SUPREME COURT NO. 96226-0
COA NO. 34947-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICK KELLY,

Petitioner.

PETITION FOR REVIEW

COLIN PATRICK
Licensed Legal Intern

GREGORY LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

Statutes

Rules

Session Laws

Bill Reports

A. IDENTITY OF PETITIONER

Rick Kelly, appellant below, seeks review of the Court of Appeals decision designated below in Section B.

B. COURT OF APPEALS DECISION

Mr. Kelly appealed his conviction from the Superior Court of Spokane County. The Court of Appeals affirmed the conviction in an unpublished opinion on July 12, 2018, attached as Appendix A. This petition is based on RAP 13.3(a)(1) and RAP 13.4(b)(1),(4).

C. ISSUES PRESENTED FOR REVIEW

1. Excited utterances are a narrow exception to the rule against hearsay. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). Regardless of the time interval between the startling event and statement, the party seeking to admit the statement must provide sufficient proof that the declarant did not engage in reflective thought. *Id*. The Court of Appeals decision relieved the State of its burden to show Ms. Pritchard did not engage in reflective thought prior to making the statement. Is the Court of Appeals decision inconsistent with *Chapin*, warranting review?

2. Amendments to statutes apply retroactively when they are remedial in nature. *State v. Blank*, 131 Wn.2d 230, 248, 930 P.3d 1213

(1997). Are the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h), barring the imposition of $200 courts cost on an indigent defendant, remedial and therefore apply retroactively?

3. The presumptively mandatory "shall" may be understood as discretionary when there is strong legislative intent indicating as such. *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). Does the passage of Engrossed Second Substitute House Bill 1783 (E2SHB 1783) evince a sufficient legislative intent so as to justify reading any "shall" in a statute imposing a legal financial obligation as discretionary?

D. STATEMENT OF THE CASE

Rachel Pritchard called 911 from her home, alleging a domestic dispute occurred with her live-in ex-boyfriend Rick Kelly. RP 115, 134, 153–54. Officers arrived approximately 20–30 minutes later, investigated the scene, and arrested Mr. Kelly after speaking with him and Ms. Pritchard. RP 111–12. The State charged Mr. Kelly with assault in the second degree by strangulation and unlawful imprisonment. CP 3–4.

At trial, there were dueling accounts as to what occurred. Mr. Kelly stated that while packing his belongings and preparing to move

out, Ms. Pritchard came to speak with him before leaving for the weekend. RP 196–97. Ms. Pritchard asked for her laptop, which Mr. Kelly was using, and then stated she was taking back the cellphone she gave to Mr. Kelly. RP 147–48. Ms. Pritchard reached across Mr. Kelly for the phone at the same time as Mr. Kelly. RP 199. Ms. Pritchard fell on top of Mr. Kelly and he tried to reach out to catch her from falling. RP 199–200. Mr. Kelly stated he never made any effort to restrict her breathing. RP 200, 204.

Ms. Pritchard testified to the same events. She stated she went to the basement to retrieve her laptop, but that Mr. Kelly told her he first needed to remove some personal files. RP 147–48. She asked him to retrieve the files later and the two began arguing about finances. RP 148. Ms. Pritchard told Mr. Kelly that she was also taking back the phone she had given him. RP 149. It was at this point that Mr. Kelly jumped up and grabbed her around the neck with his forearm, jerking her onto the bed. *Id.* She stated he used a lot of force and she could not get away. *Id.* Ms. Pritchard said it lasted for about 10 seconds before Mr. Kelly let her go. RP 150, 161–62.

The court, after an initial exclusion, admitted, as an excited utterance, Ms. Pritchard's statements made to the officer who arrived

roughly 30 minutes after the 911 call. RP 102–04, 105–07, 109–11. The officer testified that Ms. Pritchard told him that Mr. Kelly wrapped his arm around her neck, pulled her onto the bed, and held her there for about 10 seconds. RP 109–111. The officer stated Ms. Pritchard was originally sobbing, but was able to talk to the officer soon after in a normal manner and he could understand her without trouble. RP 105–07, 112–13.

The jury acquitted Mr. Kelly of the charged counts, but convicted him of the lesser-included crime of assault in the fourth degree with a domestic violence finding. CP 50–53. The court also imposed two legal financial obligations (LFO): the $500 victim assessment and $200 in court costs. CP 59.

Mr. Kelly appealed, challenging the court's admission of Ms. Pritchard's statement as an excited utterance and the imposition of the LFOs. App 1. The Court of Appeals affirmed, finding the trial court did not abuse its discretion in admitting Ms. Pritchard's statement to the officer and properly imposed the LFOs. *Id.* at 6.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. In affirming that Ms. Pritchard's statement was an excited utterance, the Court of Appeals relieved the State of its burden to show that Ms. Pritchard did not engage in reflective thought prior to making the statement – conflicting with a decision of this Court.

Excited utterances are a limited exception to the rule against hearsay and should only be admitted when the stress of the startling event prevented the declarant from engaging in reflective thought. *Chapin*, 118 Wn.2d at 688. As the time between the startling event and the utterance increases, so does the "need for proof that the declarant did not engage in reflective thought." *Id.* Accordingly, a shorter time period will require less proof, while a longer interval will necessitate more to be admissible. *See id.* Regardless of the time period however, the party wishing to admit the statement must meet this burden. *See id.*

The Court of Appeals decision ignored these precepts and relieved the State of its burden to show Ms. Pritchard did not engage in reflective thought prior to making her statement to a police officer. App 5. This conflicts with this Court's decision in *Chapin*. 118 Wn.2d at 688. This Court should grant review to ensure that lower courts are properly applying essential case law regarding the admissibility of excited utterances. RAP 13.4(b)(1).

a. The language of Chapin mandates that there be sufficient proof that an excited utterance was not the product of reflective thought.

Chapin states that the second element of ER 802(a)(2), "that the statement must have been made while the declarant was under the stress of excitement caused by the startling event… constitutes the essence of the rule." 118 Wn.2d at 687. The key inquiry revolves around the statement's spontaneity. *Id.* at 688. The opinion notes that "[i]deally, the utterance should be made contemporaneously with or soon after the startling event." *Id.* (citing *State v. Palomo*, 113 Wn.2d 789, 791, 783 P.2d 575 (1989)). This is because "as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases." *Chapin*, 118 Wn.2d at 688. This line of reasoning led this Court to conclude that "[t]he longer the time interval, the greater the need for proof that the declarant did not engage in reflective thought." *Id.* This conclusion is the rule on which this petition is based.

The meaning of the above rule is facially apparent. The length of the time between event and statement dictates the level of proof needed to show the declarant did not engage in reflective thought. A shorter time period will require less proof, while a longer interval will

necessitate more. However, the rule does not evince a situation where proof of reflective thought is not required.

The sentence is split into two clauses: "The longer the time interval," and "the greater the need for proof that the declarant did not actually engage in reflective thought." *Id.* The structure of this sentence demonstrates that, regardless of the length of the time interval, there is *always* the need for proof that the declarant did not engage in reflective thought prior to making the statement. If this Court meant for the "need" to be indeterminate and only applicable when a court felt the time interval sufficiently long, then the rule would read "[t]he longer the time interval, the greater *a* need for proof that the declarant did not engage in reflective thought." Considering this Court did not choose that language, *Chapin* stands for the proposition that the party wishing to admit a statement under ER 803(2)(a) must provide sufficient proof that the declarant did not engage in reflective thought prior to making the statement.

Chapin remains a seminal case regarding the admissibility of excited utterances. By delving into the underlying purpose of ER 803(a)(2)'s elements, *Chapin* frames how lower courts should determine a statement's admissibility under the exception. Deviating

from the mandates of *Chapin* only brings about confusion and inconsistent rulings. This Court should grant review to ensure *Chapin* is followed. RAP 13.4(b)(1).

b. The Court of Appeals relieved the State of its burden to provide sufficient proof that Ms. Pritchard did not engage in reflective thought, conflicting with Chapin.

The Court of Appeals did not follow the rule laid down in *Chapin*. While the court cited the relevant rule from *Chapin*, it failed to follow it and erroneously relieved the State of its burden to show Ms. Pritchard did not engage in reflective thought. App 4–5.

Noting that approximately 20–30 minutes passed between the startling event and the statement, the Court of Appeals stated this period was less than other time intervals that were upheld. *Id.* at 5 (citing *State v. Strauss*, 119 Wn.2d 401, 416, 823P.2d 78 (1992); *State v. Flett*, 40 Wn. App. 277, 286–87, 699 P.2d 774 (1985)). In light of these cases, the Court of Appeals concluded that "[b]ecause the interval was not overly long, the State was not required to establish that Ms. Pritchard did not engage in reflective thought." App 5.

The Court of Appeals deviated from *Chapin* with this conclusion. Simply because longer intervals have been upheld does not mean the State is relieved of its burden to prove Ms. Pritchard did not

engage in reflective thought prior to making the statement. *See Chapin*, 118 Wn.2d at 688. Rather, the difference in time intervals would, at best, justify a conclusion that less proof is needed than in the cited cases. *Id.*

The cases the Court of Appeals cites to justify its conclusion are not persuasive. First, *Flett* is cited by *Chapin* as support for the rule that the Court of Appeals ignored. *Chapin*, 118 Wn.2d at 688 (citing *Flett*, 40 Wn. App. 277). It is incongruent to cite a case as support for one rule when that same case is part of the basis for an incompatible proposition. Additionally, *Strauss* provides no support for the Court of Appeals' conclusion. In *Strauss*, this Court noted that the record was properly analyzed to determine if the declarant's statement still qualified as an excited utterance when it was made three-and-a-half hours after the startling event. 119 Wn.2d at 416–17. Nowhere in either *Flett* or *Strauss* is there support for a rule that differs from the one outlined in *Chapin*. Perhaps most telling, the Court of Appeals failed to cite a case to support its conclusion.

Beyond being out of line with *Chapin*, the Court of Appeals decision is inconsistent with the underlying logic of the excited utterance exception. The focus of the exception is the declarant's

spontaneity in making the statement. *State v. Ramires*, 109 Wn. App. 749, 758, 37 P.3d 343 (2002). Under the stress of a startling event, the declarant is supposedly speaking without deliberation and therefore more likely to speak the truth. *Chapin*, 118 Wn.2d at 686. Thus, a court must be assured that a statement is not "the result of fabrication, intervening actions, or the exercise of choice or judgment" before admitting the statement. *State v. Brown*, 127 Wn.2d 749, 759, 903 P.2d 459 (1995). By relieving the State of its burden to show Ms. Pritchard did not engage in reflective thought, the Court of Appeals decision runs wholly counter to the purpose of the excited utterance exception.

Without a viable defense of its conclusion, the Court of Appeals decision is in conflict with *Chapin* and this Court should grant review to ensure that its precepts are followed. RAP 13.4(b)(1).

2. Determining whether the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) apply retroactively is an issue of substantial public interest.

The Court of Appeals upheld the imposition of $200 in court costs under RCW 36.18.020(2)(h) as mandatory. However, as of June 7, 2018, roughly a month before the filing of the Court of Appeals decision, the $200 court costs are no longer mandatory for indigent defendants and may not be imposed on an indigent defendant. RCW

36.18.020(2)(h); Laws of 2018, ch. 269, §17. This Court should grant review to ensure that lower courts are not imposing costs on indigent defendants in contravention of the legislature's intent. RAP 13.4(b)(4).

a. The amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) apply retroactively.

New statutes generally operate prospectively. *Blank*, 131 Wn.2d at 248. However, such statutes, and amendments thereto, apply retroactively when they are remedial in nature. *Id.* Statutory language that applies to "practice, procedure, and remedies" and "does not affect a substantive or vested right" is remedial. *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.3d 1118 (1999). Modifications to the mechanisms by which LFOs are collected have been deemed remedial. *See Blank*, 131 Wn.2d at 250.

The amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) are undoubtedly remedial. They do not create a new substantive right or liability for indigent defendants, but instead modify the discretion a court has in applying a liability. RCW 10.01.160(3); RCW 36.18.020(2)(h). Additionally, these amendments are far more remedial than those determined remedial in *Blank*. In *Blank*, changes to a statute allowed a court to impose appellate costs on indigent defendants. 131 Wn.2d at 234. These changes, despite increasing the

financial liability of indigent defendants, were held remedial because they simply provided "a mechanism for recouping the funds advanced" to ensure the individuals' right to appeal. *Id.* at 250. Here, the changes to the relevant statutes do not actually shift any burdens or create any rights, but merely further defined the legislature's directive about not burdening indigent defendants. Because these changes provided guidance, did not create new liabilities, and were demonstrably more remedial than the changes in *Blank*, the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) should apply retroactively.

b. The Court of Appeals did not apply the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) retroactively.

The Court of Appeals tersely concluded that the $200 court cost was mandatory. App 6. There was no discussion of whether the changes passed in E2SHB 1783 were retroactive. *Id.*

The failure to determine whether the amendments were retroactive ensured that Mr. Kelly, an indigent person, was saddled with a financial burden that the legislature believed he should not bear. This Court should grant review to determine the retroactivity of the changes to RCW 10.01.160(3) and RCW 36.18.020(2)(h) to ensure that

Mr. Kelly, and other defendants, are not placed with onerous burdens in contravention of a clear legislative intent. RAP 13.4(b)(4).

3. Determining whether the passage of E2SHB 1783 requires trial courts to conduct an inquiry into an indigent defendant's ability to pay before imposing an LFO is an issue of substantial public interest.

The Court of Appeals held the trial court did not have to evaluate Mr. Kelly's ability to pay before imposing the $500 victim assessment under RCW 7.68.035(1)(a) and $200 court costs under RCW 36.18.020(2)(h). App 6. The court found these LFOs were mandatory and were required "irrespective of [Mr. Kelly's] ability to pay." *Id.* (citing *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013)). However, the legislature passed sweeping reforms to the LFO system. Laws of 2018, ch. 269. These changes are evidence that the legislature now intends for trial courts to conduct an ability to pay inquiry before imposing an LFO on an indigent defendant. This Court should grant review to determine whether the intent of E2SHB is sufficient to establish that the "shall" in RCW 7.68.035(1)(a) and RCW 36.18.020(2)(h) should be understood as discretionary. RAP 13.4(b)(4).

a. The intent of E2SHB 1873 is strong evidence that any "shall" in a statute imposing an LFO be read as discretionary.

"Shall" is generally an imperative; conferring a duty, not discretion. *Crown Cascade Inc., v. O'Neal*, 100 Wn.2d 256, 261, 686 P.2d 585 (1983). However, "shall" may be read as discretionary when there is clear legislative intent rebutting the presumptive imperative. *Bartholomew*, 104 Wn.2d at 848. The language and legal context surrounding the passage of E2SHB 1783 provide strong support that the legislature intended for courts to evaluate an indigent defendant's ability to pay before imposing any LFO, overriding the presumption that the "shall" in RCW 7.68.035(1)(a) and RCW 36.18.020(2)(h) are directives.

In its 2018 regular session, the legislature passed wide-ranging reforms of the LFO system. Law of 2018, ch. 269. These reforms focused on alleviating the crushing financial costs that arise from LFOs, with special attention paid to the effects LFOs have on the indigent. H.R. Bill Rep. E2SHB 1783, Wash H.R. 6, 65th Reg. Sess. (2018). The legislation contains several mandates that prevent a court from imposing LFOs on an indigent defendant. *E.g.*, Laws of 2018, ch. 269, §6(3) (forbidding the imposition of costs incurred in prosecuting

an indigent defendant); §9 (forbidding the imposition of costs of the proceeding on an indigent defendant); §16 (forbidding the imposition of the guilty plea fee on an indigent defendant), §17 (forbidding the imposition of $200 court costs on an indigent defendant). There are additional sections meant to alleviate the financial burden of LFOs, including those deemed mandatory. *Id.* at §1(1) (eliminating interest on all non-restitution LFOs); §1(2)(a) (allowing, by motion, the waiver of all accrued interest on non-restitution LFOs); §1(2)(b) (allowing, by motion, the waiver of all accrued interest on restitution LFOs when the principal has been paid); §6(4) (allowing indigent defendants to remit or convert unpaid LFOs after release from total confinement). These sections evince a clear intent from the legislature that LFOs, and their effects, should rarely be borne by indigent defendants.

The legal context presaging the passage of the E2SHB 1783 provides further support for its strong intent. *See State v. Dubois*, 58 Wn. App. 299, 303, 793 P.2d 439 (1990) (citing *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1983)) (noting "amended statutes should be interpreted in light of court decisions that may have prompted the amendments"). The passage of E2SHB 1783 came in the wake of this Court's decisions in *State v. Blazina*, 182 Wn.2d 827, 344

P.3d 680 (2015) and *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016). In both cases, this Court emphasized the need for trial courts to conduct an individualized inquiry into an indigent defendant's ability to pay before imposing and enforcing LFOs. *Blazina*, 182 Wn.2d at 839; *Wakefield*, 186 Wn.2d at 607. It was after these decisions that the legislature began working on reforming the LFO system. Furthermore, the underlying principle of these cases, making sure indigent defendants are not saddled with LFOs they cannot pay, was replicated with the bill as evidenced by the litany of provisions detailed above. Accordingly, the amendments within E2SHB 1783 should be understood within this larger legal problem-solving context, and thus demonstrate the legislature's plain intent to require courts evaluate an indigent's defendant's ability to pay before imposing an LFO.

b. The Court of Appeals did not consider whether E2SHB 1783 requires an ability to pay inquiry before imposing an LFO on the indigent Mr. Kelly.

The Court of Appeals flatly concluded that, despite Mr. Kelly's indigency, both LFOs were mandatory and the trial court did not have to evaluate his ability to pay. App 6. There was no consideration of whether E2SHB 1783 carries the requisite contrary intent needed to

transform the presumptively mandatory "shall" in RCW 7.68.035(1)(a) and RCW 36.18.020(2)(h) into a discretionary term. *Id.* This Court should grant review to ensure lower courts are properly considering whether the intent E2SHB 1783 is sufficient to require an ability to pay inquiry regardless of whether a statute authorizing an LFO includes "shall" language. RAP 13.4(b)(4).

F. CONCLUSION

Because the Court of Appeals decision to relieve the State of its burden to show Ms. Pritchard did not engage in reflective thought prior to admitting her statement conflicts with a decision of this Court, this Court should grant review. In addition, the Court of Appeals dual failures to determine the retroactivity and intent of E2SHB 1783 raises an issue of substantial public interest.

DATED this 11 day of August 2018.

Respectfully submitted,

Colin Patrick

Colin Patrick (ID# 9865188)
Licensed Legal Intern
Washington Appellate Project (91052)

Gregory C. Link (WSBA 25228)

Washington Appellate Project (91052)
Attorney for Petitioner

APPENDIX A

Table of Contents

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

STATE OF WASHINGTON	)	No. 34947-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
RICK ADAM KELLY,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Rick Kelly appeals after his conviction for fourth degree assault—domestic violence. Mr. Kelly argues the court improperly admitted the victim's statement to law enforcement as an excited utterance and that the court erred by imposing $700 in mandatory legal financial obligations (LFOs). We affirm.

FACTS

Mr. Kelly and Rachel Pritchard were living together at Ms. Pritchard's home. Ms. Pritchard asked Mr. Kelly for her laptop because she needed it for work. An argument ensued about Mr. Kelly wanting to remove private items from the computer. Ms. Pritchard then said she would take back a cell phone she had given him. As she reached

for the cell phone, Mr. Kelly wrapped his arm around her neck, jerked her down on the bed, and strangled her for about 10 seconds before letting her go.

Ms. Pritchard then called 911. About 20 or 30 minutes later, Spokane County Sheriff's deputies arrived at her home. Deputy Branson Schmidt first spoke with Mr. Kelly. Mr. Kelly denied doing anything improper. Deputy Schmidt then spoke with Ms. Pritchard. Ms. Pritchard told the deputy the events described above. As she did so, she was hysterical, and had to repeatedly stop because she was sobbing. The deputy observed a very large red mark over Ms. Pritchard's throat.

The State charged Mr. Kelly with second degree assault by strangulation. Prior to trial, Mr. Kelly moved to exclude Ms. Pritchard's statement to Deputy Schmidt. The trial court reserved judgment on the motion. At trial, Ms. Pritchard testified consistent with her previous statement. She also testified that after being assaulted she called her mother, and her mother arrived at her home and removed her children.

The State called Deputy Schmidt and asked him to testify about Ms. Pritchard's statements to him. Mr. Kelly renewed his objection, and the trial court allowed the testimony. Deputy Schmidt then testified to what Ms. Pritchard had told him. Mr. Kelly testified in his own defense and denied assaulting Ms. Pritchard.

The jury acquitted Mr. Kelly of the felony charge, but found him guilty of the lesser included offense of fourth degree assault—domestic violence. The trial court sentenced Mr. Kelly and imposed $700 in mandatory LFOs. Mr. Kelly did not object to the imposition of the mandatory LFOs.

Mr. Kelly appealed.

ANALYSIS

A. EXCITED UTTERANCE HEARSAY EXCEPTION

Mr. Kelly claims the trial court erred by allowing Deputy Schmidt to recount what Ms. Pritchard told him 20 or 30 minutes after the purported assault. Specifically, he contends the statements do not qualify under the excited utterance exception to hearsay because Ms. Pritchard was not continuously under the stress of the event.

An appellate court reviews a trial court's determination that a hearsay statement falls within the excited utterance exception for abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). The trial court's decision will not be reversed unless no reasonable judge would have made the same ruling. *State v. Woods*, 143 Wn.2d 561, 595-96, 23 P.3d 1046 (2001).

The party seeking to admit the hearsay under the excited utterance exception must satisfy three closely connected requirements: "that (1) a startling event or condition

occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). Mr. Kelly challenges the second requirement.

The rationale for the hearsay exception is that due to the stress from the startling event, the declarant will have little chance of misrepresentation or conscious fabrication. *State v. Flett*, 40 Wn. App. 277, 286, 699 P.2d 774 (1985). To determine whether the declarant was under the stress from the event, courts consider the time elapsed since the event, and the declarant's visible level of emotional stress. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992). The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992).

Prior to admitting the statement, the trial judge must make a preliminary finding that the declarant was still under the influence of the event at the time the statement was made. *State v. Ramires*, 109 Wn. App. 749, 757-58, 37 P.3d 343 (2002). This is a highly factual determination. *Id.* at 758. Evidence that the declarant has calmed down before making a statement tends to negate a finding that the declarant was still under the influence of the event. *Id.*

Here, the statement was made approximately 20 to 30 minutes following the startling event. This interval is much less than other intervals where courts have upheld a trial court's finding that the declarant was still under the stress of the event. *See e.g.*, *Strauss*, 119 Wn.2d at 416 (more than three hours after rape); *Flett*, 40 Wn. App. at 286-87 (seven hours after rape). Because the interval was not overly long, the State was not required to establish that Ms. Pritchard did not engage in reflective thought.

Ms. Pritchard showed obvious signs of emotional stress when she recounted to Deputy Schmidt what had occurred. She was hysterical and sobbing uncontrollably, and she had to stop multiple times during her statement to cry and sob. These clear signs of emotional stress weigh in favor of admissibility of the challenged statements.

Mr. Kelly argues that Ms. Pritchard was not continuously under the stress of the startling event because "[Ms.] Pritchard had extricated herself from the basement, called 911, cared for her children, put them in the care of her mother, and stood in the driveway . . . ." Br. of Appellant at 9. Mr. Kelly's statement is not entirely accurate. Although Ms. Pritchard called 911 and then her mother, her mother drove to her home and removed the children before law enforcement arrived. The fact that Ms. Pritchard contacted law enforcement and a close relative to provide safety for herself and her children does not establish the sort of reflective thought that would diminish admissibility of the challenged

statement. To the contrary, taking immediate steps to protect oneself and one's children from harm is consistent with an ongoing emergency situation.

We conclude that the trial court did not abuse its discretion when it found that Ms. Pritchard was still under the stress of the assault when she spoke with law enforcement 20 to 30 minutes later.

B. MANDATORY LFOS

Mr. Kelly contends that the trial court erred by imposing the $500 victim assessment under RCW 7.68.035(1)(a) and $200 in court costs under RCW 36.18.020(2)(h)—both mandatory LFOs—without evaluating his ability to pay. We disagree. Mandatory LFOs are required irrespective of the defendant's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013).

Mr. Kelly also contends that the imposition of mandatory LFOs violates equal protection and his substantive due process rights. These constitutional arguments fail for the reasons set forth in *State v. Mathers*, 193 Wn. App. 913, 924-28, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016).

We conclude that the trial court properly imposed the mandatory LFOs without regard to Mr. Kelly's ability to pay.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

Pennell, J.

Pennell, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

July 12, 2018

E-mail
Larry D. Steinmetz
Brian Clayton O'Brien
Spokane County Pros Atty
1100 W Mallon Ave
Spokane, WA 99260-2043

E-mail
Gregory Charles Link
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-3647

Marla Leslie Zink
The Law Office of Marla Zink, PLLC
1037 NE 65th St #80840
Seattle, WA 98115
marla@marlazink.com

CASE # 349471
State of Washington v. Rick Adam Kelly
SPOKANE COUNTY SUPERIOR COURT No. 161036105

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Michael Price
c: Rick Adam Kelly
3717 E. Grace
Spokane, WA 99217

Log Number: U-160
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 34947-1
Title of Case: State of Washington v. Rick Adam Kelly
File Date: 07/12/2018

SOURCE OF APPEAL

Appeal from Spokane Superior Court
Docket No: 16-1-03610-5
Judgment or order under review
Date filed: 12/07/2016
Judge signing: Honorable Michael P. Price

JUDGES

Authored by Robert Lawrence-Berrey
Concurring: Laurel Siddoway
Rebecca Pennell

COUNSEL OF RECORD

Counsel for Appellant(s)

Gregory Charles Link
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA, 98101-3647

Marla Leslie Zink
The Law Office of Marla Zink, PLLC
1037 Ne 65th St #80840
Seattle, WA, 98115

Counsel for Respondent(s)

Brian Clayton O'Brien
Spokane Co Pros Atty
1100 W Mallon Ave
Spokane, WA, 99260-2043

Larry D. Steinmetz
Cnty Prosc Atty Ofc
1100 W Mallon Ave
Spokane, WA, 99260-2043

OPINION FACT SHEET

Case Name: State v. Kelly
Case Number: 349471

1. TRIAL COURT INFORMATION:

   A. SUPERIOR COURT: Spokane
   Judgment; Mike Price;
   Filed 12/7/16

2. COURT OF APPEALS INFORMATION:
   Disposition:
   (X) Affirmed
   ( ) Affirmed as Modified
   ( ) Affirmed in Part/Remanded**
   ( ) Affirmed/Reversed-in part and Remanded**
   ( ) Affirmed/Vacated in part
   ( ) Affirmed/Reversed in part
   ( ) Denied (PRP, Motions, Petitions)
   ( ) Dismissed
   ( ) Granted/Denied in part
   ( ) Granted (PRP, Motions, Petitions)
   ( ) Other
   ( ) Reversed and Dismissed
   ( ) Remanded**
   ( ) Remanded with Instructions**
   ( ) Reversed in part
   ( ) Reversed and Remanded**
   ( ) Reversed
   ( ) Reversed, Vacated and Remanded**
   ( ) Vacated and Remanded**
   * These categories are established by the Supreme Court
   ** If remanded, is jurisdiction being retained by the Court of Appeals? () YES
   () NO

3. **SUPERIOR COURT INFORMATION:**
   (IF THIS IS A CRIMINAL CASE, CHECK ONE)

   Is further action required by the superior court?
   ( ) YES
   (x) NO

RLB
Authoring Judge's Initials

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 34947-1-III
	)	
RICK KELLY,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF AUGUST, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN	( )	U.S. MAIL
[SCPAappeals@spokanecounty.org]	( )	HAND DELIVERY
SPOKANE COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
1100 W. MALLON AVENUE		
SPOKANE, WA 99260		

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF AUGUST, 2018.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

August 13, 2018 - 4:17 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34947-1
Appellate Court Case Title:	State of Washington v. Rick Adam Kelly
Superior Court Case Number:	16-1-03610-5

The following documents have been uploaded:

- 349471_Petition_for_Review_20180813161618D3180613_9552.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.081318-02.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Gregory Charles Link - Email: greg@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180813161618D3180613