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**I. Counter Statement of the Issues.**

1. Did the trial court err by admitting the defendant's incriminating statements to law enforcement when he (1) received proper advisements of his *Miranda* rights; (2) affirmed he understood said rights; (3) signed a written acknowledgment, waiving his rights; (4) agreed to speak with law enforcement; (5) knew he was under no obligation to speak with police; (6) understood he could always have an attorney present during his police interviews; (7) only requested that he receive an attorney in the future; and (8) made certain unsolicited statements?
2. If the trial court erred by admitting the defendant's incriminating statements that were made during police interviews, was the error harmless when the defendant (1) confessed that he committed the crime, and (2) this confession was not the product of any police questioning?
3. Did the trial court err when it refused to inform the jury venire that the State was not seeking the death penalty?
4. Did the trial court err when it ordered the defendant to make certain legal financial obligations?
5. Did the trial court err when it sentenced the defendant to 24-48 months of community custody?

**II. Statement of the Case.**

A. Factual Background

On September 24, 2009, at approximately 10:30 p.m., in Forks, Washington, Antonio Maldonado was walking to the residence of his three children and ex-girlfriend, Kellie White. CP TBD – Ex. 7-8; RP (12/7/2010) at 80, 84-85; RP (12/8/2010) at 85. Maldonado never arrived at the apartment. Etienne Choquette shot and killed Maldonado as he

approached a dark footpath leading to White's neighborhood. RP (12/7/2010) at 67-72.

Three months before Maldonado's murder, Choquette met White through a mutual friend. RP (12/7/2010) at 80-81; RP (12/13/2010) at 18. Choquette quickly grew close to White and her several children, spending nearly every day with the family. RP (12/7/2010) at 91-93; RP (12/13/2010) at 18-19. While Choquette's friendship with White was platonic, he hoped it would develop into a romantic relationship. RP (12/7/2010) at 94; RP (12/13/2010) at 50. *See also* Ex. 33 at 10; Ex. 35 at 36-37, 59, 61

In contrast to her relationship with Maldonado, White felt safe in Choquette's company. RP (12/7/2010) at 91, 94-95. White soon disclosed to Choquette that Maldonado regularly abused her, and that she was afraid Child Protective Services (CPS) would take custody of her children if her ex-boyfriend continued to interject himself into their lives. RP (12/7/2010) at 89; RP (12/13/2010) at 20. Choquette told White he would do whatever he could to prevent Maldonado from hurting her. RP (12/7/2010) at 87-89, 95; RP (12/13/2010) at 21-22.

A couple weeks before the murder, Choquette observed bruises on White's face, neck, abdomen and legs. RP (12/7/2010) at 94; RP (12/13/2010) at 20. White broke into tears and confided that Maldonado

had physically assaulted her, again. RP (12/7/2010) at 87, 89, 94-95; RP (12/13/2010) at 20-21. White told Choquette that she believed the only way Maldonado would leave her and the children alone was if he was dead. RP (12/7/2010) at 87, 89, 94-95; RP (12/13/2010) at 21.

Choquette determined Maldonado needed a taste of his own medicine, *i.e.* “a good beating.” RP (12/13/2010) at 21-22, 59. In the days leading to the murder, Tyson LaGambina heard Choquette ask White if she really wanted Maldonado “out of the picture.” RP (12/7/2010) at 127.

On the late evening of September 24, Choquette drove his black Chevy Blazer to White’s residence so he could check on the family and make sure Maldonado was not there. RP (12/13/10) at 18, 23, 43-44, 58. White was already asleep when Choquette arrived, so he spoke briefly with her two oldest children. RP (12/13/10) at 23, 43-44. After five or ten minutes, Choquette left the apartment and allegedly drove his black sport utility vehicle (SUV) to meet LaGambina. RP (12/13/2010) at 18, 23, 44.

Sometime around 10:30 p.m., but before 11:00 p.m., witnesses heard a series of gunshots in the neighborhood behind the Shell gas station. *See e.g.* RP (12/7/2010) at 13-15, 48-49, 56, 62-63. These witnesses testified that they heard between 2 and 4 shots, which sounded like fireworks. RP (12/7/2010) at 14, 48-50, 56, 62-63.

Nikki Farron believed she heard four shots. RP (12/7/2010) at 14-15. After the first two shots, she heard a car door squeak open,<sup>1</sup> which was then followed by two more blasts. RP (12/7/2010) at 14-15. Immediately after the second volley, Farron observed a black vehicle, in the area where the gunfire originated, turn on its headlights and speed past her location.<sup>2</sup> RP (12/7/2010) at 15-16, 20, 35. *See also* RP (12/8/2010) at 70.

Before the shooting, Jose Luis Roland heard two people speaking in loud voices. RP (12/7/2010) at 49. Roland first heard two shots. RP (12/7/2010) at 49. After a brief pause, he heard a third. RP (12/7/2010) at 49. After these shots, Roland watched a black Chevy Blazer speed from the area that produced the gunfire.<sup>3</sup> RP (12/7/2010) at 49-50, 52-53.

Forks Police Department (FPD) dispatched Sergeant Darryl Elmore<sup>4</sup> to investigate the reported gunfire. RP (12/7/2010) at 101; RP (12/8/2010) at 15. Elmore discovered Maldonado lying prone on the

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<sup>1</sup> A search of Choquette's vehicle revealed that the driver's side door produced a loud noticeable squeak when it opened. RP (12/8/2010) at 5.

<sup>2</sup> At trial, Farron had difficulty naming the model of the vehicle she observed. *See e.g.* RP (12/7/2010) at 16, 24, 42. However, she identified Choquette's vehicle as the one she observed departing the scene during a subsequent vehicle line-up and at trial. RP (12/7/2010) at 21-24, 32, 43; RP (12/8/2010) at 73-75.

<sup>3</sup> At trial, Roland identified Choquette's vehicle as the one he saw departing the crime scene. RP (12/7/2010) at 49, 51-52.

<sup>4</sup> Elmore resigned voluntarily from FPD after he lied about previous a sexual relationship he had with a victim in an unrelated murder/suicide case. RP (9/29/2010) at 50-56; RP (12/8/2010) at 42-45.

ground with a large pool of blood around his head. RP (12/7/2010) at 15, 103; RP (12/8/2010) at 16. *See also* RP (12/7/2010) at 69-70. After identifying the body, Elmore learned Maldonado had a volatile relationship with White, who resided only a few blocks from the crime scene. RP (12/7/2010) at 71, 103; RP (12/8/2010) at 16.

On September 25, 2009, Elmore interviewed White. RP (12/7/2010) at 103; RP (12/8/2010) at 22. White said she was 99% certain Choquette was responsible for the murder. RP (12/7/2010) at 104. According to White, Choquette was in love with her, and he was angry Maldonado regularly assaulted her. RP (12/7/2010) at 104. White also admitted that she had told Choquette she wanted Maldonado dead. RP (12/7/2010) at 104.

Pursuant to White's disclosures, the police located and placed Choquette under arrest. RP (12/7/2010) at 107; RP (12/8/2010) at 68-69. At the police station, Elmore conducted two recorded interviews with Choquette. *See below.* While Choquette initially offered an alibi during the first interview, he later gave a detailed confession.<sup>5</sup> *See below.* Following

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<sup>5</sup> At a 3.5 hearing, the defense argued the trial court should suppress the confession because (1) Elmore failed to re-advise Choquette of his *Miranda* warnings in between two police interviews that occurred on different days, (2) Elmore allegedly coerced the confession by making promises for leniency that he could not keep, (3) Elmore's improper interview techniques tainted a subsequent interview that led to the discovery of the murder weapon, and (4) a spontaneous and unsolicited confession never occurred. RP (9/29/2010) at 91-94.

his confession, Choquette told law enforcement where he disposed of the murder weapon, a Colt .38s revolver. *See below.*

Based on the information Choquette provided police, divers recovered a Colt .38s revolver from a river in the Forks / La Push area. CP 52; RP (12/8/2010) at 77-79, 81, 102, 136. The revolver was still operable, but there was rust on the firearm and inside the barrel. RP (12/8/2010) at 141-42.

A subsequent autopsy of the victim's body produced two .38s federal hydra shok bullets.<sup>6</sup> RP (12/8/2010) at 113, 116-18, 136, 143-44, 149, 152-154; RP (12/9/2010) at 34-36, 42-43, 56, 58-59. A forensic analyst determined that the gun recovered from the river could have fired these two bullets, but the deteriorated condition of the barrel prevented a conclusive identification. RP (12/8/2010) at 142-45, 150. Despite its condition, the analyst concluded the gun had only been in the water a couple of days. RP (12/8/2010) at 155-56.

Additionally, the autopsy revealed the pathway the two bullets traveled through Maldonado's body. RP (12/9/2010) at 34. One bullet passed through his arm and entered his chest cavity. RP (12/8/2010) at 117; RP (12/9/2010) at 42-43, 58-59. The pathologist concluded the gunman fired this round from a distance greater than 3 feet. RP

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<sup>6</sup> At trial, Choquette admitted he owned .38s hydra shok bullets. RP (12/13/2010) at 43.

(12/9/2010) at 42-43. A second bullet hit Maldonado in the back of the neck at the base of the skull. RP (12/8/2010) at 118; RP (12/9/2010) at 34-36, 56. The pathologist determined the gunman had fired this shot within 1-3 feet of his victim.<sup>7</sup> RP (12/9/2010) at 49.

Based on these facts, the State charged Choquette with first-degree premeditated murder. CP 98. At trial, the State's witnesses testified in accordance with the facts previously described.

Choquette testified in his own defense. According to Choquette, he was with LaGambina at the time of the murder, and he gave a false confession in exchange for assurances that (1) White would be released from custody, and (2) he would receive a reasonable bail (\$25,000) so he could get his affairs in order. RP (12/13/2010) at 23, 37-39. While Choquette testified the recovered gun did belong to him, he claimed he threw the firearm into the river two weeks before the incident because he thought it was stolen. RP (12/13/2010) at 40.

The jury found Choquette guilty of first-degree premeditated murder. CP 22; RP (12/14/2010) at 2. Additionally, it returned a special verdict, finding Choquette committed the crime with a firearm. CP 21. At the close of the case, Choquette affirmed he received a fair trial, and his

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<sup>7</sup> The pathologist testified it was possible that the gun was fired within a foot from the victim's head. RP (12/9/2010) at 49.

defense concluded they could find no reversible error in the course of the proceedings. RP (2/3/2011) at 10, 18.

Nonetheless, Choquette filed an appeal (1) challenging the admission of his statements to law enforcement, (2) alleging the trial court improperly instructed the jury that the case did not involve the death penalty, and (3) contesting the imposed community custody term and discretionary fees totaling \$968.56.

B. The statements to Sergeant Elmore

On September 25, at approximately 5:45 p.m., Elmore conducted a tape-recorded interview with Choquette.<sup>8</sup> Ex. 33 at 2. Elmore carefully advised Choquette of his *Miranda* rights. Ex. 33 at 3-4; RP (9/29/2010) 27, 41, 77, 80-81; RP (12/8/2010) at 27-28; RP (12/13/2010) at 31. Choquette affirmed he understood his rights. Ex. 33 at 3-4; RP (9/29/2010) at 42-43. However, Choquette expressed confusion regarding the written acknowledgement purporting to waive said rights:

SGT. ELMORE: Are you willing to waive your constitutional rights at this time and sign such a waiver?

MR. CHOQUETTE: I don't know what that means.

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<sup>8</sup> Elmore explained he preferred to use cassette tapes because he had difficulty operating the digital recorder. RP (9/29/2010) at 41. Unfortunately, the first portion of the second part of the September 25th interview was lost. *See* Ex. 34 at 1.

SGT ELMORE: Okay, I have questions that I want to ask you.

MR. CHOQUETTE: Okay.

SGT ELMORE: The[y] ... could be incriminating questions. They can be questions that point to your guilt or not for that matter. It's up to you if you answer those questions.

MR. CHOQUETTE: Okay, yeah.

SGT ELMORE: Okay, all right, with that in mind "I have read ... the above explanation of my Constitutional rights and I understand them. I have decided not to exercise these rights at this time and any statements made by me are made freely and voluntarily and without threats or promises of any kind" and if you agree with that then please sign there and I'll sign there after yours.

Ex. 33 at 5. *See also* RP (9/29/2010) at 42-43. After this colloquy, Choquette signed the written waiver and agreed to speak with Elmore. Ex. 33 at 5; Ex. 49; RP (9/29/2010) at 28, 43, 77; RP (12/8/2010) at 27-28; RP (12/13/2010) at 32.

Throughout the September 25th interview, Choquette maintained his innocence. Ex. 33 at 9, 17, 20-22; Ex. 34 at 6; RP (9/29/2010) at 60; RP (12/8/2010) at 24; RP (12/13/2010) at 33. Choquette presented an alibi to the crime, claiming he was with LaGambina when the murder occurred.

Ex. 33 at 17-18, 22-26; RP (9/29/2010) at 60; RP (12/7/2010) at 108; RP (12/8/2010) at 24; RP (12/13/2010) at 33.

As the September 25th interview concluded, Elmore informed Choquette that he would remain in custody and be transported to the county jail:

MR. CHOQUETTE: There are a couple of things that we need to go over.

SGT. ELMORE: Sure.

MR. CHOQUETTE: My medications.

SGT. ELMORE: Okay, that will be ultimately with the corrections staff and I'll let them know I'm going to give you an opportunity to speak with them not only here but you'll need to do that with uh, with uh, Clallam County.

You're not going to stay here, you're going to end up over in the Clallam County Jail because that's where we hold our felons.

MR. CHOQUETTE: Okay, where's that at if you don't mind my asking?

SGT. ELMORE: Port Angeles, sure, Port Angeles, so we'll make these preparations.

You will not – you will likely be leaving tomorrow.

MR. CHOQUETTE: Okay.

SGT. ELMORE: Okay, in the meantime though I'm going to ... speak with the correctional staff and tell them what it is you need, okay?

MR. CHOQUETTE: Okay.

SGT. ELMORE: All right, so do you have anything else to add?

MR. CHOQUETTE: I'm just concerned about my medication.

SGT. ELMORE: Okay.

MR. CHOQUETTE: And my dog.

SGT. ELMORE: Your brother's got your dog.

MR. CHOQUETTE: He does have my dog?

SGT. ELMORE: He does, yes.

MR. CHOQUETTE: Okay and um, you know, if you could get a message to him to uh, whether to take him to Sharon's or I don't know what he wants to do with him.

He's not exactly set up to take care of him but uh, if he could take him to Sharon's.

SGT. ELMORE: Okay, I'll do that. To Sharon's?

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

SGT. ELMORE: Yes.

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

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.

Okay.

MR. CHOQUETTE: Can I still have that cigarette?

Ex. 34 at 3-5. Following this exchange, Choquette reiterated his concerns regarding his medication and dog's welfare. Ex. 34 at 5-9. Choquette never demanded that an attorney be present during future police questioning, nor did he express any reluctance to speak with police. *See* Ex. 33 at 1-27; Ex. 34 at 1-9; RP (9/29/2010) at 44.

When the September 25th interview ended, Elmore did not ask Choquette to sign an acknowledgment following the interview. Ex. 49; RP (9/29/2010) at 60. However, the record shows Elmore made no threats or promises to the defendant. RP (9/29/2010) at 43.

On September 26, 2009, Elmore interviewed LaGambina. RP (9/29/2010) at 39; RP (12/7/2010) at 108; RP (12/8/2010) at 25. LaGambina refused to corroborate Choquette's alibi. RP (9/29/2010) at 40; RP (12/7/2010) at 126-27, 133. After this discovery, Elmore decided to interview Choquette a second time. RP (9/29/2010) at 40-41. This second interview occurred on the late evening of September 26. *See* Ex. 35 at 2.

When the September 26th interview commenced, Elmore did not re-advise Choquette of his *Miranda* rights or ask him to sign a written acknowledgment.<sup>9</sup> *See* Ex. 35 at 2; RP (9/29/2010) at 44, 60, 77. Instead, Elmore only requested Choquette's consent to record the interview.<sup>10</sup> Ex. 35 at 2; RP (9/29/2010) at 60. Again, Choquette agreed to participate in a recorded interview. Ex. 35 at 2.

Initially, Choquette maintained his innocence. Ex. 35 at 7, 10, 13, 17-18, 22-24, 30-31, 35-36, 40; RP (12/8/2010) at 26. However,

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<sup>9</sup> At a 3.5 hearing, Choquette testified that during the second interview (1) he knew he was still a suspect in the Maldonado murder, (2) he understood his constitutional rights, (3) he knew he did not have to speak with Elmore, (4) he knew he had the right to have an attorney be present during questioning, (5) he knew nothing had changed between September 25th and September 26th with respect to the rights available to him, and (6) he knew Elmore would be asking questions that sought incriminating responses. RP (9/29/2010) at 81-84.

<sup>10</sup> Unfortunately, approximately three hours are missing from the recording because Elmore forgot to turn the tape over when it came to an end. *See* Ex. 35 at 48.

Choquette admitted that White had asked him to kill Maldonado, on more than one occasion. Ex. 35 at 25-26, 28, 37; RP (12/13/2010) at 52-53.

As the second interview progressed, Elmore stated his belief that Choquette was not capable of premeditated murder and only committed a crime of passion. Ex. 35 at 45. Elmore opined that Choquette could not tolerate Maldonado terrorizing the woman he loved and simply lost control. Ex. 35 at 45-47. *See also* RP (12/8/2010) at 26; RP (12/13/2010) at 33-34.

“Off the record,” Elmore and Choquette discussed the differences between murder and manslaughter.<sup>11</sup> Ex. 35 at 47; RP (9/29/2010) at 45-50, 77-78; RP (12/7/2010) at 112; RP (12/8/2010) at 26. The parties disputed who requested a conversation “off the record.” RP (9/29/2010) at 46, 62-63, 78; RP (12/7/2010) at 112; RP (12/8/2010) at 34, 41, 59; RP (12/13/2010) at 34. However, it is clear Elmore and Choquette discussed (1) the differences in sentencing between murder and manslaughter, and (2) certain concessions Choquette wanted in exchange for a guilty plea. RP (9/29/2010) at 47-48, 63, 67-68, 78-79; RP (12/7/2010) at 112; RP (12/8/2010) at 34-35.

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<sup>11</sup> The parties conferred “off the record” for approximately 15 to 20 minutes, however, this conversation coincided with the three hours that are missing from the recorded interview. RP (9/29/2010) at 49; RP (12/8/2010) at 32-33.

When Elmore and Choquette went back on the record, Choquette confessed that he killed Maldonado. Ex. 35 at 49-64. Choquette provided specific details regarding the crime, including that (1) he fired three shots, one from inside his vehicle, (2) he only shot the defendant two times because one of his shots missed and ricocheted off the ground, and (3) he had to exit his vehicle to fire the *coup de gras* – a shot “inches” from the back of his victim’s head. Ex. 35 at 52, 56-57, 59, 65. Choquette affirmed Elmore made him no promises in exchange for his confession. Ex. 35 at 61, 65; RP (12/8/2010) at 54. *See also* RP (9/29/2010) at 47-48, 64-65, RP (12/7/2010) at 112-13; RP (12/8/2010) at 40-48. At no point during the September 26th interview did Choquette request an attorney’s presence, nor did he express an unwillingness to speak with police. RP (9/29/2010) at 66-67.

C. The statements to Officer Shannon

Officer Michael Shannon was on duty the evening of September 26th. RP (9/29/2010) at 9-12. However, he did not participate in the interview between Elmore and Choquette. RP (9/29/2010) at 16. After the interview, Elmore asked Shannon to escort Choquette back to his holding cell. RP (9/29/2010) at 11; RP (12/8/2010) at 75. Shannon never spoke to Choquette, nor did he ask him any questions. RP (9/29/2010) at 11; RP

(12/8/2010) at 76. When Shannon and Choquette neared the jail's holding unit, the defendant made the following statement:<sup>12</sup>

Can I tell you something[?] I didn't want this on tape[.] I did the right thing, he needed to die.

RP (9/29/2010) at 11; RP (12/8/2010) at 76, 88. Choquette denied making this statement. RP (9/29/2010) at 80; RP (12/13/2010) at 40.

D. The statements to Officer Hoagland

On September 27, Officer Gene Hoagland contacted Choquette inside his cell. RP (9/29/2010) at 17; RP (12/8/2010) at 59-60. Hoagland advised Choquette of his constitutional rights. RP (9/29/2010) at 17-18; RP (12/8/2010) at 60. Choquette affirmed he understood his rights and that he had no questions for the officer. RP (9/29/2010) at 18-19. Choquette said he was willing to speak with Hoagland, and he never demanded an attorney. RP (9/29/2010) at 18-19; RP (12/8/2010) at 60-61. Hoagland asked questions about the murder weapon.<sup>13</sup> RP (9/29/2010) at 17; RP (12/8/2010) at 60. Choquette described the color of the gun and the location where he disposed of the weapon. RP (9/29/2010) at 24; RP (12/8/2010) at 60-61.

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<sup>12</sup> The trial court erroneously found that this statement was made on September 25, 2009. *See* CP 77-78.

<sup>13</sup> While the police always knew a gun served as the murder weapon, Elmore directed Hoagland to ask additional questions regarding the firearm. RP (9/29/2010) at 20-21, 23.

E. Information conveyed to the jury venire

Outside the presence of the jury venire, the parties discussed how the court should introduce the case to the jury pool. RP (12/6/2010) at 3, 5. The State asked the trial court to inform the potential jurors that the pending case did not involve the death penalty. RP (12/6/2010) at 7. The Defense requested that the court (1) introduce Choquette by his nickname “Lucky”, and (2) inform the venire that the defendant was charged with murder in the first degree while armed with a firearm, rather than reveal the allegation that the crime involved premeditated intent. 1RP (12/6/2010) at 7-8.

The trial court granted the two defense requests. 2RP (12/6/2010) at 68. However, it ignored the State’s suggestion, and it never informed the jurors that the crime alleged was not a capital offense. *See* 1RP (12/6/2010) at 7; 2RP (12/6/2010) at 1-159. *See also* CP 24-42.

F. Sentencing

At sentencing, the superior court imposed a sentence at the low end of the standard range: 240 months (20 years). CP 10; RP (2/3/2011) at 12. The sentencing court also imposed an additional 60 months (5 years) pursuant to the jury’s finding that the defendant used a firearm during the commission of the offense. CP 10; RP (2/3/2011) at 12. The court then

ordered Choquette to serve a community custody term of 24 to 48 months. CP 11; RP (2/3/2011) at 13-14. Finally, the court imposed certain legal financial obligations, including a \$200 criminal filing fee, \$350 attorney fee, and \$418.56 sheriff service fee. CP 13-14. The sentencing court never entered formal findings regarding Choquette’s ability to pay his legal financial obligations.

### **III. Argument.**

#### **A. THE TRIAL COURT PROPERLY ADMITTED THE STATEMENTS TO LAW ENFORCEMENT.**

The Fifth Amendment to the U.S. Constitution reads “no person... shall be compelled in any criminal case to be a witness against himself[.]” Article I, section 9 of the Washington Constitution is nearly identical to its federal counterpart: “[n]o person shall be compelled in any criminal case to give evidence against himself[.]” Thus, the two provisions are co-extensive. *State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991); *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971).

In *Miranda v. Arizona*, 384 U.S. 436, 469-73, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the U.S. Supreme Court held a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during question. The high court explained that law

enforcement is required to inform a suspect of this right before questioning begins. *Miranda*, 384 U.S. at 469-73. However if a suspect waives his right to counsel after receiving his *Miranda* warnings then law enforcement is free to question him. *North Carolina v. Butler*, 441 U.S. 369, 372-76, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

In the present case, the Forks Police Department did not violate Choquette's right to counsel pursuant to *Miranda* and its progeny. Thus, the incriminating statements Choquette made to law enforcement were admissible. With respect to his statements to Officer Shannon, Choquette spontaneously confessed his crime and his admissions were not elicited via custodial interrogation. With respect to his statements to Sergeant Elmore and Officer Hoagland, Choquette never demanded an attorney be present during police questioning, and he waived his *Miranda* rights before making his incriminating statements.<sup>14</sup> There is no error.

1. The statements to Off. Shannon are admissible because they were not the product of police interrogation.

Choquette argues his statements to Officer Shannon were inadmissible because they were "part and parcel" of his interview with Sergeant Elmore, which he maintains was unlawful. *See* Brief of

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<sup>14</sup> The State notes that Choquette does not challenge the admission of his statements to Officer Hoagland on appeal. *See* Brief of Appellant at 9-20.

Appellant at 14-15. However, the issue is whether Choquette's statements to Officer Shannon were the product of a custodial interrogation. This Court should hold that Choquette's sudden confession to Officer Shannon was admissible because it was not elicited through words or conduct that could reasonably be interpreted to extract an incriminating response.

Under *Miranda*, the right to counsel is implicated when the suspect is taken into custody and interrogated by law enforcement. 384 U.S. at 469-73. A suspect is in "custody" when law enforcement has placed him under arrest, or curtailed the suspect's freedom of action/movement to a degree associated with formal arrest.<sup>15</sup> *Berkemmer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986). "Interrogation" involves express questions, or its functional equivalent, initiated by an officer that is likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987); *State v. Hawkins*, 27 Wn. App. 78, 81-82, 615 P.2d 1327 (1980). If a suspect freely and voluntarily gives a statement that is not elicited via a custodial interrogation, then it is admissible at trial. *Innis*, 446 U.S. at 300; *Miranda*, 384 U.S. at 478.

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<sup>15</sup> The State does not dispute that Choquette was in "custody" during the time he made incriminating statements to law enforcement.

When the facts do not involve express questioning, the focus is on the perception of the suspect rather than the intent of the officer. *Innis*, 446 U.S. at 301; *State v. Wilson*, 144 Wn. App. 166, 181 P.3d 887 (2008). The standard is an objective one, and the appellate courts will examine what the officer knew or should have known would be the result of his words or acts. *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988).

In the present case, Choquette's statements to Officer Shannon were not the product of a custodial interrogation in violation of *Miranda*. Shannon did not participate in the previous Elmore/Choquette interview. RP (9/29/2010) at 16. At the end of the interview, Elmore directed Shannon to escort Choquette to his holding cell. RP (9/29/2010) at 11; RP (12/8/2010) at 75. As Shannon accompanied Choquette to the jail, he neither spoke to the defendant, nor asked him any questions. RP (9/29/2010) at 11; RP (12/8/2010) at 76. As the pair neared the holding unit, Choquette turned to Shannon and said:

Can I tell you something? I didn't want this on tape[.] I did the right thing, he needed to die.

RP (9/29/2010) at 11; RP (12/8/2010) at 76, 88. Choquette's statements were spontaneously volunteered. Thus, these statements were admissible at trial. See *Innis*, 446 U.S. at 302-04; *Miranda*, 384 U.S. at 478. There is no error.

Choquette cites *Missouri v. Seibert*, 542 U.S. 600, 614, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), to support his argument that his statements to Shannon are inadmissible. However, *Seibert* is easily distinguished.

In *Seibert*, the police employed a tactic of omitting *Miranda* warnings in order to obtain a confession. The U.S. Supreme Court ruled that the police in that case had violated *Miranda* when they purposely obtained an unwarned confession, then administered the warnings and convinced the suspect to repeat his earlier confession. The plurality opinion relied on the fact that the detective deliberately employed this tactic throughout a continuing course of interrogation as an end-run around *Miranda*'s requirement. *Seibert*, 542 U.S. at 618.

Unlike *Seibert*, Choquette was aware of his *Miranda* rights prior to his confession to either Elmore or Shannon. RP (9/29/2010) at 81-84. More importantly, Shannon's act of escorting Choquette back to his housing unit was not part of a continued course of interrogation. Shannon did not participate in the interview between Elmore and Choquette. RP (9/29/2010) at 16. Shannon only returned the defendant to his cell, refraining from asking him any questions. RP (9/29/2010) at 11; RP (12/8/2010) at 76. Shannon's conduct cannot be reasonably interpreted as an effort to circumvent the protections of *Miranda*. Thus, *Seibert* does not

control the present analysis. The trial court did not err when it admitted Choquette's statements to Shannon.

2. The statements to Sgt. Elmore are admissible because he never made a demand that counsel be present during police questioning.

For the first time on appeal, Choquette argues he made an unequivocal demand for an attorney at the end of the September 25th interview. *See* Brief of Appellant at 9-16. Thus, he argues the trial court committed reversible error when it admitted his statements to law enforcement because neither Elmore, nor Shannon, were permitted to contact him on September 26th without an attorney being present. *See* Brief of Appellant at 9-16. This argument is without merit.

First, as argued above, Choquette's statements to Shannon were spontaneous and volunteered outside any custodial interrogation. Second, Choquette never explained that he wanted an attorney present during his police interviews. Placed in its appropriate context, Choquette's single request for an attorney only referenced a future need to have an advocate appointed to represent him at trial. Finally, assuming Choquette did invoke his right to counsel prior to the September 26th interview, the admission of his confession was harmless in light of his admissible statements to Shannon. This Court should affirm.

If a suspect requests counsel at any time during a custodial interrogation, law enforcement must cease further questioning until (1) a lawyer has been made available, or (2) the suspect himself reinitiates the conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This protection is “designed to prevent police from badgering a defendant” and coercing a confession. *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). Thus, a suspect who invokes his right to counsel during a custodial interrogation cannot be questioned further unless an attorney is actually present. *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

There is no dispute Sergeant Elmore properly advised Choquette of his *Miranda* rights before the interview that occurred on September 25th. Ex. 33 at 3-4; RP (9/29/2010) at 27, 41, 77, 80-81; RP (12/8/2010) at 27-28; RP (12/13/2010) at 31. There is no dispute Choquette understood these constitutional safeguards prior to the September 25th, and that he signed a waiver/acknowledgment to this effect. Ex. 33 at 3-4; Ex. 49; RP (9/29/2010) at 42-43. There is no dispute Choquette understood his previously advised rights applied to the subsequent interview on September 26th, including the right to have counsel present during the

second custodial interrogation.<sup>16</sup> RP (9/29/2010) at 81-84. There is also no dispute Choquette consented to a recorded interview with Elmore on September 26th. Ex. 35 at 2. Thus, the issue is whether Choquette made an unequivocal demand that an attorney be present during any custodial interrogation.

Law enforcement must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during a custodial interrogation. *Edwards*, 451 U.S. at 484-85. This rigid rule requires appellate courts to “determine whether the accused *actually invoked* his right to counsel.” *Davis v. United States*, 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (quoting *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1983)). To avoid difficulties of proof, and to provide guidance to officers conducting interrogations, this is an objective inquiry. *Davis*, 512 U.S. at 459. This Court reviews de novo whether a statement is sufficient to invoke the right to counsel. *United States v. Doe*, 60 F.3d 544, 546 (9th Cir. 1995).

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<sup>16</sup> On appeal, Choquette does not argue the *Miranda* warnings he received on September 25th had become “stale” and required Elmore to re-advise him of these safeguards prior to the September 26th interview. See Brief of Appellant at 9-18. The State submits the warnings were not stale in light of existing case law. See e.g. *Puplampu v. United States*, 422 F.2d 870 (9th Cir. 1970) (interval of two days); *Maguire v. United States*, 396 F.2d 327, 331 (9th Cir. 1968) (interval of three days); *State v. Blanchey*, 75 Wn.2d 926, 454 P.2d 841 (1969), *cert denied*, 396 U.S. 1045 (1970) (interval of four days).

In order for a suspect to invoke his *Miranda* right to counsel, he “must unambiguously request counsel.” *Davis*, 512 U.S. at 459.

Although a suspect need not “speak with the discrimination of an Oxford don,” (citation omitted), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officer stop questioning the suspect.

*Davis*, 512 U.S. at 459. An officer is not required to clarify whether a suspect is actually requesting that an attorney be present during the interrogation. *Davis*, 512 U.S. at 461. Additionally, requests that an attorney be provided at a first appearance or an arraignment does not prevent officers from contacting the defendant to request an interview. *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009).

Here, Choquette’s statement that he needed an attorney was ambiguous. Elmore reasonably interpreted “obviously [was] going to need an attorney,” *see* Ex. 34 at 4, as Choquette’s expressed desire to have an attorney when the State formally filed charges and he appeared in court. *See* RP (9/29/2010) at 44; RP (12/7/2010) at 29-31. This interpretation is reasonable based upon the available record. First, Choquette made the statement regarding the need for an attorney as he was preparing for a

prolonged stay in the custody of the county jail and would need assistance (1) obtaining his medications, (2) caring for his dog, and (3) obtaining an attorney. *See* Ex. 34 at 3-5. Second, when Elmore explained the court would appoint counsel at his arraignment, Choquette never clarified that he was actually demanding that an attorney be present at any future police interview. *See* Ex. 34 at 3-10. Third, Choquette consented to an interview with Elmore the next day despite knowing that he did not have to speak with the police and he could have an attorney present during the interrogation. *See* Ex. 35 at 2; RP (9/29/2010) at 81-84. Finally, Choquette never demanded that an attorney be made available during the second interview. *See* Ex. 35 at 1-67; RP (9/29/2010) at 44.

Choquette's request to have an attorney was ambiguous because it reasonably related to his need to have one appointed in the future. Thus, Elmore was not required to (1) ask clarifying questions regarding the intent behind Choquette's request, or (2) refrain from contacting Choquette on September 26th. *See Davis*, 512 U.S. at 462. *See also Mincey v. Head*, 206 F.3d 1106, 1127-32 (11th Cir. 2000) (holding defendant's statement "go ahead and run the lawyers" constituted an ambiguous and equivocal request for counsel). Because Choquette knowingly, intelligently, and voluntarily waived his *Miranda* rights before speaking with Elmore, his incriminating statements were admissible.

Assuming, without conceding, that Choquette did invoke his right to counsel at the end of the first interview, the admission of his confession to Elmore was harmless. Error of constitutional magnitude is deemed harmless if the appellate court is able to say beyond a reasonable doubt that the error did not contribute to the resulting verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Hawkins*, 27 Wn. App. at 84. In order to support a conclusion that constitutional error is harmless, the record must contain strong independent and untainted evidence of guilt leading to the conclusion that the constitutional error did not affect the outcome at trial. *Hawkins*, 27 Wn. App. at 84-85.

Here, the circumstantial evidence demonstrated that Choquette had a motive to commit murder. The testimony showed Choquette loved White, and he was angry that Maldonado physically abused the single mother. *See e.g.* RP (12/7/2010) at 104; RP (12/13/2010) at 50. Choquette promised to take care of Maldonado, intending to cause him serious harm. *See e.g.* RP (12/7/2010) 87-89, 95; RP (12/13/2010) at 21-22, 59. LaGambina heard Choquette ask White if she really wanted Maldonado “out of the picture.” RP (12/7/2010) at 127.

The circumstantial evidence also placed Choquette at the scene of the crime. Both Choquette and Maldonado were in the same vicinity near

White's home when the murder occurred. CP TBD – Ex. 7-8; RP (12/7/2010) at 71, 80, 84-85, 103; RP (12/8/2010) at 16, 85; RP (12/13/2010) at 18, 23, 43-44, 58. Witnesses observed Choquette's Chevy Blazer speeding away from the crime scene. RP (12/7/2010) at 15-16, 10-24, 32, 35, 43, 49-53. Choquette testified that he owned the same type of ammunition that was recovered from the victim's body. RP (12/8/2010) at 113, 116-18, 136, 143-44, 149, 152-54; RP (12/9/2010) at 34-36, 42-43, 56, 58-59; RP (12/13/2010) at 43.

The circumstantial evidence supported the finding that the killing was premeditated. Farron testified that she heard two shots, followed by the sound of someone getting out of their car, and then two more shots. RP (12/7/2010) at 14-15. The autopsy revealed that the coup de gras, a final shot to the back of the victim's skull, was delivered at close range. RP (12/8/2010) 118; RP (12/9/2010) at 34-36, 49, 56.

However, and most importantly, Choquette confessed to Shannon that he killed Maldonado. RP (9/29/2010) at 11; RP (12/8/2010) at 76, 88. If the trial court erred when it admitted Choquette's statements to Elmore, the jury would still have returned a guilty verdict in light of this untainted, direct, and circumstantial evidence produced at trial. This Court should affirm.

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3. The statements to Off. Hoagland are admissible because he was properly advised of, and subsequently waived, his rights before making his statement.

On September 27, Hoagland re-advised Choquette of his *Miranda* rights before he asked any questions regarding the location of the murder weapon. RP (9/29/2010) at 17-18; RP (12/8/2010) at 60. Choquette affirmed that he understood his rights and was willing to speak with the officer. RP (9/29/2010) at 18-19. At no point did Choquette demand an attorney. RP (9/29/2010) at 18-19; RP (12/8/2010) at 60-61. Choquette subsequently provided the specifics that allowed law enforcement to find the gun. RP (9/29/2010) at 24; RP (12/8/2010) at 60-61. This Court should hold Choquette's knowingly, intelligently, and voluntarily waive his *Miranda* rights prior to speaking with Hoagland. Thus, his statements were admissible.

Even if this Court holds that Choquette's statements to Hoagland were inadmissible, the resulting error was harmless. As argued above, he jury would still have returned a guilty verdict in light of the direct and circumstantial evidence that showed Choquette was responsible for the crime. *See argument above.* This Court should affirm.

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B. THE COURT PROPERLY REFUSED TO INFORM THE JURY THAT THE CASE DID NOT INVOLVE CAPITAL PUNISHMENT.

Choquette claims the trial court erred when it informed the jury that the present case did not involve the death penalty. *See* Brief of Appellant at 18-20. However, he fails to provide any citations to the record to support his argument that the trial court actually conveyed this information to the jury. *See* Brief of Appellant at 18-20. The argument fails.

Generally, it is improper for the trial court to instruct the jury that the death penalty is unavailable in a given case. *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2396, 129 L.Ed.2d 459 (1994); *State v. Townsend*, 142 Wn.2d 838, 847, 840 P.3d 145 (2001). “If 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.” *Townsend*, 142 Wn.2d at 847.

Here, the State asked the trial court to instruct the jury venire that the present case did not involve a capital offense. RP (12/6/2010) at 7. However, the trial court never informed the jury that the death penalty was unavailable. 1RP (12/6/2010) at 7; 2RP (12/6/2010) at 1-159. *See also* CP 24-42. As such, this Court need not consider any argument that the record

does not support. *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

C. THE TRIAL COURT PROPERLY ORDERED THE DEFENDANT TO PAY CERTAIN DISCRETIONARY FEES.

Choquette argues the trial court abused its discretion when it ordered him to pay certain legal financial obligations, *i.e.* attorney fees, criminal filing fees, and sheriff service fees. *See* Brief of Appellant at 21-23. However, the facts at trial support a finding that the defendant has the ability to pay these discretionary costs/fees. The argument fails.

RCW 10.01.160 does not require a trial court to enter formal findings of fact as a predicate for imposing legal financial obligations. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992) (citing *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d (1974)). *See also State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 116 (1991) (formal findings are not required for the court to order require a defendant to pay attorney fees). This Court applies a clearly erroneous standard when reviewing the sentencing court's determination regarding the defendant's ability to pay legal financial obligations. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs/fees requires the sentencing court to balance the defendant's ability to pay against the burden of his obligation.

*Baldwin*, 63 Wn. App. at 312. This is a judgment that requires discretion and is therefore reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312.

Here, there is factual support in the record to support the conclusion that Choquette has the ability to pay his legal financial obligations. At trial, Choquette testified that he confessed to the crime hoping he would receive a reasonable bail so he could get his affairs in order. Despite his indigent status, Choquette believed a reasonable bail was \$25,000. If Choquette has access to \$25,000 then he should have little difficulty making meager payments toward his attorney fees, criminal filing fee, and sheriff costs. If the discretionary costs imposed present a financial hardship for Choquette then he may petition the court at any time for remission or modification of the payments. RCW 10.01.160(4). Accordingly, the sentencing court did not err or abused its discretion when it imposed \$968.56 in discretionary legal financial obligations.

D. THE STATE CONCEDES THE COURT ERRED  
WHEN IT IMPOSED A COMMUNITY CUSTODY  
TERM OF 24 TO 48 MONTHS.

Choquette argues the trial court erred when it imposed a community custody term of 24-48 months. *See* Brief of Appellant at 20. The State concedes that the ordered term of community custody is

contrary to statute. This Court should remand the case for the sole purpose of correcting the term of community custody.

First-degree premeditated murder is a “serious violent offense.” RCW 9.94A.030(45)(a)(i) (2009). When a jury finds a criminal defendant guilty of a serious violent offense, the trial court must impose a community custody term of 36 months. RCW 9.94A.701(1).

Here, the jury found Choquette guilty of first-degree premeditated murder. CP 22; RP (12/14/2010) at 2. However, the sentencing court imposed a community custody term of 24-48 months. This range is contrary to the explicit text of the statute. This Court should remand and instruct the sentencing court to impose a community custody term of 36 months in accordance with RCW 9.94A.201(1).

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**IV. Conclusion.**

Based on the arguments above, the State respectfully asks that this Court affirm Etienne Choquette's conviction for first-degree premeditated murder and his legal financial obligations. Additionally, the State request that this Court remand for a limited purpose so the sentencing court can impose the correct term of community custody.

Respectfully submitted: December 12, 2011.

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