

Because this issue is not properly before this Court, not ripe for review, and Defendant has failed to show a present or future inability to pay LFOs, the State respectfully requests this Court to affirm the trial court's imposition of legal financial obligations.

DATED: August 8, 2013.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.8.13 
Date Signature

APPENDIX “A”



Effective: June 10, 2010

West's Revised Code of Washington Annotated Currentness

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.01. General Provisions (Refs & Annos)

→→ 10.01.160. Costs--What constitutes--Payment by defendant--Procedure--Remission--Medical or mental health treatment or services

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hard-

ship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW 10.77.084 while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW 10.77.250 and 70.48.130, chapter 43.20B RCW, and any other applicable statute.

CREDIT(S)

[2010 c 54 § 1, eff. June 10, 2010; 2008 c 318 § 2, eff. April 1, 2008; 2007 c 367 § 3, eff. July 22, 2007; 2005 c 263 § 2, eff. July 24, 2005; 1995 c 221 § 1; 1994 c 192 § 1; 1991 c 247 § 4; 1987 c 363 § 1; 1985 c 389 § 1; 1975-'76 2nd ex.s. c 96 § 1.]

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