

No. 48651-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALLEN BAKER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Should this Court consider if the trial court erred by imposing legal financial obligations on Baker without a proper individualized inquiry when Baker did not properly preserve the issue below?
- B. Is the criminal filing fee a mandatory legal financial obligation?
- C. Should this Court impose appellate costs should the State prevail?

II. STATEMENT OF THE CASE

On November 30, 2015, at approximately 11:20 p.m., Centralia Police Officer Josh Mercer responded to a call regarding an assault in progress with a male and a knife. RP 28-29. The officers responding were unsure of the nature of the assault, whether it was a domestic incident. RP 29. When Officer Mercer entered the 300 block of North Buckner in Centralia, he saw a man running in his direction. *Id.* The man matched the description dispatch had given. *Id.* Officer Mercer stopped and detained the man, later identified as Allen Baker. RP 29-30.

Officer Mercer was wearing his police issued uniform and driving a standard-issue police patrol car, a fully marked Chevy Caprice. RP 29-30. Officer Mercer asked Baker to identify himself, which he did. RP 31. Officer Mercer explained to Baker he was going to be detained while they continued the investigation. RP 31.

Baker became belligerent. RP 31. Baker told Officer Mercer that Officer Mercer was nothing without a badge, that Baker was going to leave and there was nothing Officer Mercer could do to stop him. RP 31. Baker was swearing at Officer Mercer. *Id.* Baker yelled at Officer Mercer that Officer Mercer did not have a right to be there. *Id.* Baker yelled he was not involved and he was going to leave. *Id.*

Officer Mercer got close to Baker, turned him around so Officer Mercer could detain Baker with his hands behind his back. RP 31. Officer Mercer could smell alcohol. RP 31-32. Even after Officer Mercer got Baker into handcuffs he continued to be belligerent, threatening to leave, and swearing at the officer. RP 32-33. Therefore, Officer Mercer decided to put Baker in the back of his patrol car until he could complete the investigation. RP 33. Baker was not compliant with getting into the patrol car. RP 33-34. Baker then began backing up towards Officer Mercer, then sort of dove into the car, head first. RP 34. As Baker dove into the car, he put his legs in the area where you would normally put your legs when sitting in a car, then kicked back his legs towards Officer Mercer's face. RP 35. Baker's legs came up, his heel struck the brim of Officer Mercer's hat, and the inside portion of the insole of Baker's shoe scraped across Officer Mercer's cheek. RP 35. Officer Mercer described the

kick as a donkey kick. RP 35. Baker continued to be belligerent after he kicked Officer Mercer. RP 51.

On December 1, 2015 the State charged Baker with Assault in the Third Degree. CP 1-3. Baker elected to have his case tried to a jury. See RP. Baker testified on his own behalf. RP 55-76. Baker explained he was running down Buckner when Officer Mercer shined a spotlight on him and Baker immediately stopped running. RP 58. According to Baker, Officer Mercer told him to stop and told him to “Come here this way” and Baker immediately complied. *Id.* Baker said Officer Mercer asked him what was under his coat, which Baker showed him, and asked Baker where the knife was located. *Id.* Baker did not understand what was going on. *Id.* Baker explained he had consumed two beers. *Id.*

Baker said Officer Mercer immediately put handcuffs on him. RP 57. Baker explained he suffers from anxiety and he did tell Officer Mercer he would not sit in the police car. RP 58-59. Baker said his foot got caught on the edge of the seat when he went to sit in the patrol car and he started to fall forward. RP 61. The fall over is what caused his feet to swing up above his head and he did not intentionally swing his feet at Officer Mercer. RP 61-62. Baker insisted he did not kick Officer Mercer. RP 62.

The jury found Baker guilty as charged. RP 111; CP 24. The trial court ordered costs and fees at sentencing, including a criminal filing fee, court appointed attorney fees, and a jail reimbursement fee. CP 36-37. Baker timely appeals. CP 43

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. WHETHER THE COURT ERRED IN IMPOSING THE LEGAL FINANCIAL OBLIGATIONS WITHOUT A PROPER INQUIRY HAS NOT BEEN PRESERVED FOR REVIEW.

Baker argues the trial court impermissibly levied legal financial obligations (LFO) on him without doing an adequate inquiry regarding whether he had the present and future ability to pay those costs. Brief of Appellant 4-15. Baker did not challenge the imposition of any of his legal financial obligations at the time of his sentencing. See RP 116-21. Baker's counsel noted that while Baker was currently unemployed and receiving food stamps, which makes him indigent under GR 34 standards, that Baker was potentially employable once released from custody. RP 118. Baker's failure to object should preclude this Court from reviewing the issue on appeal, as Baker waived his right to raise any issue regarding his legal financial obligations.

Generally the appellate court will not consider a matter raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue then Baker bears the burden to show the error was manifest. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is “manifest” if Baker shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. *Kirkman*, 159 Wn.2d at 927.

In *Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant’s ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

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.

Blazina, 182 Wn.2d at 837-38.

Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances and make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.* The Supreme Court also suggested that trial courts look to GR 34 for guidance when evaluating whether a defendant has the means available to pay discretionary legal financial obligations. *Id.* at 838.

Under GR 34 a person who receives assistance under a needs-based, means-tested assistance program is considered indigent for purposes of qualifying for court appointed counsel. GR 34(3). GR 34 also discusses the federal poverty level, living expenses, and other compelling circumstances as considerations for qualifying for court appointed counsel. *Id.*

Baker does not address his burden of proof under RAP 2.5 apart from stating this Court may review the claimed error and that in light of *Blazina*, the “broken” LFO system, and to promote justice and facilitate deciding the case on its merits this court should address the LFO issues Baker is raising. Brief of Appellant 10, 14. The error was not preserved.

Baker's counsel told the trial court that his client had the potential to be employable when released. RP 118. The trial court asked Baker if there was anything about him emotionally, physically, mentally, financially, that would prevent Baker from being able to pay financial obligations if the trial court set them at a reasonable rate of 25 dollars a month. RP 118. Baker told the trial court no, there was not. RP 118. Baker, or his counsel, was more than able at this point to say, no, Baker cannot make these payments. Baker or his counsel could have stated, he has an anxiety disorder that prevents him from working, but they did not.¹ Baker or his counsel could have told the trial court Baker did not have sufficient assets, he had debts or other financial burdens which made him unable to pay the legal financial obligations the State was requesting, but they did not. The trial court asked a broad question, which encompassed all possible reasons why Baker may not be able to pay legal financial obligations, this satisfies *Blazina*.

There was also no objection to the imposition of the costs and fees, including the criminal filing fee. RP 119-20. Further, Baker had

¹ An anxiety disorder does not necessarily render a person unable to work, as it is the most common mental illness in the United States, inflicting approximately 40 million adults (18 percent of population) according to the Anxiety and Depression Association of America. <https://www.adaa.org/about-adaa/press-room/facts-statistics> (last visited 8/25/16).

not shown the alleged error regarding the imposition of discretionary LFO is of manifest constitutional magnitude that can be raised for the first time on appeal.

This Court should exercise its discretion to not entertain Baker's unpreserved argument that the trial court did not make a proper inquiry regarding his ability to pay his legal financial obligations and affirm the trial court's imposition of the legal financial obligations. In the alternative, the trial court's inquiry of Baker satisfied the individualized inquiry required by the Legislature and *Blazina*, and this Court should affirm the costs imposed.

B. THE CRIMINAL FILING FEE IS A MANDATORY LEGAL FINANCIAL OBLIGATION.

The State maintains, as argued above, that Baker has not preserved any issue in regards to legal financial obligations, as there was no objection to any of the legal financial obligations when then the trial court imposed them. Arguendo, contrary to Baker's assertion, the criminal filing fee is mandatory. This Court should continue to adhere to its holding in *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013), as Baker has not shown that *Lundy* is incorrect and harmful.

1. Standard Of Review.

This Court reviews the purpose and meaning of statutes de novo. *State v. Munoz-Rivera*, 190 Wn. App. 870, 884, 361 P.3d 182 (2015).

2. The Criminal Filing Fee Is Mandatory.

The statute in regards to the criminal filing fee is clear and unambiguous. RCW 36.18.020 states,

Clerks of superior courts shall collect the following fees for their official services:

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant shall be liable for a fee of two hundred dollars.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). “A statute is ambiguous when the language is susceptible to more than one interpretation. *Steen*, 155 Wn. App. at 248. When the reviewing court is interpreting a statute its “goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute.” *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*,

155 Wn. App. at 248; *Stratton*, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term then the courts look to the standard dictionary definition of the word. *Stratton*, 130 Wn. App. at 764. If the court finds that a statute is ambiguous, “the rule of lenity requires that we interpret it in favor of the defendant absent legislative intent to the contrary.” *Id.* at 765.

The plain language of the statute is clear, the Clerk **shall** collect upon a conviction or plea of guilty the criminal filing fee, which is set in the amount of 200 dollars, as the defendant is liable for the fee. RCW 36.18.020(h). Shall is mandatory, not discretionary. This Court held the criminal filing fee to be mandatory. *Lundy*, 176 Wn. App. at 102. Since *Lundy*, Division Three has also stated the criminal filing fee is mandatory. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015). The criminal filing fee is mandatory and it was properly imposed, regardless of Baker’s ability to pay.

Baker argues that this Court wrongly decided in *Lundy* that the criminal filing fee was a mandatory legal financial obligation and therefore the holding is incorrect and harmful. Therefore, pursuant to the doctrine of stare decises this Court should overrule its holding in

Lundy and find the criminal filing fee is actually a discretionary legal financial obligation.

The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.3d 508 (1970). The policy behind stare decisis is to promote stability in court made law. *Stranger Creek*, 77 Wn.2d at 653. It does not preclude this Court from consideration of arguments to the contrary, however, as it does not require this Court to continue to uphold a law in perpetuity that is incorrect and harmful. *Id.* The rule of law is a fluid thing, and must change when reason requires it to do so. *Id.*

Baker has not made the requisite showing that *Lundy*, or *Stoddard* and *Clark*, are wrongfully decided, that the finding the criminal filing fee is mandatory is incorrect and harmful. Baker argues “shall be liable” does not mean that fee is mandatory given that it can mean a “future possible or probable happening that may not occur.” This is an absurd interpretation of the plain language of the statute. Liable, in this context, means that the defendant is “responsible or answerable in law; legally obligated” to pay; or subject to the 200 dollar fine. BLACK’S LAW DICTIONARY 1055 (10TH ed. 2014). The statute mandating the Clerk to collect the criminal filing fee, for which

the defendant is now liable for, is not logical if the imposition of the fee is not mandatory. The Clerk cannot collect the fee if the Court does not impose it.

There is nothing harmful or incorrect about this Court's decision that the criminal filing fee is mandatory and this Court should continue to follow *Lundy*. Therefore, the trial courts imposition of the criminal filing fee, regardless of whether it made the requisite inquiry of Baker's ability to pay the obligation, was proper because the fee is mandatory.

**C. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE
IF THE COURT AFFIRMS THE JUDGMENT.**

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court pointed out in *State v. Sinclair*, the award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn. App. 380, 385, 367 P.3d 612 (2016); *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976,² the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank, supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and

² Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

constitutional, but that “costs” did not include statutory attorney fees. *Keeney*, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. *Nolan* 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State’s cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *Sinclair*, prematurely raises an issue that is not before the Court. *Sinclair*, 192 Wn. App. at 390-91. The defendant can argue regarding the Court’s exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. See *Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097

(2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; see also *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-242. See also *State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. See *Lundy*, 176 Wn. App. at 104, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. See *State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See *Blank* at 236-237, quoting *Fuller v. Oregon*, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to

satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In *Blazina* the Supreme Court, while interpreting the meaning of RCW 10.01.160(3) wrote:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Blazina, 182 Wn.2d at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Division I pointed out in *State v. Sinclair*, the Legislature did not include such a provision in RCW 10.73.160. *Sinclair*, 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant’s financial circumstances before exercising its discretion. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. It should be the burden upon

the defendant to make this record that he or she is unable to pay, as he or she holds all the cards, so to speak. The State is unable to refute much of what a defendant asserts to the trial court regarding their ability to pay, unless information has come out during the trial or other hearings that contradicts the defendant's assertions. Without a factual record the State has nothing to respond to.

While Baker was determined indigent for purposes of counsel both in the trial court and for this appeal that should not automatically render him unable to pay appellate costs. CP 44-46, 48-51. Baker himself stated there was no reason he could not pay the legal financial obligations imposed by the trial court. RP 118. This Court should award the State appellate costs as provided by court rule.

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IV. CONCLUSION

Baker did not preserve any objection to the imposition of legal financial obligations and this Court should decline to review any issue in regards to them. In the alternative, the trial court did an adequate individualized inquiry regarding Baker's ability to pay legal financial obligations. The criminal filing fee is mandatory and this court should decline Baker's invitation to overturn precedent set by this Court that holds the fee is mandatory. Finally, this Court should impose costs on appeal if the State prevails.

RESPECTFULLY submitted this 29th day of August, 2016.

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