

NO. 45438-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

MELANIE DENISE BALAO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 12-1-00405-4

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BRIEF OF RESPONDENT

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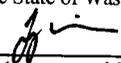
RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

**SERVICE**

Jared B. Steed  
Nielsen, Broman & Koch  
1908 E Madison Street  
Seattle, WA 98122-2842  
Email: steedj@nwattorney.net

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DATED August 22, 2014, Port Orchard, WA   
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether this Court should reject Balao's claim that the trial court erred in imposing legal financial obligations when: (1) Balao failed to preserve this issue for appeal; and (2) the record below supports the trial court's finding that Balao had either the ability, or likely future ability, to pay her LFO's?

2. Whether Balao's claim that her trial counsel was ineffective must fail when Balao has failed to show deficient performance or prejudice?

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

### **A. PROCEDURAL HISTORY**

Melanie Denise Balao was charged by an amended information filed in Kitsap County Superior Court with one count of assault in the third degree and one count of assault in the fourth degree. CP 7. A jury found Balao guilty of the charged offenses, and the trial court ultimately imposed a standard range sentence. CP 47, 84; 85-87.<sup>1</sup> This appeal followed.

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<sup>1</sup> There were actually two trials below. The jury in the first trial found Balao guilty on count II (assault in the fourth degree) but was unable to reach a verdict on Count I. CP 47. At a second trial the jury found Balao guilty of Count I (assault in the third degree). C 84.

## **B. FACTS**

At trial Balao was convicted of assault in the third degree and assault in the fourth degree. In the present appeal Balao has not raised any issues regarding her trial or her convictions for these crimes. Rather, the only issue in the present case is the trial court's imposition of legal financial obligations.

At sentencing, Balao's defense counsel specifically stated that Balao had a job, and Balao herself specifically told the trial court that she worked "full time" in the "medical field" and that she was also going to school. RP (10/4) at 8-9.<sup>2</sup> Balao also filed a Motion and Declaration for Order of Indigency at the time of sentencing. CP 98-101. In that October 4 motion and declaration Balao specifically states that she is employed as a medical assistant at Harrison Medical Group and that she had a gross monthly income of \$2,030. CP 99.<sup>3</sup>

As a part of the judgment and sentence the trial court imposed various legal financial obligations, and the judgment and sentence

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<sup>2</sup> Balao's father also informed the court that Balao had gone to nursing school and obtained her "nursing certificates" and that she was currently going back to college and that she "will do well in the future." RP (10/4) at 10.

<sup>3</sup> Approximately two weeks after the sentencing, Balao filed another motion an order of indigency that was dated October 17, 2013. CP 104-110. In that motion Balao's "gross monthly income" was scratched out and there was a hand written notation that he had been fired from her employer as of September 27, 2013. CP 106. This fact, if true, was never mentioned at the October 4 sentencing hearing and Balao never asked the trial court to reconsider its sentence. In fact, at no time prior to the present appeal did Balao ever raise an objection to the imposition of LFO's below.

contained the trial court's finding that "the Defendant has the ability or likely future ability to pay legal financial obligations." CP 91. Balao never raised any objection to the trial court's finding or to the imposition of legal financial obligations.

### III. ARGUMENT

**A. THIS COURT SHOULD REJECT BALAO'S CLAIM THAT THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS BECAUSE: (1) BALAO FAILED TO PRESERVE THIS ISSUE FOR APPEAL; AND (2) THE RECORD BELOW SUPPORTS THE TRIAL COURT'S FINDING THAT BALAO HAD EITHER THE ABILITY OR LIKELY FUTURE ABILITY TO PAY HER LFO'S.**

Balao argues that the trial court erred in imposing legal financial obligations (LFO's) as a part of the judgment and sentence. App.'s Br. at 4.<sup>4</sup> This claim is without merit because the record shows that the trial

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<sup>4</sup> Balao specifically argues that the trial court failed to consider her ability to pay. App.'s Br. at 4. Balao, however, makes no distinction between mandatory LFOs, for which the trial court need not consider the defendant's ability to pay, and discretionary LFOs, which are subject to the requirements of RCW 10.01.160(3). As this Court noted in *Lundy*, for "victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." *Lundy*, 176 Wn.App. at 102. . A \$500 victim assessment is required by RCW 7.68.035, irrespective of the defendant's ability to pay. *State v. Curry*, 62 Wn.App. 676, 681, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992). A \$100 deoxyribonucleic acid collection fee is required by RCW 43.43.7541, also irrespective of the defendant's ability to pay. *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). A \$200 criminal filing fee is required by RCW 36.18.020(2)(h). *Lundy*, 176 Wn.App. at 103. And a \$100 crime lab fee is required by RCW 43.43.690(1). "Because the legislature has mandated imposition of these legal financial obligations, the trial court's 'finding' of a defendant's current or likely future ability to pay them is surplusage." *Lundy*, 176 Wn.App. at 103. Thus the requirement that a trial court consider the defendant's current

court did not err in imposing LFO's as the record demonstrated that Balao had the present or future ability to pay her LFO's. Furthermore, this Court should decline to consider this issue because Balao failed to preserve this issue for appeal.

This Court has recently held that a reviewing court need not address (or allow a defendant to raise) a claim regarding her ability to pay her legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *citing* RAP 2.5. *See also*, *State v. Kuster*, 175 Wn.App. 420, 425, 306 P.3d 1022 (2013); *State v. Duncan*, 180 Wn.App. 245, 255, 327 P.3d 699 (2014) (declining to address the LFO issue when it was raised for the first time on appeal, and noting that “In the unusual case of an irretrievably indigent defendant whose lawyer fails to address his or her inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress.”). This Court, therefore, should similarly reject Balao's argument concerning her legal financial obligations in the present case, as Balao failed to raise this issue below.<sup>5</sup>

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or future ability to pay only applies to discretionary LFOs. *Id.*

<sup>5</sup> Furthermore, Washington courts have consistently held that the issue of whether a defendant has a future ability to pay the LFO's is not a constitutional issue. *See, e.g., Duncan*, 180 Wn.App. at 253 (“If a trial court fails to consider ability to pay or enters an unsupported finding, it is not constitutional error.”); *State v. Calvin*, \_\_\_ Wn.App. \_\_\_, 316 P.3d 496, 507; *State v. Blank*, 131 Wn.2d 230, 241–42, 930 P.2d 1213 (1997) (“The

Furthermore, even if this Court were to review the issue regarding the imposition of LFO's, the record does not reveal any error. In the present appeal Balao claims: (1) that the record does not show that trial court considered her ability to pay before imposing LFO's (other than what Balao calls the "boilerplate" finding in the J&S stating that the court found that she had the ability to pay); and (2) that the record does not demonstrate that she had an ability to pay. App.'s Br. at 10, 19. The actual record below, however, reveals no error.

This Court recently addressed a trial court's ability to impose legal financial obligation in *State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013). Specifically, this Court explained that neither RCW 10.01.160 "nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay discretionary court costs." *Lundy*, 176 Wn.App. at 105, citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (2009). Furthermore, "if an unnecessary finding is made, perhaps through inclusion of boilerplate language in the judgment and sentence, we review it under the clearly erroneous standard." *Lundy*, 176 Wn.App. at 105, citing *State v. Bertrand*, 165 Wn.App. 393, 404 n.13, 267 P.3d 511 (2011). "A finding of fact is clearly erroneous when, although there is

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Constitution does not require an inquiry into ability to pay at the time of sentencing"). In addition, this Court has held that a challenge to "orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until

some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Lundy*, 176 Wn.App. at 105, quoting *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn.App. 648, 654, 158, 106 P.3d 113 (2007).

In addition, this Court explained in *Lundy* that 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.” *Lundy*, 176 Wn.App. at 106. This Court noted that in *State v. Baldwin*, 63 Wn.App. 303, 818 P.2d 1116 (1991) for instance, “this burden was met by a single sentence in a presentence report” that the defendant did not object to:

The presentence report contained the following statement, “Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense.” Baldwin made no objection to this assertion at the time of sentencing... Information contained in the presentence report may be used by the court if the defendant does not object to that information. *State v. Southerland*, 43 Wash.App. 246, 250, 716 P.2d 933 (1986). Therefore, when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied.

*Lundy*, 176 Wn.App. at 106, quoting *Baldwin*, 63 Wn.App. at 311. This Court, therefore, concluded that the record in *Lundy* supported the trial court's imposition of LFO's since, among other things, the defendant had

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the State attempts to curtail a defendant's liberty by enforcing them.” *Lundy*, 176

stated at sentencing that he had made a good living prior to his drug addiction and that he hoped to become a productive citizen after treatment. *Lundy*, 176 Wn.App. at 107-08. In addition, the record did not demonstrate that the defendant suffered from any disabilities that would preclude the possibility of him working in the future after his release from prison. *Id.*

In the present case Balao claims that there was “no evidence establishing [her] future employment prospects” and that the record “suggests” she was not currently employed. App.’s Br. at 19. In support of this claim Balao cites to a motion and order of indigency that was dated October 17, 2013. App.’s Br. at 19, *citing* CP at 106-08. Balao’s reliance on the October 17 motion and order, however, is misplaced as that motion and order was filed *after* the sentencing in the present case, which took place on October 4, 2013.

Balao, however, did file a Motion and Declaration for Order of Indigency at the time of sentencing. See CP 98-101. In that October 4 motion and declaration Balao specifically states that she is employed as a medical assistant at Harrison Medical Group and that she has a gross monthly income of \$2,030. CP 99. In addition, the transcript from the sentencing clearly further established that Balao had a present or future

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Wn.App. at 108 (emphasis in original).

ability to pay her LFO's. For instance, at the sentencing hearing Balao's defense counsel specifically stated that Balao had a job, and Balao herself specifically told the trial court that she worked "full time" in the "medical field" and that she was also going to school. RP (10/4) at 8-9.<sup>6</sup>

Given this information in the record at the time of sentencing, the trial court erred in finding that Balao would likely have a future ability to pay her legal financial obligations. To the contrary, the record showed that Balao was employed and was also going back to college, and there was no evidence that Balao suffered from any disability that would preclude her from working in the future. Thus there was ample evidence in the record that supported the trial court's finding that Balao had the present or future ability to pay her LFO's, and Balao has thus failed to demonstrate that the trial court's finding was clearly erroneous.

**B. BALAO'S CLAIM THAT HER TRIAL COUNSEL WAS INEFFECTIVE MUST FAIL BECAUSE BALAO HAS FAILED TO SHOW DEFICIENT PERFORMANCE OR PREJUDICE.**

Balao next claims that she received ineffective assistance of counsel because her trial counsel failed to object to the imposition of

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<sup>6</sup> Balao's claim that that the record "suggests" she was not currently employed, therefore, is clearly without merit. Furthermore, Balao's father also informed the court that Balao had gone to nursing school and obtained her "nursing certificates" and that she was currently going back to college and that she "will do well in the future." RP (10/4) at 10.

LFO's. App.'s Br. at 20. This claim is without merit because Balao has failed to demonstrate either deficient performance or prejudice.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that her counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

To establish the prejudice prong of the ineffective assistance of counsel test, a defendant must show a reasonable probability that the outcome of the trial would have differed absent counsel's deficient performance. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Thus, “[w]here a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained.” *State v. Fortun-Cebada*, 158 Wn.App. 158, 172, 241 P.3d 800 (2010).

Since the only evidence in the record was that Balao had obtained

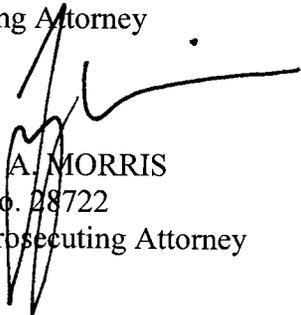
her nursing certificate, was working full time in the medical field, and was also going back to college, her trial attorney did not provide ineffective assistance by failing to object to the imposition of LFO's. Rather, as there was absolutely no evidence that Balao would be unable to work in the future, there was no basis for defense counsel to even raise the objection. Nor can Balao demonstrate that the trial court would have agreed with defense counsel even if such an objection would have been raised. In short, Balao has failed to demonstrate either deficient performance or prejudice. Her claim of ineffective assistance of counsel, therefore, must fail.

#### IV. CONCLUSION

For the foregoing reasons, Balao's conviction and sentence should be affirmed.

DATED August 22, 2014.

Respectfully submitted,  
RUSSELL D. HAUGE  
Prosecuting Attorney

  
JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

# KITSAP COUNTY PROSECUTOR

**August 22, 2014 - 10:24 AM**

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