

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

STATE OF OREGON,  
*Plaintiff-Respondent,*

*v.*

RASSI ETHAN HARRIS,  
*Defendant-Appellant.*

Washington County Circuit Court  
16CR24758; A163995

D. Charles Bailey, Jr., Judge.

Submitted June 1, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Morgen E. Daniels, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Adam Holbrook, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

PER CURIAM

Portion of judgment requiring defendant to pay attorney fees reversed; otherwise affirmed.

## PER CURIAM

Defendant appeals a judgment of conviction for unlawful use of a weapon, ORS 166.220, and menacing, ORS 163.190. On appeal, he challenges the trial court's imposition of court-appointed attorney fees in the amount of \$642.

Defendant asserts that the trial court plainly erred in imposing attorney fees in the absence of evidence that he "is or may be able to pay" them. *See* ORS 151.505(3) ("The court may not require a person to pay costs under this section unless the person is or may be able to pay the costs."); ORS 161.665(4) ("The court may not sentence a defendant to pay costs under this section unless the defendant is or may be able to pay them."); *see also* ORAP 5.45(1) ("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, in its discretion, consider a plain error."); *State v. Coverstone*, 260 Or App 714, 716, 320 P3d 670 (2014) (a trial court commits plain error when it imposes court-appointed attorney fees in the absence of evidence of the defendant's ability to pay those fees). The only evidence in this case relating to defendant's potential ability to pay fees was that the trial court asked defendant if he was "working before all this" and defendant responded affirmatively. The state concedes that, under those circumstances, it was plain error for the trial court to impose attorney fees. We agree and accept the state's concession. *See State v. Orozoco-Navarro*, 292 Or App 31, 32, \_\_\_ P3d \_\_\_ (2018) (concluding that the trial court plainly erred in imposing attorney fees in similar circumstances); *State v. Belen*, 277 Or App 47, 57-58, 369 P3d 438 (2016) (plain error to impose court-appointed attorney fees where the only evidence in the record was that the defendant had worked in the past); *State v. Mejia-Espinoza*, 267 Or App 682, 684, 341 P3d 180 (2014), *rev den*, 357 Or 164 (2015) ("Although the record contains some evidence that defendant worked in the past, as a field worker and as a firefighter, there is no evidence as to (1) defendant's historical earnings from such work and (2) whether, given the nature of defendant's criminal convictions and the length of his incarceration, such employment \*\*\* will be plausibly available to defendant following his release.").

Furthermore, for the reasons articulated in *Coverstone*, 260 Or App at 716-17, we conclude that it is appropriate to exercise our discretion to correct the trial court's plain error. In particular, in light of all of the circumstances, the gravity of the error weighs in favor of correcting it. *See id.*; *see also State v. Sanders*, 285 Or App 878, 879-80, 399 P3d 487, *rev den*, 361 Or 803 (2017) (exercising discretion to correct plain error in imposing court-appointed attorney fees). Accordingly, we reverse the portion of the judgment requiring defendant to pay \$642 in attorney fees.

Portion of judgment requiring defendant to pay attorney fees reversed; otherwise affirmed.