No. 93700-1

COA # 46790-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MELVIN HARTFIELD,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO AND THE SUPERIOR COURT OF THE STATE OF WASHINGTON, PIERCE COUNTY

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# PETITION FOR REVIEW

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**WASHINGTON SUPREME COURT**



**WASHINGTON COURT OF APPEALS**



**RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS**



**OTHER AUTHORITIES**

A. IDENTITY OF PARTY

Melvin Hartfield, appellant below, asks this Court to grant review of the decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and (4), Mr. Hartfield seeks review of the unpublished decision of the court of appeals, Division Two, affirming his conviction and partially affirming the imposition of legal financial obligations, in State v. Hartfield, __ Wn. App. ___ (2016 WL 4041561), decided July 26, 2016 (attached as Appendix A). The court of appeals denied Hartfield's Motion to Modify on August 24, 2016 (attached as Appendix B).

C. ISSUES PRESENTED FOR REVIEW

1. Does the decision below conflict with State v. Duncan, 185 Wn.2d 430, 374 P.2d 83 (2016)?

2. Should review be granted because the same serious concerns expressed by this Court in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), apply whether the monies ordered paid by a trial court have been deemed "discretionary" and this continuing question about Blazina's scope should be resolved by this Court?

3. Should review be granted because the sentencing occurred before this Court's decision in Blazina and thus trial counsel's failure to object to imposition of legal financial obligations should not be held against his client on appeal?

D. STATEMENT OF THE CASE

1. Procedural Posture

Petitioner Melvin Hartfield was charged with first-degree robbery

but convicted of a first-degree theft as a "lesser included offense." CP 1-2, 60-61, 64-75; RCW 9A.56.190; RCW 9A.56.200(1)(b). He appealed and on July 26, 2016, Division Two of the court of appeals issued an unpublished opinion, affirming in part and reversing in part. See CP 99; App. A. Hartfield filed a motion to reconsider, which was denied on August 24, 2016. See App. B. This Petition follows.

2. Facts relevant to issues presented

Petitioner Melvin Hartfield was deemed indigent in the trial court and given appointed counsel at public expense below. CP 85-87. Sentencing occurred in October of 2014, with the prosecutor asking for "$500 crime victim penalty assessment, $200 in costs, $100 DNA fee, and given that there was a full trial in this matter. . . $1,000 in attorney's fees reimbursement to DAC." RP 222-23. Counsel told the court that Hartfield was indigent and planning to appeal. RP 224-25.

The judgment and sentence included a "boilerplate" pre-printed finding which provided, as follows:

> **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 68. Also included as preprinted conditions were the requirement of an interest rate of 12 %, for that rate to be applicable immediately, for

Hartfield to pay costs of collection and for the amount due to be due right away, even though Hartfield was in custody. CP 91-93. As of January 8, 2015, additional cost bills for things like witness travel fees had been filed. CP 92-93. From the time of sentencing three months earlier, the amount had increased by $60.57 in interest alone; just about four months out, when collection was already being demanded by the county, the "judgment amount" had increased $100, from $2,424 to $2,524 - and a threatened fee was threatened if payment was not made, to be added for "unpaid legal financial obligations." CP 98.

At the same time, however, Hartfield was also given a similar letter which said "[a]ccording to our records you have made monthly payments and are in compliance with your Judgment and Sentence" but "it is now necessary for you to make new payment arrangements with the Clerk's Office." CP 99. The county said it would next be turning the case over to a collection agent. CP 99.

On appeal, Hartfield argued that the court erred in imposing legal financial obligations without considering his ability to pay, and, in a Statement of Additional Grounds, that the trial court erred in giving a lesser included offense instruction and counsel was ineffective in proposing that instruction. On July 26, 2016, Division Two affirmed on the issues raised in the Statement. App. A at 7-8. It also exercised its discretion to address only the discretionary "but not the mandatory LFOs,"

holding that "the trial court erred in imposing a discretionary LFO without assessing Hartfield's ability to pay" as required under RCW 10.01.160(3). App. A at 6-7. The court noted that this Court had previously "exercised its discretion under RAP 2.5(a) to consider unpreserved arguments" about discretionary LFOs, citing Duncan, 185 Wn.2d 430. App. A at 6. It concluded that the result was it should "seriously consider" exercising its discretion and address issues raised by the defendant regarding discretionary LFOs. App. A at 6. And it found nothing in the record to provide "a possible strategic reason" for counsel's failure to object to discretionary LFOs and was ineffective for that failure. App. A at 6-7. The court declined to reverse for consideration of ability to pay for mandatory LFOs, citing State v. Mathers, 193 Wn. App. 913, 918, __ P.3d __ (2016), petition pending, No. 93262-0, and a pre-Blazina case, State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013). The court also said that "the trial court is not required to assess the defendant's ability to pay mandatory LFOs," such as the crime victim penalty assessment, DNA fee and criminal filing fee at issue here. App. A at 6 n. 1.

Mr. Hartfield timely filed a motion to reconsider that ruling, which was denied by Division Two. App. B at 1-2.

This Petition timely follows.

## E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### THIS COURT'S GUIDANCE IS DESPERATELY NEEDED TO ENSURE THAT ALL INDIGENT DEFENDANTS ARE GIVEN

THE SAME OPPORTUNITY FOR RELIEF UNDER BLAZINA REGARDLESS OF THE HAPPENSTANCE OF TIMING AND BECAUSE THE IMPACT IS NOT DIFFERENT FOR MANDATORY AND DISCRETIONARY COSTS

In Blazina, this Court recently recognized that the system of legal financial obligations as it is enforced and collected in our superior courts is far from what was intended and no longer serves its purpose. Blazina, 182 Wn.2d at 835. The Court noted that imposition of costs against impoverished defendants causes serious problems such as "increased difficulty in reentering society." Id. And the Court found incredible "inequities in administration" and enforcement and collection of such costs - including some evidence of racial bias. Blazina, 182 Wn.2d at 835. The Court also detailed studies showing the broad impact our broken system has had on the ability of the impoverished to become productive parts of society. Id. The Court noted the astonishing interest rate (12 percent) which applies from the date of the entry of the order rather than release, also pointing to collection fees and other fees all of which create an ever-deeper debt so that a person paying even the minimum every single month would end up owing more in fees and costs than originally imposed. Id.

As a result of Blazina, some myths have been soundly dispelled. It is now clear that, across the state and in fact across the country, people in poverty are being subject to imprisonment, fines and other punishment for failure to pay legal costs despite their indigency. See Blazina, 182 Wn.2d

at 835-36; ACLU/Columbia Legal Services, *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor* (February 2014), available at http://columbialegal.org/resources/publications. Indeed, the extremely troubling impacts of our broken system caused this Court to not only take review in Blazina but to grant relief in that case despite a lack of objection below - and do so with many cases to follow - including Duncan.

In Duncan, this Court applied Blazina to not only imposition of discretionary LFOs but expressly to *all* amounts, even those which have been designated by the legislature as "mandatory." Duncan, 185 Wn.2d at 437 n. 2. The Court reaffirmed Blazina and the ample and increasing evidence of the severe and damaging impact of unpayable LFOs. Duncan, 185 Wn.2d at 437. Despite Duncan, however, and even though Mr. Hartfield was sentenced *prior* to Blazina, the court of appeals did not address the imposition of the mandatory LFOs in this case.

As this Court is well aware, the lower appellate courts are struggling with how and when to apply Blazina. Indeed, the issue of whether Blazina applies to "mandatory" costs such as the DNA fee, trial court filing costs and victim fee costs here, is already pending on a petition in front of this Court. See Mathers, 193 Wn. App. 913. The issues and concerns raised in Blazina do not have anything to do with the source of the authority for ordering the debt. The crushing weight of the debt is the

same magnified by unfair and extreme interest rates and collections practices regardless whether the debt is ordered as "mandatory" or discretionary. This Court should grant review to address the apparent conflict between the decision in this case and in Duncan. Further, it should grant review to address whether Blazina controls and requires the consideration of ability to pay prior to imposition of *any* legal financial obligations on an indigent person.

F. CONCLUSION

This Court should grant review. In case after case, the appellate Divisions of the court of appeals are facing decisions about how to deal with the very issues presented here and this Court's guidance is needed. Further, the decision below runs afoul of Duncan and improperly limits the holding of Blazina to discretionary LFOs only.

DATED this 22nd day of September, 2016.

Respectfully submitted,

/s/ Kathryn Russell Selk

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I caused a true and correct copy of the attached Petition for Review to be sent to opposing counsel at Piece County Prosecutor's Office via the Court's email and via U.S. Postal Service to Mr. Hartfield, 1440 North Bluff, Wichita, KS 67028.

DATED this 22nd day of September, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk

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# APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 26, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>MELVIN LEE HARTFIELD,<br><br>Appellant. | No. 46790-9-II<br><br>UNPUBLISHED OPINION |

MAXA, J. – Melvin Hartfield appeals his conviction for first degree theft and the trial court's imposition of legal financial obligations (LFOs) as part of his sentence. Hartfield was charged with first degree robbery, but the trial court gave a jury instruction on the lesser included offense of first degree theft. The jury found Hartfield not guilty of first degree robbery but guilty of first degree theft.

We hold that (1) the invited error doctrine precludes our review of Hartfield's challenge to the trial court's jury instruction on first degree theft because Hartfield requested the instruction, (2) defense counsel was not ineffective for making the tactical decision to request the first degree theft instruction, and (3) the trial court erred by failing to inquire into Hartfield's ability to pay before imposing a discretionary LFO of $1,000 for court-appointed attorney fees and defense costs. Accordingly, we affirm Hartfield's conviction for first degree theft, but

remand to the trial court for a determination of Hartfield's present and future ability to pay the $1,000 discretionary LFO.

## FACTS

On June 5, 2014, Hartfield entered Heritage Bank carrying a piece of paper. He presented the paper to Marlene Wheeler, who was working at a teller station. Wheeler could not read everything on the paper before Hartfield pulled it from her hands, but she saw the words "This is a robbery" and what looked like a list of instructions. Report of Proceedings (RP) at 75.

Hartfield told Wheeler that he wanted money, and Wheeler partially opened one of the cash drawers at her teller station. She gave Hartfield the small bills and mutilated currency from the drawer. Hartfield asked if there were larger bills. Although Wheeler did have larger bills and about $20,000 at her station, she told him that there were no larger bills and showed him that the drawer was empty. Hartfield then left the bank, and Wheeler called 911. Police later located Hartfield because he had left his cell phone near the scene.

The State charged Hartfield with first degree robbery. At trial, Wheeler testified that she was not afraid of Hartfield and that Hartfield never threatened her. She said that she gave him the money because she was trained to do so.

Hartfield requested a jury instruction for first degree theft as a lesser included offense to first degree robbery. The State opposed the lesser included instruction. The trial court gave the proposed first degree theft instruction to the jury.

The jury found Hartfield not guilty of first degree robbery but guilty of first degree theft. At sentencing, the trial court imposed $800 in statutorily mandated LFOs – a $500 crime victim penalty assessment, a $100 DNA fee and a $200 criminal filing fee – and a $1,000 discretionary

LFO for court-appointed attorney fees and defense costs. The judgment and sentence contained boilerplate language that Hartfield had the present and future ability to pay LFOs, but the trial court did not actually make an individualized inquiry into Hartfield's ability to pay. Hartfield did not object to the imposition of LFOs.

Hartfield appeals his conviction and sentence.

## ANALYSIS

### A. LESSER INCLUDED OFFENSE INSTRUCTION

Hartfield argues in a statement of additional grounds that (1) the trial court erred by giving a lesser included offense instruction for first degree theft and (2) his defense counsel was ineffective for proposing the lesser included offense instruction. We hold that Hartfield invited any instructional error and that defense counsel was not ineffective in proposing the lesser included offense instruction.

#### 1. Invited Error

Hartfield argues that the trial court erred in giving the lesser included offense instruction because first degree theft is not a lesser included offense to first degree robbery. However, we do not address this argument because Hartfield proposed the lesser included offense instruction and the State argued against it.

The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). To determine whether the invited error doctrine applies, we consider whether the defendant "affirmatively assented to the error, materially contributed to it, or benefited from it." *Id.* at 154. Under this test, the invited error doctrine precludes appellate review of a defendant's claim of

instructional error when the trial court gave the instruction at the defendant's request. *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Because Hartfield requested that the jury be instructed on first degree theft as a lesser included offense to first degree robbery, he cannot now challenge the instruction on appeal. Accordingly, we hold that the invited error doctrine precludes review of the first degree theft instruction.

2. Ineffective Assistance of Counsel

Hartfield argues that his counsel was ineffective for requesting the first degree theft instruction instead of allowing the trial court to instruct only on first degree robbery. We disagree.

a. Legal Principles

We review claims of ineffective assistance of counsel de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. *State v. Gentry*, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995).

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the trial would have been different. *Id.* at 34. We review the challenged conduct from counsel's perspective at the time. *Id.*

We begin our analysis with a strong presumption that counsel's performance was effective. *Id.* at 33. To rebut this presumption, the defendant must establish the absence of any " '*conceivable* legitimate tactic explaining counsel's performance.' " *Id.* (emphasis added) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wn.2d at 33.

b. No Deficient Performance

Whether to request an instruction on a lesser included offense is a tactical decision. *State v. Witherspoon*, 180 Wn.2d 875, 886, 329 P.3d 888 (2014). Counsel, in consultation with the defendant, may decide to take the "all or nothing" approach and forgo a lesser included offense instruction. *Id.* However, this approach exposes the defendant to the risk that the jury will convict on the only option presented. *Id.*

In *Witherspoon*, defense counsel pursued the all or nothing approach and did not request a jury instruction on the lesser included offense of theft on the belief that the State would not meet its burden to prove that the defendant used threat or force to take property. *Id.* Although the evidence of threat or force was slim, the jury convicted the defendant of robbery. *Id.* Here, in a similar situation, Hartfield's counsel took a more conservative approach and provided the jury with an option between all and nothing. This was a legitimate trial tactic.

Hartfield asserts that if the jury had not been instructed on theft, it would have found him not guilty of robbery. But there was strong evidence that Hartfield demanded and took money from the bank. If the jury had been presented with the choice between finding Hartfield guilty of

robbery or not guilty of anything, it reasonably could have decided to convict Hartfield of robbery because he obviously was not an innocent actor.

Accordingly, we hold that defense counsel's tactical decision to request a first degree theft instruction was not deficient performance and reject Hartfield's ineffective assistance of counsel claim.

B. IMPOSITION OF LFOS

Hartfield argues for the first time on appeal that the trial court erred by imposing LFOs without making an inquiry into his ability to pay. We exercise our discretion to consider Hartfield's challenge to the discretionary LFO but not the mandatory LFOs, and hold that the trial court erred in imposing a discretionary LFO without assessing Hartfield's ability to pay.[1]

1. Failure to Object at Trial

We generally do not consider issues raised for the first time on appeal. However, the Supreme Court repeatedly has exercised its discretion under RAP 2.5(a) to consider unpreserved arguments that the trial court erred in imposing discretionary LFOs without considering the defendant's ability to pay. *E.g.*, *State v. Duncan*, 185 Wn.2d 430, ___ P.3d ___ (2016); *State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); *State v. Leonard*, 184 Wn.2d 505, 506-08, 358 P.3d 1167 (2015); *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). These cases

[1] Hartfield does not distinguish between mandatory and discretionary LFO's in his assignment of error, but references only discretionary LFOs in his statement of issues. To the extent that Hartfield is challenging the imposition of mandatory LFOs – the crime victim penalty assessment, DNA fee, and criminal filing fee – we decline to consider that argument for the first time on appeal because the trial court is not required to assess the defendant's ability to pay mandatory LFOs. *State v. Mathers*, 193 Wn. App. 913, 918 ___ P.3d ___ (2016); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013).

suggest that we should seriously consider exercising our discretion to address discretionary LFO challenges even when the defendant did not object in the trial court.

Here, nothing in the record indicates a possible strategic reason for Hartfield's failure to object to the imposition of the discretionary LFO. And there does not appear to be any compelling reason not to consider the issue. Therefore, we exercise our discretion under RAP 2.5(a) and consider Hartfield's challenge to the imposition of the discretionary LFO.

2. Failure to Inquire Into Ability to Pay

Before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's present and future ability to pay. RCW 10.01.160(3)[2]; *Blazina*, 182 Wn.2d at 838. Including boilerplate language in the judgment and sentence stating that the defendant has an ability to pay does not satisfy this requirement. *Blazina*, 182 Wn.2d at 838. The record here indicates that the trial court failed to make any inquiry into Hartfield's ability to pay discretionary LFOs. Accordingly, we remand the case to the trial court in order to allow for an individualized inquiry into Hartfield's ability to pay before imposing the $1,000 discretionary LFO for court-appointed attorney fees and defense costs.

[2] RCW 10.01.160 was amended in 2015. Laws of 2015, 3d Spec. Sess., ch. 35 § 1. These amendments do not affect the issues in this case. Accordingly, we refrain from including the word "former" before this statute.

CONCLUSION

We affirm Hartfield's conviction for first degree theft, but remand to the trial court for determination of Hartfield's present and future ability to pay the $1,000 discretionary LFO for court-appointed attorney fees and defense costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

JOHANSON, J.

BJORGEN, C.J.

# APPENDIX B

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>MELVIN L. HARTFIELD,<br><br>Appellant. | No. 46790-9-II<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |



**APPELLANT** moves for reconsideration of the Court's July 26, 2016 opinion in the above-referenced matter. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Bjorgen, Johanson, Maxa

**DATED** this 24th day of August, 2016.

**FOR THE COURT:**

Bjorgen, C.J.
CHIEF JUDGE

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## RUSSELL SELK LAW OFFICES

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