

**NO. 47368-2-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**FAUZI BIN ZAIN,**

**Appellant.**

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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**RYAN JURVAKAINEN  
Prosecuting Attorney  
JODY NEWBY/WSBA 41460  
Deputy Prosecuting Attorney  
Representing Respondent**

**HALL OF JUSTICE  
312 SW FIRST  
KELSO, WA 98626  
(360) 577-3080**

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## **I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

1. The trial court did not err by when it entered all of Zain's LFOs.
2. The trial court did not err when it entered finding of fact 2.5.

## **II. STATEMENT OF THE CASE**

The State does not have anything to add to the Appellant's "Statement of Facts and Prior Proceedings" for purposes of the Respondent's Supplemental Brief.

## **III. ARGUMENT**

### **A. Zain waived his right to object to the imposition of legal financial obligations by failing to object to their imposition below.**

Zain alleges that the trial court erred by finding that he has the ability either in the present or future to pay legal financial obligations, premised largely upon the court's alleged failure to consider his ability to pay at the time of sentencing under RCW 10.01.160(3). Zain bears the burden of demonstrating he can raise this issue for the first time on appeal. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

"RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State*

*v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011)) (citing *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue sua sponte. *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

RAP 2.5(a) gives three exceptions that allow an appeal as a matter of right. Like in *Blazina*, Holman does not argue an exception to RAP 2.5. However, the Washington Supreme Court holds that the exception found in *State v. Ford* does not apply because “[u]npreserved LFO errors do not command review as a matter of right under *Ford* and its progeny.” *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999).

Here, Zain did not object to the imposition of LFO at sentencing, therefore the court should exercise its discretion and decline to reach the merits.

**B. Even if the court considers the issue properly before the court, the court did not err when it entered all of the LFOs.**

The court reviews the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991), 837 P.2d 646 (1992). “A finding

of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’ ” *Schryvers v. Coulee Cnty. Hosp.*, 138 Wn. App. 648, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000)).

“The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one.” *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013). Indeed, “a trial court is prohibited from imposing legal financial obligations only when it appears from the record that there is no likelihood that the defendant's indigency will end.” *Id.* at 99, 308 P.3d 755. In *State v. Duncan*, the court considered the reasons in which a defendant may not want to tell the court he will never be employable nor have the ability to pay his LFOs. 180 Wn. App. 245, 327 P.3d 699 (2014). “But having come to the conclusion that ability to pay LFOs is not an issue that defendants overlook—it is one that they reasonably waive—we view this as precisely the sort of issue we should decline to consider for the first time on appeal.” *Id.* at 253

Many of the LFOs do not have an exception for indigency. For example, the court in this case imposed a \$500.00 victim assessment penalty. CP 17. Under RCW 7.68.035(1)(a), this assessment must be

imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigency. Similarly, pursuant to RCW 43.43.7454(1), a \$100.00 biological sample fee must be included in every sentence for which a biological sample must be taken. This includes every case in which a person is convicted of a felony, and was therefore appropriately included in this case.

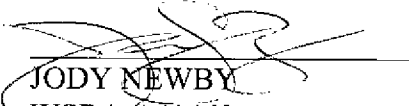
**IV. CONCLUSION**

For the above stated reasons, the conviction should be affirmed.

Respectfully submitted this 12 day of August.

RYAN JURVAKAINEN  
Prosecuting Attorney

By:

  
JODY NEWBY  
WSBA # 41460  
Deputy Prosecuting Attorney  
Representing Respondent



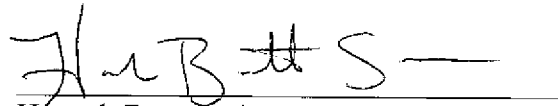
**CERTIFICATE OF SERVICE**

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund  
Attorney at Law  
P.O. Box 6490  
Olympia, WA 98507  
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 12, 2015.

  
\_\_\_\_\_  
Hannah Bennett-Swanson

# COWLITZ COUNTY PROSECUTOR

**August 12, 2015 - 12:13 PM**

## Transmittal Letter

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