

**FILED: July 23, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

MITCHELL ALAN BELOW,  
Defendant-Appellant.

Jackson County Circuit Court  
111175FE

A152374

Timothy C. Gerking, Judge.

Submitted on June 18, 2014.

Peter Gartlan, Chief Defender, and Anne Fujita Munsey, Senior Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Matthew J. Preusch, Assistant Attorney General, filed the brief for respondent.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Edmonds, Senior Judge.

DUNCAN, P. J.

Portion of judgment requiring defendant to pay court-appointed attorney fees and indigent contribution reversed; otherwise affirmed.

1                   DUNCAN, P. J.

2                   Defendant was convicted of murder and sentenced to life in prison, with the  
3 possibility of parole after 25 years. He appeals, raising four assignments of error. In his  
4 first and second assignments, he asserts that the trial court erred in admitting certain  
5 evidence. We reject those assignments without published discussion. In his third and  
6 fourth assignments, he asserts that the court erred in imposing \$18,000 in court-appointed  
7 attorney fees and an \$18,000 indigent contribution. Defendant acknowledges that those  
8 claims of error are unpreserved but asks us to review and correct them as "plain error,"  
9 that is, as errors of law "apparent on the record." ORAP 5.45(1).<sup>1</sup> For the reasons  
10 explained below, we agree with defendant that the trial court erred in imposing the  
11 challenged financial obligations, that the errors are plain, and that it is appropriate for us  
12 to exercise our discretion to correct them.

13                   Under ORS 151.505 and ORS 161.665, a trial court may order a defendant  
14 to pay court-appointed attorney fees and other costs. However, in order for a court to do  
15 so, there must be evidence that the defendant "is or may be able to pay" the fees and  
16 costs. ORS 151.505(3) (so providing); ORS 161.665(4) (same). "A court cannot impose  
17 fees based on pure speculation that a defendant has funds to pay the fees or may acquire  
18 them in the future." *State v. Pendergraph*, 251 Or App 630, 634, 284 P3d 573 (2012);

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<sup>1</sup> ORAP 5.45(1) provides, in part:

"No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court \* \* \*, provided that the appellate court may consider an error of law apparent on the record."

1 *see State v. Kanuch*, 231 Or App 20, 22, 217 P3d 1082 (2009) (trial court erred in  
2 imposing \$15,000 in court-appointed attorney fees on the defendant, who had been  
3 convicted of aggravated murder and sentenced to life in prison, with the possibility of  
4 parole after 25 years, where there was no evidence that the defendant was or might be  
5 able to pay the fees). The state bears the burden of proving that a defendant is or may be  
6 able to pay fees. *State v. Coverstone*, 260 Or App 714, 716, 320 P3d 670 (2014).

7           In this case, defendant was charged with a murder committed in 2011, and  
8 he applied for court-appointed counsel. The trial court waived the \$20 application fee  
9 and appointed counsel for defendant. Defendant's case proceeded to a bench trial, where  
10 his defense was that he killed the victim as a result of an extreme emotional disturbance.  
11 *See* ORS 163.135 (providing for extreme emotional disturbance defense to murder). In  
12 support of his defense, defendant presented an expert witness who testified about  
13 defendant's history of depression and alcohol abuse, among other things. The trial court  
14 found defendant guilty and sentenced him to life in prison, with the possibility of parole  
15 after 25 years. At sentencing, the court ordered defendant to pay \$673 in assessments,  
16 \$4,000.73 in restitution, a \$9,327 fine, \$18,000 in court-appointed attorney fees, and an  
17 \$18,000 indigent contribution.<sup>2</sup> The court did not address whether defendant was able to

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<sup>2</sup> The court did not specify the basis for the indigent contribution. Under ORS 151.505, at the conclusion of a case, a court can order the defendant to pay costs including "a reasonable attorney fee for counsel appointed to represent the person and a reasonable amount for expenses authorized under ORS 135.055[,]" which applies to, among other things, fees and expenses for investigators and experts. Similarly, under ORS 161.665, in cases in which a defendant has been convicted, a court can order the defendant to pay costs, including "a reasonable attorney fee for counsel \* \* \* and a

1 pay the ordered amounts or might be able to pay them in the future.

2           As mentioned, on appeal, defendant asserts that the trial court committed  
3 plain error by ordering him to pay the court-appointed attorney fees and indigent  
4 contribution.<sup>3</sup> According to defendant, "the record contains no evidence to support a  
5 finding that defendant had the ability to pay his attorney fees and other expenses incurred  
6 in his defense." He contends that the only evidence regarding his ability to pay was that  
7 he was 45<sup>4</sup> years old, had a history of underemployment and unemployment due to his  
8 depression and alcohol abuse, and was facing a sentence of life imprisonment.

9           In response, the state asserts that the trial court did not commit plain error  
10 because "nothing in this record tends to show that the defendant was unemployable." "To  
11 the contrary," the state asserts, "the record shows that defendant had held good jobs in the  
12 past." In support of its assertion, the state quotes a portion of the testimony of  
13 defendant's expert witness where the witness said that defendant had "several fairly good  
14 jobs."

15           Whether there is sufficient evidence for a trial court to find that a defendant  
16 is or may be able to pay fees or other costs under ORS 151.505 or ORS 161.665 is a

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reasonable amount for fees and expenses incurred pursuant to preauthorization under ORS 135.055."

<sup>3</sup> Defendant does not challenge the trial court's imposition of the assessments, restitution, or fine.

<sup>4</sup> Although defendant's brief states that he was 45 years old at the time of sentencing, the record reflects that defendant was born on June 28, 1960, and was therefore 52 years old at the time of sentencing.

1 question of law, which we review for errors of law. *See Bacote v. Johnson*, 333 Or 28,  
2 33-34, 35 P3d 1019 (2001). In order for the erroneous imposition of fees or other costs to  
3 constitute "plain error," the error must be apparent on the face of the record. That is, the  
4 relevant facts and legal error must be clear from the record itself. *State v. Brown*, 310 Or  
5 347, 355, 800 P2d 259 (1990) (ruling that an unpreserved error is reviewable as "plain  
6 error" if (1) the error is one of law; (2) the legal point is obvious--that is, "not reasonably  
7 in dispute"; and (3) to reach the error, "[w]e need not go outside the record or choose  
8 between competing inferences to find it").

9           At the outset, we reject the state's argument that the trial court did not err  
10 because "nothing in this record tends to show that the defendant was unemployable." As  
11 we have held, accepting such an argument would impermissibly "shift[ ] the burden of  
12 proof to defendant" by requiring "defendant to demonstrate that he or she *cannot* pay  
13 attorney fees." *Coverstone*, 260 Or App at 716 (emphasis added); *see also Pendergraph*,  
14 251 Or App at 635 n 6 ("[T]he state bears the burden of proving that a defendant is or  
15 may be able to pay attorney fees. A defendant is not required to prove that he or she is  
16 unable to pay them.") (Citations omitted.); *Kanuch*, 231 Or App at 24 (rejecting  
17 argument that a court can impose attorney fees "unless a defendant demonstrates that he  
18 or she cannot pay them"). Thus, whether the trial court erred depends on whether there  
19 was sufficient evidence to support a finding that defendant was or might be able to pay  
20 the \$18,000 court-appointed attorney fees and the \$18,000 indigent contribution.

21           We conclude that the trial court committed plain error; the record does not

1 contain sufficient evidence to support a finding that defendant was or might be able to  
2 pay the court-appointed attorney fees or indigent contribution. First, there was no  
3 evidence from which the court could find that defendant was able to pay the challenged  
4 financial obligations; the record contains no evidence that defendant had financial  
5 resources that would enable him to pay the substantial obligations. Second, there was no  
6 evidence from which the trial court could find, without speculating, that defendant might  
7 acquire such resources in the future. Defendant was 52 years old at the time of  
8 sentencing, and he was sentenced to life in prison, with the possibility of parole after 25  
9 years. It is speculative whether he will ever be released, and it is even more speculative  
10 that, if he is released, he might be able to obtain employment that would enable him to  
11 pay the \$18,000 court-appointed attorney fees and the \$18,000 indigent contribution,  
12 particularly in light of his history, age, and other court-imposed financial obligations.

13           The state points out that defendant's expert witness testified that defendant  
14 had "several fairly good jobs" in the past, but that testimony--read in full--is insufficient  
15 to support a finding that defendant might be able to pay the challenged financial  
16 obligations in the future. While describing defendant's problems with depression and  
17 alcohol abuse and the effects of those problems on his employment, the witness testified  
18 that defendant

19           "had a period of time where he worked in construction; had several fairly  
20           good jobs and then that's the point where he just couldn't function any  
21           longer and started working for temp agencies."

22 According to the witness, "the point where [defendant] just couldn't function any longer"

1 occurred in the early "2000s," approximately a decade before defendant's crime, trial, and  
2 sentencing. Consistent with the witness's testimony, the trial court found that defendant  
3 had "a long history of depression and substance abuse," "difficulties holding down jobs  
4 for extended periods of time," and "[f]inancial problems due to underemployment, or  
5 unemployment." Thus, although there was evidence that defendant "had several fairly  
6 good jobs" in the past, those jobs were too distant in time to support a finding that  
7 defendant might be able to pay the court-appointed attorney fees and indigent  
8 contribution. *See State v. Ramirez-Hernandez*, \_\_\_ Or App \_\_\_, \_\_\_, \_\_\_ P3d \_\_\_ (July  
9 23, 2014) (slip op at 2-3) (rejecting "[t]he [state's] argument that, with court-ordered  
10 alcohol and mental health treatment, [the] defendant would be employable in the future"  
11 because it "fails to account for the facts that [the] defendant is homeless, mentally ill, and  
12 on a immigration hold with the likelihood of being deported").

13           Thus, the evidence before the trial court was insufficient to support a  
14 finding that defendant had the financial resources or employment opportunities that  
15 would enable him to pay the challenged financial obligations at the time of sentencing,  
16 and it was also insufficient to support a finding that that he might acquire those resources  
17 or opportunities during or after his lengthy prison term. Therefore, the trial court  
18 committed plain error by imposing the court-appointed attorney fees and indigent  
19 contribution. *See Coverstone*, 260 Or App at 716.<sup>5</sup>

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<sup>5</sup> *See also State v. Delgado-Juarez*, 263 Or App 706, 707, \_\_\_ P3d \_\_\_ (2014) (trial court's imposition of \$1,200 in attorney fees constituted plain error where the defendant was sentenced to 298 months in prison and the record contained no evidence of his

1           Having determined that the court committed plain error, we turn to the  
2 question whether we should exercise our discretion to review and correct the error.  
3 "When a plain error is established, we still must determine if it is appropriate to exercise  
4 our discretion to correct the error, considering, among other things, 'the gravity of the  
5 error; the ends of justice in the particular case; how the error came to the court's attention;  
6 and whether the policies behind the general rule requiring preservation of error have been  
7 served in the case in another way.'" *Coverstone*, 260 Or App at 716-17 (quoting *Ailes v.*  
8 *Portland Meadows, Inc.*, 312 Or 376, 382, 382 n 6, 823 P2d 956 (1991)). In *Coverstone*,  
9 we exercised our discretion to reverse the trial court's imposition of court-appointed  
10 attorney fees, explaining:

11           "As defendant points out, the error is grave. Defendant was ordered to pay  
12 \$8,000, a substantial sum. Moreover, contrary to the state's view, this is not  
13 a case where, had it been alerted to the issue, the trial court could easily  
14 have determined that defendant could or would be able to pay the fees. The  
15 record contains no evidence of any financial resources available to  
16 defendant. And, defendant was sentenced to a lengthy prison term--375  
17 months."

18 260 Or App at 717.<sup>6</sup>

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financial resources); *State v. Callentano*, 263 Or App 190, 191, 326 P3d 630 (2014) (trial court's imposition of \$2,500 in attorney fees on a defendant sentenced to 90 months in prison, was plain error where the record contained no evidence that the defendant was or might be able to pay the fees); *State v. Chavez*, 263 Or App 187, 188, 326 P3d 629 (2014) (trial court committed plain error by imposing \$1,600 in attorney fees where the record failed to establish that the defendant, who had been sentenced to 300 months in prison, was or might be able to pay the fees); *State v. Strong*, 262 Or App 585, 586, 325 P3d 795 (2014) (correcting as plain error trial court's imposition of \$11,760 in attorney fees on the 64 year-old defendant, who had been sentenced to 186 months in prison, where there was no evidence regarding the defendant's ability to pay the fees).

<sup>6</sup> See also *Delgado-Juarez*, 263 Or App at 707 (exercising discretion to correct as



1                   For reasons similar to those in *Coverstone*, we conclude that it is  
2 appropriate to exercise our discretion to correct the erroneous imposition of court-  
3 appointed attorney fees and the indigent contribution in this case. The errors are grave, in  
4 that defendant was ordered to pay a substantial sum, \$18,000 in court-appointed attorney  
5 fees and an additional \$18,000 indigent contribution, for a total of \$36,000 in addition to  
6 the approximately \$14,000 in other financial obligations. And, this is not a case in which  
7 the trial court could have made the necessary finding regarding ability to pay if the issue  
8 had been brought to its attention; as discussed above, there was no evidence that  
9 defendant was able to pay the court-appointed attorney fees or might be able to pay them  
10 in the future. *See Ramirez-Hernandez*, \_\_\_ Or App at \_\_\_ (slip op at 3-4) (noting that, in  
11 that case, "while there is some speculative evidence that [the] defendant might find work  
12 in the future, the actual evidence is to the contrary").

13                   Portion of judgment requiring defendant to pay court-appointed attorney  
14 fees and indigent contribution reversed; otherwise affirmed.

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plain error trial court's imposition of attorney fees); *Callentano*, 263 Or App at 191 (same); *Chavez*, 263 Or App at 188 (same); *Strong*, 262 Or App at 586 (same); *cf. State v. Baco*, 262 Or App 169, 171, 324 P3d 491 (2014) (declining to exercise discretion to correct imposition of \$510 in attorney fees on the ground that the amount was not substantial and the defendant's probationary sentence did not prevent him from working).