

FILED: December 24, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JAMES LEROY COOK,
Defendant-Appellant.

Marion County Circuit Court
13C42340

A155184

Dale Penn, Judge.

Submitted on November 07, 2014.

Peter Gartlan, Chief Defender, and Alice S. Newlin, Deputy Public Defender, Office of Public Defense Services, filed the opening brief for appellant. On the reply brief were Peter Gartlan, Chief Defender, and Morgen E. Daniels, Deputy Public Defender.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Jamie K. Contreras, Assistant Attorney-in-Charge, filed the brief for respondent.

Before Duncan, Presiding Judge, and Lagesen, Judge, and Flynn, Judge.

LAGESEN, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
-

1 LAGESEN, J.

2 Defendant appeals a judgment of conviction, asserting only an unpreserved
3 assignment of error regarding the trial court's award of attorney fees for defendant's
4 court-appointed lawyer under ORS 151.505(3) and ORS 161.665(4). Defendant contends
5 that the award must be set aside in its entirety because the record contains no evidence
6 that defendant "is or may be able to pay" any amount of attorney fees. ORS 151.505(3)
7 ("The court may not require a person to pay costs under this section unless the person is
8 or may be able to pay the costs."); ORS 161.665(4) ("The court may not sentence a
9 defendant to pay costs under this section unless the defendant is or may be able to pay
10 them."). The state concedes that the trial court erred in awarding attorney fees and
11 acknowledges that the record contains no evidence regarding defendant's ability to pay a
12 fee award but argues that we should remand to the trial court with instructions to enter a
13 judgment for a reduced fee award based on arguments that defense counsel made at
14 sentencing. We decline to accept the state's concession. *See State v. R. L. W.*, ___ Or
15 App ___, ___, ___ P3d ___ (Dec 24, 2014) (explaining that we are not bound by
16 concessions of error) (slip op at 4). Based upon our independent review of the record, we
17 conclude that any error by the trial court was invited and, in any event, is not plain.
18 Accordingly, we affirm.

19 Defendant pleaded guilty to, and was convicted of, three counts of
20 encouraging child sexual abuse in the first degree, ORS 163.684. The trial court
21 sentenced defendant to a stipulated sentence of 225 months in prison and 76 months of

1 post-prison supervision. At sentencing, the prosecutor noted that she had already "filled
2 out the judgments for the case" and had "gone ahead and put down on the monetary
3 awards attorney fee, Judge, but certainly we can modify those depending on what you
4 decide, and any other monetary awards." As filled out by the prosecutor, the judgment
5 indicated a total attorney fee award of \$4,800 (\$1,600 in fees per conviction). In
6 response to the requested award of fees, defense counsel argued that a reduced amount of
7 "perhaps * * *one-third" would be appropriate:

8 "[DEFENSE COUNSEL]: The one thing I forgot to mention, Your
9 Honor, is attorney's fees are optional based on the client's ability to pay, and
10 so the Court might consider, rather than having him pay the full amount of
11 attorney's fees, perhaps reducing it to one-third, if the Court thinks that's
12 appropriate, just because he'll obviously be in prison and it would be very
13 hard for him to pay the full amount.

14 "THE COURT: Okay. Normally, my process is that when it is
15 anticipated there would be post-prison supervision, I would enter a
16 judgment for the attorney's fees and then there would need to be a finding
17 by Department of Corrections at release about your ability to pay and
18 setting up a payment schedule at that time. So I would authorize attorney's
19 fees at this point, keeping in mind that your future ability to pay will really
20 set the monthly payments and whether or not that's possible to collect.

21 "So I'm going to enter the attorney's fees now, but that will be a later
22 decision by Department of Corrections."

23 The trial court then signed the orders prepared by the state.

24 Thereafter, further proceedings were held off the record, after which the
25 court came back on the record to amend the judgment with respect to the award of
26 attorney fees:

27 "THE COURT: All right. This is on State v. Cook, 13C-42340. I
28 just pronounced sentence in this case, but I was told that the computation of
29 the attorney's fees was in error, and so I'm going to change that total and I

1 will initial that on each page of the judgment. I think the net effect is it
2 reduces the attorney's fees.

3 "[DEFENSE COUNSEL]: It does, Your Honor. It will be [\$]820
4 times 3 instead of [\$]1,600 times 3.

5 "THE COURT: Okay. So I will simply make that change and initial
6 each page, and since we're still all in the courtroom, I thought I'd just
7 announce it on the record.

8 "[DEFENSE COUNSEL]: Everybody's good with that. I'm sure my
9 client is good in that reduction and the Attorney General's Office, Ms.
10 Hoffmeyer said she's fine with that as well.

11 "THE COURT: All right. So the total should be then \$2,460?

12 "[DEFENSE COUNSEL]: That's correct, Your Honor.

13 "THE COURT: [\$]2,460. All right. I will make that change.
14 Thank you very much."

15 The court then crossed out the \$1,600 in attorney fees that it had awarded
16 on each conviction and, in each instance, replaced it with \$820, thereby reducing the total
17 award of attorney fees from \$4,800 to \$2,460, the amount that, according to defense
18 counsel, "[e]verybody's good with[.]"

19 As noted, defendant's sole contention on appeal is that the trial court erred
20 by awarding any amount of attorney fees, and the state concedes the error. However,
21 given how the parties presented the issue of attorney fees to the trial court, we decline to
22 accept the state's concession and decline to review defendant's claim of error for two
23 reasons.

24 First, "if an appellant 'was actively instrumental in bringing about' the error,
25 then the appellant 'cannot be heard to complain, and the case ought not to be reversed

1 because of it." *State v. Ferguson*, 201 Or App 261, 269, 119 P3d 794 (2005), *rev den*,
2 340 Or 34 (2006) (quoting *Anderson v. Oregon Railroad Co.*, 45 Or 211, 217, 77 P 119
3 (1904)); *see State ex rel Juv. Dept. of Multnomah County v. S. P.*, 346 Or 592, 606, 215
4 P3d 847 (2009) ("This court has determined that it will not exercise its discretion to
5 review an asserted plain error if the party seeking review encouraged commission of the
6 error in question * * *."). Here, defense counsel told the trial court that an award of fees
7 is "optional based on the client's ability to pay," implying that such an option was at least
8 possible on the record before the court. Defense counsel then asked the court to
9 "consider, rather than having him pay the full amount of attorney's fees, *perhaps reducing*
10 *it to one-third, if the Court thinks that's appropriate, just because he'll obviously be in*
11 *prison and it would be very hard for him to pay the full amount.*" (Emphasis added.)
12 And, ultimately, after off-the-record discussions led to a significant reduction in the
13 amount of attorney fees awarded, defense counsel told the court that "[e]verybody's good
14 with that" reduced amount. In other words, defendant framed the question of attorney
15 fees as a choice among three alternatives, each of which lacked support in the record:
16 "the full amount," which would be "very hard for him to pay"; one-third of that "full
17 amount," which would be easier; or, finally, the apparent consensus amount of
18 approximately one-half the amount originally requested by the state. Having implied to
19 the trial court that some award of attorney fees was authorized and then having
20 encouraged the trial court to award fees based on the parties' representations, defendant is
21 no longer in a position to argue that "the trial court lacked the authority to impose *any*

1 attorney fees." (Emphasis by defendant.)

2 Second, even if defendant had not invited the error, the quoted part of the
3 transcript demonstrates why the asserted error--if error--does not qualify as plain error.
4 To qualify as "error apparent on the record," the error must, among other criteria, not
5 require us to "go outside the record to identify the error or choose between competing
6 inferences * * *." *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956
7 (1991). In this case, a conclusion that the trial court erred by awarding \$2,460 in attorney
8 fees would require us to resolve competing inferences regarding what the parties
9 discussed, and what agreement they may have reached, during the off-the-record
10 discussions that led the trial court to reduce the original award of attorney fees.¹ It is
11 possible that the parties negotiated a resolution--something tantamount to a stipulated
12 amount of attorney fees. The transcript does not conclusively establish what transpired
13 during those unrecorded discussions, and we cannot entertain a claim of plain error that
14 requires us to speculate about what the parties might have accomplished while off the
15 record. *See State v. Harbick*, 234 Or App 699, 705, 228 P3d 727, *rev den*, 349 Or 171
16 (2010) (explaining that the appellant had not demonstrated that the trial court committed
17 plain error by considering a guilty-except-for-insanity defense, because given the

¹ The fact that the record affirmatively reflects that off-the-record discussions about attorney fees took place distinguishes this case from *State v. Coverstone*, 260 Or App 714, 320 P3d 670 (2014). There, in which we concluded that a trial court plainly erred by awarding attorney fees, there was no evidence of any off-the-record discussions of attorney fees, and we declined to speculate as to whether such discussions may have occurred. Here, by contrast, the record not only reflects that such discussions occurred, but that they led to the entry of a fee award that everybody was "good with."

1 evidence of off-the-record proceedings in that particular case, "[i]t is at least possible
2 that, following the competency hearing, the parties discussed that very issue off the
3 record").

4 Affirmed.