

NO. 46907-3

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

STATE OF WASHINGTON, RESPONDENT

v.

MARK WILMER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman, Judge

No. 14-1-01690-7

BRIEF OF RESPONDENT

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

1. Did the defendant fail to preserve his claim or objection to the imposition of legal financial obligations when he failed to object to the issue at the trial court?

2. Has the defendant failed to show the trial court abused its discretion or acted in a clearly erroneous way when assigning discretionary legal financial obligations, after considering the defendant's individual circumstances?

3. Has defendant failed to show defense counsel was ineffective for choosing not to object to the discretionary legal financial obligations when the trial court considered the defendant's individual circumstances, the totality of the defense was effective, and no prejudice resulted?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Mark Wilmer ("defendant") with Assault 2, the case proceeded to trial before the Honorable John R. Hickman. CP 1, RP 1-3. The defendant was convicted as charged and sentenced to 55 months confinement after a trial by jury. CP 69, 71, 75-76. He was ordered to pay mandatory legal financial obligations ("LFOs") totaling

\$800, and a discretionary recoupment of \$1,500 to the Department of Assigned Counsel (“DAC”). CP 73; RP 352; RCW 7.68.035; RCW 43.43.7541; RCW 36.18.020; RCW 10.01.160. Defendant timely appealed. CP 66.

2. Facts

On April 23rd, 2014, the defendant physically and verbally assaulted his then wife causing her a broken nose, bruised heart and lungs, and fractured transverse process on the lumbar vertebrae¹. RP 67, 69-73, 178-79, 229-35, 273-74. The defendant violently punched and kicked the victim while she was on the ground, nude, and cornered in a protective fetal position. RP 71-74. When she attempted to escape, the defendant threw her back to the ground and continued the abuse. RP 72-74. The victim became so frightened that she defecated on herself. RP 74.

Eventually, the defendant ceased the beatings, allowed the victim to take a shower, and then forced her to clean the blood and feces from the house before he would return her clothes. RP 77-78. After several hours of cleaning the blood stained carpet, walls, and mattresses, all while still bleeding, the victim’s clothes were returned and she walked to a nearby gas station to call for an ambulance and the police. RP 75, 77-80.

¹ A fracture of a transverse process is a break of bones around the spine that can be caused by direct blows to the back. CP 229; Transverse Process Fracture, Baylor, Scott, & White Health Web Page (Jul. 28, 2015, 2:07 PM), [http:// www.sw.org/misc/ health /Transverse%20Process%20Fracture.html](http://www.sw.org/misc/health/Transverse%20Process%20Fracture.html).

The victim was transported by ambulance initially to St. Clare Hospital and then transferred to Tacoma General due to the severe extent and trauma of her injuries. RP 83-86, 215-17. After receiving treatment she remained under hospital care for a week, remaining largely bed ridden. RP 85-86. Her injuries prevented her from walking without assistance and required her to use a breathing machine for some time following her discharge from the hospital. RP 85-86, 129. Defendant did not testify during trial. RP 249-250.

C. ARGUMENT.

1. THE DEFENDANT DID NOT PRESERVE THE ISSUE FOR REVIEW WHERE HE FAILED TO OBJECT TO THE ASSIGNMENT OF LEGAL FINANCIAL OBLIGATIONS.

A failure to object to an issue in the trial court precludes it from being reviewed on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. See *State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

During sentencing, the defense raised no objection to the sentence. RP 349-54. The defendant did not challenge the state's recommendation of \$1,500 in discretionary LFOs, which the court imposed. *Id.* The defendant had an opportunity to object to the court's imposition of discretionary fees, but did not. RP 352-54. Defendant did not preserve the issue for review on appeal.

The appellate court may review issues raised for the first time on appeal only if there is (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also, State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); *State v. Sisouvanh*, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). The defendant would have to claim there was a manifest error with actual prejudice affecting a constitutional right in order to raise it under the RAP 2.5(a) exceptions. *See, State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Only in the event that a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Failing to make an individualized inquiry into a defendant's ability to pay LFOs does not involve a constitutional right. *State v. Blazina*, 182 Wn.2d 827, 840-41, 311 P.3d 492 (2015) (Fairhurst, J., concurring). Defendant has failed to provide any evidence of prejudice required for a

manifest constitutional error, so this court should decline to exercise its discretionary RAP 2.5(a) review.

The defendant relies on *Blazina*, 182 Wn.2d 827, to argue that this court should overlook his failure to preserve the issue through a proper objection and grant review under RAP 2.5(a). While the Supreme Court used its discretionary authority under RAP 2.5(a) to reach the merits, they acknowledged unique circumstances led them to exercise their discretion and “...the Court of Appeals properly declined discretionary review.” *Id.* at 834-35.

In *Blazina*, the Supreme Court did not create a new standard exempting LFO claims from traditional preservation requirements; it explicitly noted “[the assigned LFO error] will not taint sentencing for similar crimes in the future. The error is unique to these defendants’ circumstances...” *Id.* at 834. The Court reached the merits of the case because of “[n]ational and local cries for reform of broken LFO systems...”², a reason particularly suited to the Supreme Court’s unique ability to address broad policy issues of statewide or national concern. The Supreme Court did not overrule the Court of Appeals’ denial of review for failure to preserve and explicitly stated that other appellate courts are not obligated to exercise their discretion in the same way. *Id.* at 834-35. This court should decline to exercise such discretion since the

² *Blazina*, 182 Wn.2d 827 at 835.

defendant has failed to present an argument for why this case demands the court exercise its power of discretionary review under RAP 2.5(a).

2. THE TRIAL COURT WAS PRESENTED WITH SUFFICIENT INFORMATION TO ASSESS THE DEFENDANT'S INDIVIDUAL FINANCIAL RESOURCES AND THEREBY, PROPERLY IMPOSE DISCRETIONARY LFOs IN ACCORDANCE WITH RCW 10.01.160(3).

A court must impose certain mandatory fees on a convicted defendant, including a victim penalty assessment, DNA collection fee, and a clerk's filing fee. RCW 7.68.035; RCW 43.43.7541; RCW 36.18.020. Additionally, the court can use its discretion to order the defendant to pay other fees to recoup court costs based on an individualized assessment of the defendant's ability to pay the discretionary fees. RCW 10.01.160. No such inquiry is required for the mandatory fees, which are uniformly imposed by statute and do not take into account a defendant's financial situation. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The recoupment to DAC was the only discretionary LFO assigned to the defendant. CP 73; RCW 10.01.160.

A court is not required to issue formal findings on its assessment of the defendant's financial situation. *State v. Curry*, 118 Wn. 2d 911, 916, 829 P.2d 166 (1992). However, there must be sufficient information in the record of the defendant's present or future ability to pay his LFOs to

conduct an appellate review under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012). The trial court is required to make an individualized inquiry as to each defendant's ability to pay assigned discretionary fees. *Blazina*, 182 Wn.2d at 838; RCW 10.01.160(3).

The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. *Lundy*, 176 Wn. App. at 105. A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); *Sisouvanh*, 175 Wn.2d at 619. If the appellant fails to meet this burden, the trial decision stands. *State v. Tracy*, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005) *aff'd*, 158 Wn.2d 683, 147 P.3d 559 (2006). Therefore, the defendant has the burden of showing the trial court judge improperly exercised his discretion by showing an affirmative error.

The record on review shows that the court was presented with sufficient information to make a determination about the defendant's ability to pay his discretionary financial obligations. Over the course of the trial, it was discovered that the defendant was in possession of his deceased father's home which he was making improvements on to sell. RP

70, 72-73. The defendant purchased between \$50-\$60 worth of cocaine, along with a number of twenty-four ounce cans of malt liquor and some beers, immediately preceding the actions that led to his conviction. RP 104-06, 109-10. The record strongly implies that the purchase of cocaine was not a one-time occurrence. RP 109-11 (testimony as to the “usual amount” of cocaine that the defendant and victim would split). Additionally, he owned an operating phone that he used to call the victim several times in the aftermath of the assault. RP 78-79, 82-83, 124-25. Finally, the severe physical force the defendant used to break his victim’s nose, bruise her lungs and heart, and fracture her transverse processes on her lumbar vertebra demonstrates that the defendant possess some physical strength and is able bodied. RP 178-79, 229-35, 273-74.

The information in the record on review reveals a defendant in possession of a home he is planning to sell. RP 70, 72-73. The defendant possessed the financial ability to maintain an active phone line and purchase cocaine and alcohol. RP 78-79, 82-83, 104-06, 109-11, 124-25.

In terms of future earnings ability, the defendant’s behavior shows he is physically able to find employment upon release from custody. *Cf. Bertrand*, 165 Wn. App. at 403-04. These factors, when aggregated, provided the court with enough information to make an assessment of the

defendant's ability to pay his discretionary LFOs. The defendant has failed to show that the trial court acted in a clearly erroneous fashion or abused its discretion in assigning LFOs.

3. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL'S REPRESENTATION WAS OBJECTIVELY REASONABLE AND NO PREJUDICE RESULTED.

To demonstrate ineffective assistance of counsel, a defendant must show that: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong "Strickland test" from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The burden is on the defendant alleging ineffective assistance to show deficient representation under the *Strickland* test based on the record below. *Strickland*, 466 U.S. at 667-68; *McFarland*, 127 Wn.2d at 335; *In re Davis*, 152 Wn. 2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). In the instant case, the defendant alleges that defense counsel was ineffective for failing to object to the assignment of LFOs. Amended Brief of Appellant at 1, 6-8.

- a. Defendant has failed to prove that defense counsel provided ineffective representation by choosing not to object to the imposition of LFOs.

There is a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). A defendant must rebut this presumption by showing that counsel's mistakes "so upset the adversarial balance", *Kimmelman*, 477 U.S. at 374, that the trial was unfair and the verdict unreliable. *Id. See also, Strickland*, 466 U.S. at 693. Only in the most egregious circumstances does counsel's failure to object constitute ineffectiveness of counsel that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The defendant does not meet his burden under the first prong of the *Strickland* test, as he failed to show counsel's representation was unreasonable based on the record on review. As explained above, the sentencing of LFOs was proper and it was not unreasonable for defense counsel not to object to their imposition. Counsel cannot be deemed ineffective for withholding baseless objections to proper sentencing.

- b. Defendant has failed to prove that defense counsel's overall performance was deficient.

A defendant's right to effective counsel is met when he is able to "require the prosecution's case to survive the crucible of meaningful

adversarial testing.” *U.S. v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657 (1984). The defendant must demonstrate that counsel’s unprofessional conduct or the circumstances surrounding his legal representation have deprived him of a fair, adversarial trial. *See Cronic*, 466 U.S. at 658; *U. S. v. Morrison*, 449 U.S. 361, 363, 101 S. Ct. 665, 667, 66 L. Ed. 2d 564 (1981).

The effectiveness of counsel must be judged based on a totality of the legal representation provided by counsel at all phases of the trial. *See Cronic*, 466 U.S. at 659; *see also, Avery v. State of Alabama*, 308 U.S. 444, 452, 60 S. Ct. 321, 325, 84 L. Ed. 377 (1940) (evaluating the entirety of defense counsel’s performance to be effective, despite alleged errors by defendant); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (holding that a tardy appointment of counsel is not a per se denial of effective counsel). Isolated errors by counsel do not justify setting aside a judgement, provided that the trial still adequately served its adversarial purpose. *See, Id.* at 656-57; *Strickland*, 466 U.S. at 691.

In the instant case, when the record is reviewed as a whole, it is apparent that defendant received effective assistance of counsel as guaranteed by the Sixth Amendment. U.S. Const. amend. VI. Defense

counsel advocated to exclude State's evidence in a preliminary hearing. RP 18-20, 22, 24-25, 31-34, 35-36. Counsel cross-examined each of the State's five witnesses. RP 103-29, 138-40, 149-51, 152, 162-66, 179-80, 237-47. Defense counsel also made objections throughout trial. RP 79, 84, 147, 157, 160. Counsel vigorously argued for a lesser included offense of assault in the fourth degree, and worked with the State to craft proposed jury instructions that incorporated elements sought by the defense. RP 188-90, 191-98. The defendant fails to show how counsel's overall trial performance was sufficiently inadequate as to deprive him of a fair and adversarial trial.

c. Defendant has failed to show prejudice resulting from counsel's decision not to object to LFOs.

The *Strickland* test requires the defendant to show the prejudice resulted from counsel's deficient representation to establish a valid ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687.

Prejudice means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The defendant must show that the proceeding would have had a different outcome, but for counsel's deficient

representation. *McFarland*, 127 Wn.2d at 337; *See also, Strickland*, 466 U.S. at 687. The failure of a defendant to show either deficient performance or prejudice defeats his claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

The defendant has failed to show that a different result would have occurred even if counsel's representation was deficient. The trial court was presented with adequate information to make an individualized financial determination as required by RCW 10.01.160 before ruling on legal financial obligations. RP 70, 72-73, 78-79, 82-83, 104-06, 109-11, 124-25. Therefore, no prejudice could have resulted from such a failure to object. The defendant has failed to show that defense counsel's conduct was unreasonable and that any unreasonable conduct was prejudicial.

D. CONCLUSION.

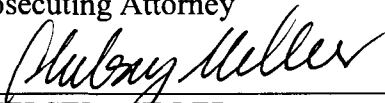
The State respectfully request that the Court decline to review the defendant's challenge to legal financial obligations because he failed to preserve the alleged error for review and, even if preserved, is without merit.

Additionally, the Court should deny the defendant's claim of ineffective assistance of counsel because defense counsel's overall

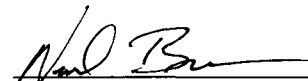
performance does not rebut the presumption of effective assistance and the defendant was not prejudiced. The defendant's convictions should be affirmed.

DATED: August 26, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~C.S.~~ e-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.

8-27-15 
Date Signature

PIERCE COUNTY PROSECUTOR

August 27, 2015 - 8:54 AM

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