IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

SERGIO CASAS,
Defendant-Appellant.

Washington County Circuit Court
16CR69072, 16CN05522;
A165187 (Control), A165188

Eric Butterfield, Judge.

On respondent's Motion for Summary Affirmance filed August 3, 2018, and appellant's response filed August 6, 2018.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Joanna R. Hershey, Assistant Attorney General, for motion.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Rond Chananudech, Deputy Public Defender, Office of Public Defense Services, for response.

Before DeVore, Presiding Judge, and Egan, Chief Judge, and James, Judge.

PER CURIAM

Motion for summary affirmance granted; affirmed.

James, J., concurring.

PER CURIAM

Defendant appeals from a judgment of conviction for fourth-degree assault constituting domestic violence and harassment, both misdemeanors. The state moves pursuant to ORS 138.225 for summary affirmance on the ground that the appeal does not present a substantial question of law. We grant the motion and affirm.

At sentencing the trial court ordered defendant to pay a $184 court-appointed attorney fee from a security amount totaling $7,500 that had been previously posted. On appeal, defendant contends that the court plainly erred in ordering him to pay court-appointed attorney fees from the previously posted security deposit without first finding that he had the ability to pay those fees. At the time security was posted, defendant signed a release agreement containing an express condition that the security amount would be applied to fines, fees, or court ordered financial obligations arising out of this case or any other case involving defendant.

The resolution of this case is controlled by *State v. Thomas*, 292 Or App 756, 425 P3d 437 (2018). In *Thomas,* we held that the defendant did not demonstrate plain error by the trial court when it imposed $1,600 in court-appointed attorney fees. *Id*. at 760-61. We rejected the argument that the trial court did not make the statutorily required on-the-record findings regarding the defendant's ability to pay fees given the court's finding that the defendant had the funds available to pay fees from the security deposit monies. *Id.* at 760. Moreover, we explained that any error was not obvious given our case law authorizing a trial court to find that a defendant has the ability to pay court-appointed fees when security is posted subject to the express condition that the funds be available to pay a defendant's financial obligations. *Id*. at 761-63 (citing *State v. Wise*, 40 Or App 303, 594 P2d 1313 (1979); *State v. Twitty*, 85 Or App 98, 106, 735 P2d 1252, *rev den*, 304 Or 56 (1987); *State v. Wetzel*, 94 Or App 426, 428-29, 765 P2d 835 (1988)). Thus, on review for plain error in this case, defendant's security deposit appears to provide sufficient evidence to support the trial court's imposition of court-appointed attorney fees, even if a trial court, when properly presented with questions in the first instance as

to how defendant acquired the funds for a security deposit, might reach a different result. Additionally, although defendant raises factual questions on appeal that may not have been raised in the trial court or in *Thomas*, factual questions preclude plain-error review, and defendant fails to meaningfully distinguish *Thomas*. Defendant also fails to address the standards necessary to establish that *Thomas* was plainly wrong. *See State v. Civil*, 283 Or App 395, 388 P3d 1185 (2017) (explaining standards for establishing that prior case was plainly wrong and should be overturned).

Motion for summary affirmance granted; affirmed.

JAMES, J., concurring.

I concur in the per curiam, for the reasons explained in the concurring opinion in *State v. Thomas*, 292 Or App 756, 764, 425 P3d 437 (2018) (Egan, C. J., concurring).