

No. 41769-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ETIENNE CHOQUETTE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding, in the absence of substantial evidence, that Mr. Choquette did not request an attorney during custodial interrogation. CP 80 (Finding H). On the contrary, Mr. Choquette stated, "obviously I'm going to need an attorney." Ex. 34 at 4.

2. The trial court erred in finding, in the absence of substantial evidence, that Mr. Choquette made an admission to Officer Mike Shannon on September 25, 2009. CP 77-78. On the contrary, Officer Shannon testified that this statement occurred after the interview on September 26, 2009, which was after Mr. Choquette had requested counsel. 9/29/10 RP 9-12.

3. The trial court violated Mr. Choquette's rights under the Fifth and Fourteenth Amendments by admitting statements he made in response to custodial interrogation after requesting an attorney.

4. The trial court erred in instructing the jury this was not a death penalty case.

5. The sentencing court erred in imposing 24-48 months of community custody.

6. The sentencing court erred in imposing discretionary costs and fees.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court violates a defendant's Fifth and Fourteenth Amendment rights by admitting statements the defendant made during a police interrogation after the defendant had requested counsel. Did the trial court violate Mr. Choquette's Fifth and Fourteenth Amendment rights by admitting statements he made in response to police questioning after Mr. Choquette said "obviously I'm going to need an attorney?"

2. The Washington Supreme Court has repeatedly held it is error to inform the jury in a non-capital case that the case is not a death penalty case. Did the trial court err in instructing the jury that Mr. Choquette's case was not a death penalty case?

3. RCW 9.94A.701 requires the sentencing court to impose a three-year term of community custody for serious violent offenses. Did the sentencing court err in imposing 24-48 months of community custody upon Mr. Choquette following his conviction for first-degree murder with a firearm?

4. Courts may not impose costs on defendants unless they have a present or future ability to pay. Here, the court imposed

discretionary costs and fees upon Mr. Choquette totaling \$968.56, even though the evidence showed Mr. Choquette has no money, is disabled and unemployed, and is serving a 300-month prison term. The court did not find Mr. Choquette had the present or future ability to pay. Did the sentencing court err in ordering Mr. Choquette to pay discretionary fees and costs?

C. STATEMENT OF THE CASE

Etienne Choquette is a 47-year-old man who had never so much as been arrested, let alone convicted of a crime, prior to this case. 9/29/10 RP 73; 12/13/10 RP 30, 48. But on September 25, 2009, he was arrested as a suspect in the homicide of Tony Maldonado. 9/29/10 RP 27. When he was alive, Mr. Maldonado apparently physically abused his girlfriend, Kellie White. 12/7/10 RP 87-88. The authorities thought Mr. Choquette, who was a friend of Ms. White's, may have killed Mr. Maldonado in retaliation for the assaults. 12/7/10 RP 104; 12/13/10 RP 85; ex. 33 at 11. But according to Ms. White, Mr. Choquette "never insinuated he would do any harm. Basically he said he would be support if I needed him to help me, he would do whatever he could to help protect me from being harassed." 12/7/10 RP 95.

On the evening of September 25, 2009, Sergeant Darryl Elmore of the Forks Police Department interrogated Mr. Choquette. Exs. 33, 34. Sergeant Elmore advised Mr. Choquette of his Fifth Amendment rights, and Mr. Choquette agreed to speak with Elmore. 9/29/10 RP 27-28. Sergeant Elmore recorded both the that interrogation and another that occurred the next day, but the recordings were botched – Sergeant Elmore recorded over part of the interview, and said he did not realize the tape had stopped during another section of the interrogation. 9/29/10 RP 46; 12/7/10 RP 111. Nevertheless, much of the interrogation was recorded. Ex. 33 (September 25, 2009); Ex. 34 (continuation of September 25, 2009); Ex. 35 (September 26, 2009).

Throughout the interview, Mr. Choquette repeatedly professed his innocence with respect to the alleged crime. Ex. 33 at 16, 17. Toward the end of the first night's interview, he sought assurances from Sergeant Elmore that he would receive his multiple-sclerosis medications and that someone was caring for his dog. Ex. 34 at 4. He then said, "And obviously I'm going to need an attorney." Ex. 34 at 4.

Sergeant Elmore did not cease the interrogation and did not make an attorney available for Mr. Choquette, instead implying that

Mr. Choquette could not obtain a lawyer until after he was arraigned. Ex. 34 at 4-5. The interview ended shortly thereafter.

The next day, Sergeant Elmore resumed the interrogation without having made counsel available to Mr. Choquette. Ex. 35. During the first part of this interview, Mr. Choquette continued to proclaim his innocence. Ex. 35 at 23. What happened next is not clear because the recording suddenly stopped. Ex. 35 at 48.

Shortly after the recording resumed, Mr. Choquette stated that he shot and killed Mr. Maldonado. Ex. 35 at 51. Mr. Choquette said he intended only to beat him up, but he “just lost it” when Mr. Maldonado would not get in the car with him. Ex. 35 at 50-51. He said, “I pulled the gun and I just, I shot him out the window.” Ex. 35 at 56. He said, “then I put one through his head.” Ex. 35 at 57. He said he was “inches” from the victim when he shot him in the head. Ex. 35 at 64.

The State charged Mr. Choquette with one count of first-degree murder with a firearm. CP 98-99. Mr. Choquette moved to exclude the statements he made during the September 26, 2009 interrogation pursuant to CrR 3.5. At the hearing on the motion, Sergeant Elmore testified that Mr. Choquette “never asked for an attorney” and that he had promised him nothing during the time the

recorder was off. 9/29/10 RP 44, 49. Mr. Choquette, on the other hand, testified that during the time the recorder was off, Elmore asked him what he would have to do to get Mr. Choquette to confess, and promised Mr. Choquette that if he confessed, Kellie White would not be charged with a crime if it turned out she was the one who committed the homicide. 9/29/10 RP 78-79. He also promised that Mr. Choquette would be charged only with manslaughter. 9/29/10 RP 78-79. Sergeant Elmore called the prosecuting attorney, then came back and said, "we have a deal; let's go make a statement." 9/29/10 RP 78-79. Relying on this promise, Mr. Choquette then made a false confession. 9/29/10 RP 79.

The court denied the motion to suppress. CP 75-82. It found, inter alia, that Mr. Choquette never requested a lawyer. CP 80. It also found no promises were made. CP 80. The judge apparently found Sergeant Elmore credible and Mr. Choquette not credible despite the facts that:

- On the recording toward the end of the September 25, 2009 interview, Mr. Choquette said, "And obviously I'm going to need an attorney;" ex. 34 at 4;
- Mr. Choquette had never so much as been arrested, let alone convicted of any crimes of dishonesty; 9/29/10 RP 73;

- Sergeant Elmore had resigned from the police department because he was caught lying about a relationship with a person involved in a murder-suicide; 9/29/10 RP 50-53, 57;
- Mr. Choquette had repeatedly professed his innocence until the recording was abruptly cut off. Sergeant Elmore testified that Mr. Choquette asked him to stop recording, but that request is nowhere on the recording. Once recording resumed, Mr. Choquette inexplicably confessed. Exs. 33, 34, 35; 9/29/10 RP 46.

On December 6, the court and parties discussed pre-trial jury instructions. The prosecutor asked the court to “let them know up front that this is not a death penalty case.” 12/6/10 RP 7.

At trial, the State called several witnesses, none of whom observed the shooting. Two witnesses who lived in the neighborhood near the gas station where the incident occurred testified that they heard shots but saw nothing. 12/7/10 RP 54-65. Two witnesses who were in a car together in the gas station parking lot also testified. 12/7/10 RP 12-53. Neither could identify the shooter or his companion, but they thought they could identify the car they were in. 12/7/10 RP 16, 27, 49. Nikki Farron testified that the car the shooters were in was a Camaro. 12/7/10 RP 16. Her boyfriend Jose Louis Roland thought it was a Blazer. 12/7/10 RP 49. Ms. Farron said the car had a squeaky door and the license plate included the number 827. 12/7/10 RP 15, 28. Mr.

Choquette's car has a squeaky door, but his license plate number is 91617. 12/8/10 RP 5; Ex. 39.

No DNA or fingerprint evidence was tied to Mr. Choquette. 12/8/10 RP 127; CP 52. The forensic scientist testified that she could not match the bullets found in the victim's body to the alleged murder weapon. 12/8/10 RP 142.

Sergeant Elmore testified that Mr. Choquette confessed to the crime, and the recorded statements were played for the jury. 12/7/10 RP 134-36; 12/8/10 RP 4. On cross-examination, Mr. Choquette's lawyer pointed out that at the end of the first interview, Mr. Choquette said, "I am going to need an attorney." 12/8/10 RP 30. He said, "Did you take that to be a request for an attorney?" Sergeant Elmore said, "No." 12/8/10 RP 30.

Mr. Choquette asked Sergeant Elmore whether he made any promises during the three hours the recorder was off, and Sergeant Elmore said he did not. 12/8/10 RP 40. He said he told Mr. Choquette he could not make any deals, and that Mr. Choquette simply confessed anyway. 12/8/10 RP 40.

Mr. Choquette testified that he had nothing to do with Mr. Maldonado's death and did not even find out about it until the next day. 12/13/10 RP 23-28. He gave a false confession because he

knew Kellie White had been arrested for the crime and was worried about her and her children. 12/13/10 RP 37. He said Elmore promised him a manslaughter charge in exchange for a confession. 12/13/10 RP 37. He gave a confession using the details Sergeant Elmore had provided him about the incident. 12/13/10 RP 38-39.

The jury convicted Mr. Choquette of first-degree murder with a firearm. CP 21-22. He timely appeals. CP 6.

D. ARGUMENT

1. MR. CHOQUETTE'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE ADMISSION OF STATEMENTS HE MADE AFTER UNEQUIVOCALLY REQUESTING AN ATTORNEY.

a. If an accused requests counsel, police must cease interrogation and may not reinitiate questioning until counsel has been provided. The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, protects criminal suspects against compelled self-incrimination. U.S. Const. amend. V; U.S. Const. amend. XIV; Edwards v. Arizona, 451 U.S. 477, 481, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). These constitutional clauses provide not only the right to remain silent, but also the right to have counsel present during custodial interrogation. Edwards, 451 U.S. at 482. The assistance of counsel is necessary "to dispel

the compulsion inherent in custodial surroundings.” Miranda v. Arizona, 384 U.S. 436, 458, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Otherwise, “no statement obtained from the defendant can truly be the product of his free choice.” Id.

If, during questioning, an accused requests counsel, “the interrogation must cease until an attorney is present.” Edwards, 451 U.S. at 482 (quoting Miranda, 384 U.S. at 474). So long as the accused has made “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,” questioning must end. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The police may not resume the interrogation until counsel has been made available. Edwards, 451 U.S. at 484-85. This is a “rigid rule” protecting an “undisputed right.” Id. at 485.

b. The trial court erroneously admitted statements Mr. Choquette made in response to questions Sergeant Elmore asked after he said “obviously I’m going to need an attorney”. In this case, law enforcement officers violated the rigid Edwards rule by continuing to interrogate Mr. Choquette after he requested counsel. The trial court committed constitutional error in admitting the

statements Mr. Choquette made in response to the continued interrogation.

During the September 25, 2009 interrogation, Mr. Choquette repeatedly professed his innocence. Ex. 33 at 16, 17. Toward the end of that night's interview, he sought assurances from Sergeant Elmore that he would receive his multiple-sclerosis medications and that someone was caring for his dog. Ex. 34 at 4. He then said, "And obviously I'm going to need an attorney." Ex. 34 at 4.¹

At that point, Sergeant Elmore was required to cease the interview and not reinstate questioning until an attorney was provided. Edwards, 451 U.S. at 484-85; Miranda, 384 U.S. at 474. Instead, Sergeant Elmore implied that Mr. Choquette was not allowed to have an attorney until after arraignment:

MR. CHOQUETTE: And obviously I'm going to need an attorney.

SGT. ELMORE: Yes.

MR. CHOQUETTE: So what do we do about that?

¹ The trial court's finding that Mr. Choquette did not request an attorney is not supported by substantial evidence. CP 80. Indeed, it is directly contrary to the record. Ex. 34 at 4. Furthermore, the portion of the waiver form that the suspect is supposed to fill out after the interrogation is conspicuously blank. The section asks "at any time during this statement, have you requested an attorney?" There is a place for the defendant's signature. Mr. Choquette did not sign it. Ex. 49.

SGT. ELMORE: You'll be arraigned, you'll be arraigned and once that happens I'm going to present the probable cause that I believe I have.

At some point or other you will be asked if you can afford an attorney, if you choose to they'll appoint an attorney for you if you meet the criteria for a public defender, so.

MR. CHOQUETTE: And when will that be?

SGT. ELMORE: Uh, Monday, I would, I would anticipate Monday.

MR. CHOQUETTE: Can I still have that cigarette?

Ex. 34 at 4-5.

The interview ended shortly thereafter. The next day, Sergeant Elmore resumed the interrogation without having made counsel available to Mr. Choquette. Ex. 35. During the first part of this interview, Mr. Choquette continued to proclaim his innocence. Ex. 35 at 23. But Elmore eventually coerced the confession that would later be used against Mr. Choquette at trial. Ex. 35 at 51, 56, 57, 64.² The admission of the statements was unconstitutional. Edwards, 451 U.S. at 481.

² The statements included:

- "I pulled the gun and I just, I shot him out the window;" ex. 35 at 56;
- "then I put one through his head;" ex. 35 at 57;

This case is very similar factually to Edwards. There, as here, the defendant was arrested, taken to the police station and informed of his rights as required by Miranda. Edwards, 451 U.S. at 478. There, as here, the defendant “denied involvement and gave a taped statement presenting an alibi defense.” Id. at 479. The defendant then requested an attorney, and the interrogation ceased. Id.

But as in Mr. Choquette’s case, law enforcement returned to Mr. Edwards the next day, without providing him an attorney, and resumed questioning. Id. As in Mr. Choquette’s case, the defendant eventually implicated himself in the crime, and the court admitted the confession at trial. Id. The Supreme Court held that because officers improperly questioned Edwards after he requested counsel, “the use of Edwards’ confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments.” Id. at 480.

The same is true here. Indeed, the facts of Mr. Choquette’s case are arguably even more egregious because unlike in Edwards, Mr. Choquette was not readvised of his Miranda rights prior to the second day’s interrogation. See Edwards, 451 U.S. at

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- Q: “How close were you when you shot him in the head?” A: “Inches.” Ex. 35 at 64.

479 (Edwards was readvised); CP 75 (Mr. Choquette was not readvised). The Supreme Court held that despite the readvisement in that case, the statements were inadmissible because once an individual requests counsel, he is not subject to further interrogation until counsel has been made available to him. Id. at 484-85. The statements here were likewise inadmissible, and this Court should reverse.

c. The statement Mr. Choquette made to Officer Shannon right after confessing to Sergeant Elmore was also inadmissible. Not only were Mr. Choquette's statements to Sergeant Elmore on September 26 inadmissible, but the statement he allegedly made immediately thereafter to Officer Shannon should have been suppressed as well. The trial court's finding that Mr. Choquette made the statement to Officer Shannon on September 25 is directly contrary to the record. CP 77-78, 80, 81. Officer Shannon testified that Mr. Choquette made the statement to him on September 26, as he took him back to his cell after Sergeant Elmore coerced a confession.³ 9/29/10 RP 9-12.

The fact that Officer Shannon, unlike Sergeant Elmore, was not interrogating Mr. Choquette is of no moment. In Edwards, the

³ The alleged statement was, "I did the right thing; he needed to die." CP 78.

defendant was readvised of his Miranda rights prior to confessing, but this readvisement did not render the statements admissible because the statements were made without the defendant having had access to counsel. Edwards, 451 U.S. at 487. Here, as in Edwards, the police reinterrogated Mr. Choquette after he clearly asserted his right to counsel. It was during this reinterrogation that Mr. Choquette confessed. His alleged follow-up statement to Officer Shannon was part and parcel of the unconstitutional interrogation; it referred to the statements made moments earlier in response to Sergeant Elmore's questioning, and cannot be characterized as a separate conversation initiated by Mr. Choquette. Cf. Missouri v. Seibert, 542 U.S. 600, 614, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (holding confession following Miranda warnings must be suppressed along with prior unwarned confession and stating, "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle").

In sum, all statements Mr. Choquette made on September 26 were inadmissible because Mr. Choquette clearly requested

counsel on September 25 yet police continued to interrogate him until he confessed without making counsel available.

d. Reversal is required because the State cannot prove beyond a reasonable doubt the error did not contribute to the verdict obtained. The State bears the burden of proving that the admission of statements obtained in violation of Miranda was harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the conviction. Fulminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26).

The State cannot meet this heavy burden here. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Fulminante, 499 U.S. at 296 (internal quotation omitted). Mr. Choquette's coerced confession was the heart of the prosecution's case; indeed it was the only direct evidence that he committed the crime. None of the witnesses the State called saw Mr. Choquette commit the crime. Neighbors Willena Richards and Morris Jacobsen heard shots but

did not see the shooter or shooters. 12/7/10 RP 54-65. Jose Louis Roland and Nikki Farron were in a car near the scene of the crime, but could not identify the perpetrators. 12/7/10 RP 27. Mr. Roland said the shooter drove a black Blazer while Ms. Farron said he drove a Camaro. 12/7/10 RP 16, 42, 49. Ms. Farron said the shooter's license plate included the number "827," but Mr. Choquette's license plate number is 91617. Ex. 39; 12/7/10 RP 28.

The State's theory was that Mr. Choquette killed the victim because the victim had perpetrated domestic violence against Kellie White, who was the victim's girlfriend and a friend of Mr. Choquette. But Ms. White testified that unlike her brothers – who had explicitly threatened to kill the victim in retaliation for the beatings – Mr. Choquette "never insinuated he would do any harm. Basically he said he would be support if I needed him to help me, he would do whatever he could to help protect me from being harassed." 12/7/10 RP 95.

No fingerprints or DNA evidence connected Mr. Choquette to the crime. 12/8/10 RP 127. The forensic scientist could not match the bullets found in the victim's body to the alleged murder weapon. 12/8/10 RP 142.

In sum, the evidence apart from the coerced confession was extremely weak. The State therefore cannot show that the improper admission of Mr. Choquette's statements was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and the case remanded for a new trial. Chapman, 386 U.S. at 24.

2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THIS CASE WAS NOT A DEATH-PENALTY CASE.

The prosecutor asked the court to instruct the jury pretrial that "this is not a death penalty case." 12/6/10 RP 7. The Supreme Court has repeatedly held that such instructions are improper. State v. Hicks, 163 Wn.2d 477, 487-88, 181 P.3d 831 (2008); State v. Mason, 160 Wn.2d 910, 930, 162 P.3d 396 (2007); State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001). "The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in a capital case." Townsend, 142 Wn.2d at 846 (quoting State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960)).

The Court explained that this rule "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. "[I]f jurors know that the death penalty is not

involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” Id. at 847. Telling the jury that a case is noncapital “would only increase the likelihood of a juror convicting the [defendant].” Id. Thus, in order to ensure fundamental fairness, such instructions are strictly prohibited. Id. at 846.

At the prosecutor’s urging, the trial court violated this strict prohibition here. The violation requires reversal in this case. “Under Washington law, when assessing the impact of an instructional error, reversal is automatic unless the error is ‘trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.’” Townsend, 142 Wn.2d at 848. The outcome of the case was affected because the giving of the instruction “increase[d] the likelihood of a juror convicting” Mr. Choquette. Id. at 847. The instruction probably made the jury less careful, and more apt to ignore weaknesses in the State’s case like the forensic scientist’s inability to conclude the bullets used in the homicide were fired by Mr. Choquette’s gun and the eyewitness’s statement that the license plate number of the shooter’s car was

different from that of Mr. Choquette. 12/8/10 RP 142. At a minimum, had the erroneous instruction not been given, the jury may have convicted Mr. Choquette of second-degree murder rather than first-degree murder. Accordingly, this Court should reverse the conviction and remand for a new trial.

3. THE SENTENCING COURT ERRED IN IMPOSING 24-48 MONTHS OF COMMUNITY CUSTODY AND IN IMPOSING DISCRETIONARY COSTS AND FEES.

a. The sentencing court erred in imposing 24-48 months of community custody because the statute mandates a term of 36 months. The judgment and sentence includes a preprinted section for community custody, which correctly indicates that RCW 9.94A.701 requires a fixed community-custody term of three years for serious violent offenses. CP 11; RCW 9.94A.701. Without explanation, the court crossed out the preprinted phrase “36 months for Serious Violent Offenses” and wrote in the phrase “24-48 months.” The sentence should be reversed and the case remanded for imposition of a three-year term of community custody, because that is the term authorized by statute.

b. The sentencing court erred in imposing costs and fees because Mr. Choquette is indigent and lacks the ability to pay. The sentencing court imposed \$ 1,568.56 in legal financial obligations (“LFOs”). CP 12-13. Of that amount, \$600 was for mandatory fees. The court also imposed \$350 for court-appointed counsel, \$200 for “criminal filing fee,” and \$418.56 for “sheriff service fees.” CP 13.

The court did not make an oral finding that Mr. Choquette had the ability to pay these costs, and the judgment and sentence does not contain a written finding on ability to pay. Although mandatory fees were properly imposed, it was improper for the court to impose an additional \$968.56 in costs and fees given that Mr. Choquette lacks the present and future ability to pay.

Courts may not require an indigent defendant to reimburse the state for the costs unless the defendant has or will have the means to do so. State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing costs. Id. This requirement is both constitutional and statutory. Id. A trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing

Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Choquette without finding he had the ability to pay. Nor would substantial evidence support such a finding. Mr. Choquette was indigent and was represented by court-appointed counsel. He was on the verge of serving a 300-month prison sentence. He had testified that although he used to earn a living as a fisherman, he was severely injured in a car accident and was living on SSI payments. 12/13/10 RP 16. Additionally, he suffers from multiple sclerosis. 12/13/10 RP 16. The court did not take Mr. Choquette's financial status into account at all, instead imposing the costs and fees "we typically impose." 2/3/11 RP 14.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In Richardson, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. State v. Richardson, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). And in Baldwin, this Court affirmed the imposition of costs because the Presentence Report "establishe[d] a factual basis for the defendant's future ability to pay." State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991).

But unlike the defendant in Richardson, Mr. Choquette is not employed. Furthermore, he will not be able to obtain employment in the near future because he is serving a 300-month prison term. And unlike in Baldwin, the State did not submit a presentence report that established a factual basis for Ms. Choquette's future ability to pay. On the contrary, all evidence presented showed that Mr. Choquette is indigent and likely to remain so. Thus, this Court should strike the discretionary costs imposed.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Choquette's conviction and remand for a new trial.

DATED this 10th day of October, 2011.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

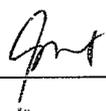
STATE OF WASHINGTON,)	
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RESPONDENT,)	
)	
v.)	NO. 41769-3-II
)	
ETIENNE CHOQUETTE,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE ON APPELLANT

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2011, I CAUSED A TRUE COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE FILED BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ETIENNE CHOQUETTE	(X)	U.S. MAIL
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WASHINGTON STATE PENITENTIARY	()	_____
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WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2011

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

October 10, 2011 - 4:20 PM

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Case Name: STATE V. ETIENNE CHOQUETTE

Court of Appeals Case Number: 41769-3

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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