

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

STATE OF WASHINGTON,

Respondent

v.

DONNA R. LOGE,

Appellant.

No. 50069-8-II

MOTION TO WITHDRAW AS
COUNSEL PURSUANT TO
ANDERS v. CALIFORNIA, RAP
15.2(i) & RAP 18.3(a)

I. IDENTITY OF PARTY

Zachary W. Jarvis, court-appointed appellate counsel for Ms. Donna R. Loge, is the moving party and seeks the relief designated in Part II.

II. RELIEF REQUESTED

Appellate counsel seeks an order allowing his withdrawal as counsel.

III. GROUNDS FOR RELIEF

This motion is based on RAP 15.2(i), RAP 18.3(a)(2), and *Anders v.*

California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1977).

IV. ISSUES THAT COULD BE ARGUED

Counsel has reviewed the record, the procedural steps leading to the short bench trial in this matter, consulted with trial counsel, and has determined there is nothing in the record that might support the appeal.

As required by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) and Rule of Appellate Procedure 18.3 (a)(2), possible issues that could be argued (if they had merit) are set forth below:

1. Whether the information was deficient?
2. Whether the trial court erred in accepting Ms. Loge's waiver of jury trial as having been made knowingly, intelligently, and voluntarily?
3. Whether the State met its burden of proof to convict Ms. Loge of Assault in the Third Degree?
4. Whether Ms. Loge received effective assistance of counsel?
5. Whether the findings of fact and conclusions of law entered by the trial court were sufficient?
6. Whether the trial court erred in imposing mandatory legal financial obligations at sentencing upon Ms. Loge?
7. Whether the trial court erred in imposing twelve months of community custody upon Ms. Loge?

V. REFERENCES TO THE RECORD

The State charged Ms. Donna R. Loge by Information with one count of

Assault in the Third Degree (RCW 9A.36.031) for an altercation with Kitsap County Sheriff's Officer James Luna alleged to have occurred on December 13, 2016, while Ms. Loge was incarcerated in the Kitsap County Jail. CP 1-3. The Information includes alternate means for the allegation that Ms. Loge assaulted James Luna pursuant to 9A.36.031 on December 13, 2016, in Kitsap County, Washington. CP 1-2.

The Kitsap County Sheriff's Office Incident/Investigation Report affixed to the Information (CP 3-6) alleges that on December 13, 2016, Officer Luna and Nurse Brandy Hall contacted Ms. Loge at her housing unit or cell within the Kitsap County Jail to perform a detoxification ("detox") check. CP 3. When Officer Luna opened the door, Ms. Loge advanced forward and stated she was going to sit in the dayroom. CP 3. Officer Luna placed his arm on the wall in front of Ms. Loge to block her way and told her the detox check would be performed in her room. CP 3. Ms. Loge said "no" and refused to go back into her cell. CP 3. Ms. Loge grabbed Officer's Luna's arm. CP 3. Officer Luna continued to attempt to guide Ms. Loge back into her cell, but she purportedly began to struggle with him. CP 3. Ms. Loge was alleged to have scratched Officer Luna's arm, put her arm around the Officer's neck, as well as having scratched his neck to the point of breaking the skin and causing bleeding. CP 3. Officer Luna used his body weight to bring Ms. Loge to the ground into a "controlled position". CP 3. Officer Luna called for backup with his free hand as he was attempting to maintain "control" of Ms. Loge. CP 3. Three other officers participated in returning Ms. Loge to her cell. CP 3.

The Omnibus Order indicates a defense of general denial. CP 7. The parties

MOTION TO WITHDRAW AS COUNSEL (*Anders*
Motion)- 3

HART JARVIS CHANG, PLLC
2025 1st Avenue, Suite 830
Seattle, WA 98121
Tel: (425) 615-6346

submitted *motions in limine* on February 13, 2017. CP 8-11; CP 12-13. Preliminarily, a status hearing was held. RP 2/13/17, 2/27/17 at 3. Ms. Loge was reportedly ill and was absent for that hearing. *Id.*

Upon resuming the hearing later in the day of February 13, Ms. Loge appeared and offered the trial court a written waiver of trial by jury through her defense counsel. RP 2/13/17, 2/14/17, 2/16/17 at 2. A written Waiver of Trial by Jury was signed by Ms. Loge, her trial counsel, and approved by the trial court for entry on February 13, 2017. CP 14. It specified Ms. Loge was aware of the following matters concerning waiver of her right to a jury trial:

Under the Constitution of the United States and the State of Washington, the laws of the State of Washington, and the Criminal Rules for the Superior Court, I am entitled to a trial by a jury of my fellow citizens who are selected at random who would determine my guilt or innocence.

In the selection of a jury, I am entitled to challenge any juror for cause if I do not believe he or she can be fair and impartial. The Trial Judge shall excuse the juror from my trial if he or she agrees with my challenge.

In the selection of a jury, I am also entitled to six peremptory challenges (an objection to a juror for which no reason needs to be given.) The trial judge shall excuse the jurors challenged.

The State must convince all of the twelve citizens (the Jury) of my guilt beyond a reasonable doubt. Unless each of them agreed on my guilt, I would not be convicted of the crime(s) charged.

In a trial without a jury, the State must only convince the judge beyond a reasonable doubt of my guilt. The judge, however, is required to make written findings of fact in an order form to explain how he or she became convinced of my guilt.

I have read or have had read to me all of the above and have had ample opportunity to meet and consult with my attorney about my decision to waive a jury trial. I hereby waive my right to a trial by jury and consent to trial by judge only. I may this waiver freely and voluntarily.

CP 14.

MOTION TO WITHDRAW AS COUNSEL (*Anders*
Motion)- 4

HART JARVIS CHANG, PLLC
2025 1st Avenue, Suite 830
Seattle, WA 98121
Tel: (425) 615-6346

On the record, Ms. Loge acknowledged the form was read to her and that she signed it. RP 2/13/17, 2/14/17, 2/16/17 at 2, lns. 24-25. In response to questioning from the trial judge, Ms. Loge stated she understood the waiver completely, denied having any questions, and acknowledged her understanding of each portion of the waiver. *Id.* at 3-5.

Through a colloquy, the trial judge went on to review with Ms. Loge her right to a jury trial based upon the US Constitution and the Constitution of the State of Washington. *Id.* at 3, lns. 11-15. Ms. Loge voiced her understanding. *Id.* at 3, ln. 15. The trial judge defined trial by jury and explained the selection process. *Id.* at 3, lns. 16-19. While elliptically referencing her belief that her right to randomly select a jury would be abridged based on her prior experiences in Kitsap County, Ms. Loge acknowledged her understanding. *Id.* at 3, lns. 20-25, and 4, lns. 1-2. The trial judge explained the challenge for cause process and defined peremptory challenges, and Ms. Loge voiced her understanding. *Id.* at 4, lns. 6-20. The trial judge explained to Ms. Loge that the State must convince all 12 of the jurors of her guilt beyond a reasonable doubt, and Ms. Loge voiced her understanding of this. *Id.* at 4, lns. 21-25, and at 5, ln. 1. The trial judge explained that in a bench trial the State must only convince the judge beyond a reasonable doubt regarding her guilt, and Ms. Loge said she understood. *Id.* at 5, lns. 2-6. The trial judge asked Ms. Loge if she understood the judge is required to make written findings of fact in order to explain the conclusion regarding guilt if that is the determination. *Id.* at 5, lns. 7-10. She responded “yes”. *Id.* at 5, ln. 11. Ms. Loge was finally asked if she wanted to proceed without a jury, and she responded

affirmatively. *Id.* at 5, lns. 12-20. Ms. Loge additionally stated no one forced her to sign the waiver. *Id.* at 5, lns. 21-22. The trial court signed the waiver and found it to have been made knowingly, intelligently, and voluntarily. *Id.* at 5, lns. 20, 23-24; CP 14.

An issue involving the jail's initial wishes to shackle Ms. Loge throughout the trial was raised by the defense, but resolved through a suggestion made by defense counsel that alleviated Ms. Loge's concern. *Id.* at 12, lns. 14-25, and at 13, lns. 1-11. The trial court noted, prior to proceeding with motions, Ms. Loge's right hand was free, she had a pen, as well as a notepad in front of her. *Id.* at 13, lns. 14-16.

Aside from motions related to self-defense that were dependent upon whether Ms. Loge would testify, *motions in limine* were resolved by agreement of the parties without any objections by either party. *Id.* at 14-19. The trial court deferred on those remaining motions until such time as it was clear whether Ms. Loge would testify. *Id.* 15, lns. 19-21, 24-25, at 16, lns. 1-2, 22-25, and at 17, lns. 1-6. Ultimately, Ms. Loge did not testify. RP 2/13/17, 2/27/17 68, lns. 4-7.

Trial resumed on February 14, 2017. RP 2/13/17, 2/14/17, 2/16/17 at 20. Ms. Loge was voluntarily absent and reported, through her trial counsel, that she was ill. *Id.* at 20, lns. 5-19. Scheduling was briefly discussed, and the court recessed to resume trial at a later date. *Id.* at 23. Ms. Loge was again voluntarily absent from court on February 16, 2017, purportedly due to the same illness, and trial counsel asked the court to continue to recess. *Id.* at 24, lns. 1-20. The trial court ultimately declined to proceed in absentia, and trial was reluctantly adjourned to February 27 in

response to the defense request. *Id.* at 32, lns. 10-15.

Trial resumed on February 27, 2017, with Ms. Loge was present. RP 2/13/17, 2/27/17. Prior to opening statements, the court permitted Ms. Loge to read a lengthy statement primarily in regard to her conditions of confinement within the jail. *Id.* at 5-7. The State proceeded to call its first witness, Brandy Hall, who worked as a contracted licensed nurse practitioner in the Kitsap County Jail. *Id.* at 9.

Ms. Hall testified about two interactions with Ms. Loge that on December 13, 2016. The first involved passing medications at 7:30. *Id.* at 11, lns. 17-19. During the second interaction, she and Officer Luna went to the door of Ms. Loge's cell to perform a check around 11:15 and 11:30. *Id.* at 15, lns. 24-25, and at 16, lns. 1-7. Ms. Loge was standing at the door, and she wanted to come out. *Id.* at 16, lns. 9-11. Officer Luna took his arm and blocked the door. *Id.* at lns. 11-12. She saw Ms. Loge put her hands on his arm. *Id.* at ln. 13. According to policy and/or her practice, she is supposed to exit if some safety-related action needed to be taken by officers, and so Ms. Hall exited outside the day room into the hallway. *Id.* at 16, lns. 13-19, at 17, lns. 8-9, and at 26, lns. 14-19. Ms. Hall went out into the hall around the corner from the door and stood by the officers' desks. *Id.* at 17, lns. 24-25. She was not able to see what happened from that position. *Id.* at 18, lns. 103. She heard Officer Luna call for back up. *Id.* at 18, ln. 5. She also heard Ms. Loge say she couldn't breathe in a very loud voice. *Id.* at 18, lns. 8-10. Ms. Hall was cross-examined. *Id.* at 19-24.

Following redirect of Ms. Hall, the State called Officer James Luna. *Id.* at 27. Officer Luna is employed with the Kitsap County Sheriff's Office as a corrections

officer. *Id.* at 28, lns. 5-6. Officer Luna testified he was working in the Kitsap County Jail on December 13, 2016. *Id.* at 28, lns. 22-25, and at 29, lns. 1-3. On that date, he came into contact with Ms. Loge to perform a ‘detox check’ with the unit nurse. *Id.* at 29, lns. 11-19. The time of the check of Ms. Loge was approximately 11:23 PM. *Id.* at 29, ln. 25. He told Ms. Loge they were “coming in to detox check, if she could sit down on her bunk”. *Id.* at 30, lns. 17-18. Officer Luna testified Ms. Loge turned around like she was going to sit down, and then, when he opened the door she started to come out the door and actually did come out of the cell. *Id.* at 30, lns. 20-22; 32, lns. 23-25, and at 33, ln. 1. At that time, Ms. Loge continued trying to exit the cell, and he placed his right hand against the wall in front of her to try and block her way. *Id.* at 33, lns. 6-8. The nurse tried to talk to her, and Ms. Loge started raising her voice saying she was going into the day room to get the detox check. *Id.* at 33, lns. 16-20. Officer Luna testified Ms. Loge grabbed his arm as he was instructing her to go back into her cell. *Id.* at 33, lns. 21-25. The nurse started to go towards the door to the exit in the unit. *Id.* at 34, ln. 1. Ms. Loge put her arm around Officer Luna’s neck and he felt her scratch him. *Id.* at 34, lns. 2-7. He grabbed her and tried to get her onto the ground. *Id.* at 34, lns. 21-25, and at 35, ln. 1-3. Once they were on the ground, Officer Luna used his free hand to call for back up on the radio. *Id.* at 35, lns. 5-7. Officer Luna later testified about feeling pain as Ms. Loge’s nails went into his neck. *Id.* at 55, lns. 21-23. Officer Luna was cross-examined. *Id.* at 56-65.

A security video depicting the altercation between Ms. Loge, Officer Luna, and the other officers who responded to his call for back up was admitted without

objection and published to the court. *Id.* at 35, lns. 8-25; 36, lns. 1-5. Photographs of the injuries to Officer Luna's neck were admitted without objection and published to the court. *Id.* at 42, lns. 22-25, and at 43, lns. 1-17. Still photographs of the video that had been previously entered into evidence were also admitted without objection and published to the court. *Id.* at 44, lns. 24-25, and at 45, lns. 1-11. The State rested following Officer Luna's redirect examination. *Id.* at at 67, ln. 12.

Ms. Loge chose not to testify, the defense called no other witnesses, and rested. *Id.* at 68:4-7. There were no objections during either the defense or prosecution closing arguments. *Id.* at 68-71. The court issued written Findings of Fact and Conclusions of Law and Verdict on February 27, 2017. CP 15-19. Ms. Loge was found guilty of Assault in the Third Degree as charged by the Information. CP 19.

Sentencing occurred on March 10, 2017. RP 3/10/17. Ms. Loge was permitted to allocute. RP 3/10/17 at 5-6. The Judgment and Sentence reflects the court's oral sentence. CP 34-44. Specifically, the court sentenced Ms. Loge to the defense sentencing recommendation of: Credit for time served (45 days in jail) within the standard sentencing range of 1-3 months given her lack of prior felony history; 12 months of community custody for a crime against persons (RCW 9.94A.701); a \$500 Victim Assessment (RCW 7.68.035); a \$200 Filing Fee; and a \$100 DNA/Biological Sample Fee (RCW 43.43.7541). The Warrant of Commitment accurately reflects the 45 days jail imposed by the court, which Ms. Loge had already served. CP 45. Ms. Loge timely filed a Notice of Appeal on the same date as sentencing, March 10, 2017. CP 20-31. An Order of Indigency was also entered on the same date. CP 32-33.

This motion is brought pursuant to the requirements of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, rehearing denied, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1977).

VI. CITATIONS OF AUTHORITY TO RELEVANT ISSUES

i. *Sufficiency of the Charging Instrument*

Criminal defendants have the constitutional right to know “the nature and cause of the accusation” against them. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. A charging instrument must charge an actual crime to be sufficient. *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989); *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991) (setting forth strict vs. liberal standards of review depending on whether challenge is raised before or after verdict). To be constitutionally sufficient, a charging document must include all essential elements of a crime, statutory and nonstatutory, so as to inform a criminal defendant of the charges and to allow the defendant to prepare a defense. *Kjorsvik*, 117 Wn.2d at 97.

A charging document that omits an essential element of the charged crime is constitutionally defective and must be dismissed without prejudice. *State v. Johnson*, 180 Wn.2d 295, 300–01, 325 P.3d 135 (2014). “ ‘An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.’ ” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (internal quotation marks omitted) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). An appellate court reviews the constitutional adequacy of a charging document *de*

novo. *State v. Goss*, 186 Wn.2d 372, 375–76, 378 P.3d 154, 157 (2016).

Two separate review standards exist for evaluating the constitutional adequacy of a charging document. The first is the liberal standard, under which a court has “ ‘considerable leeway to imply the necessary allegations from the language of the charging document.’ ” *State v. Taylor*, 140 Wn.2d 229, 237, 996 P.2d 571 (2000) (quoting *Kjorsvik*, 117 Wn.2d at 104). The second is the strict standard, which constitutes a “bright line rule mandating dismissal” when a charging document omits an essential element of the crime. *State v. Johnson*, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992).

“ ‘The standard of review for evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made.’ ” *State v. Borrero*, 147 Wn.2d 353, 360, 58 P.3d 245 (2002) (quoting *Taylor*, 140 Wn.2d at 237, 996 P.2d 571). In *Kjorsvik*, the Washington Supreme Court first examined the question of whether courts should apply a different standard of review when a defendant challenges a charging document for the first time on appeal. *See Kjorsvik*, 117 Wn.2d at 103, 812 P.2d 86. The *Kjorsvik* court held that “[c]harging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial.” *Id.* at 102, 812 P.2d 86. The court reasoned that without this rule the defendant has no incentive to timely make such a challenge since it might only result in an amendment or a dismissal potentially followed by a refile of the charge. *Id.* at 103, 812 P.2d 86. The court further reasoned that using a more liberal standard of review

would discourage “sandbagging”—where the defendant recognizes a defect in the information but forgoes raising it before trial when a successful objection would result only in the State amending the information. *Id.*

Moreover, if there is an issue, it should be preserved for review by a request for a Bill of Particulars. *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991) (where information lists statutory elements but fails to allege other facts necessary to prepare an adequate defense, defendant must request a bill of particulars to correct the defect, or the issue is waived on appeal).

ii. *The Standard for a Waiver of Jury Trial*

Criminal defendants have the right to a jury trial under both the Washington and federal constitution. *State v. Ramirez–Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). The record must show a knowing, voluntary and intelligent waiver of jury in bench trial. CrR 6.1(a); *Bellevue v. Acrey*, 103 Wn.2d 203, 691 P.2d 957 (1984).

Because waiver of the right to a jury trial is a constitutional right, an appellate court’s review is de novo. *Id.* A waiver is valid if the defendant acted knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Appellate courts do not presume the defendant waived his right to a jury trial unless there is “an adequate record showing that the waiver occurred.” *Id.* Because Washington only requires a personal expression of waiver from the defendant, the right to a jury trial is easier to waive than other constitutional rights. *Id.* at 771–72, 142 P.3d 610.

The State must prove the waiver was valid. *Ramirez–Dominguez*, 140 Wn. App. at 240. A reviewing court considers several factors in deciding whether a defendant validly waived a jury trial: (1) whether the trial court informed the defendant of the right to a jury trial, (2) whether the defendant signed a written waiver, and (3) whether defense counsel affirmatively stated the defendant waived the right. *Pierce*, 134 Wn. App. at 771. As to the first factor, a trial court is not required to conduct an extended colloquy with the defendant. *Id.* As to the second factor, a written waiver “is strong evidence that the defendant validly waived the jury trial right.” *Id.* The defendant's experience and capabilities are also taken into consideration. *Ramirez–Dominguez*, 140 Wn. App. at 240.

iii. *The State's Burden of Proof for Assault in the Third Degree*

Sufficient evidence must exist upon which to sustain the verdict. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). A rational trier of fact must find all of the elements of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found a defendant guilty beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003) (*quoting State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993)).

RCW 9A.36.031 provides a number of alternative means for the commission of Assault in the Third Degree. One of them is as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault;

RCW 9A.36.031(1)(g).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Credibility determinations are for the trier of fact and are not subject to review.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.2d 970 (2004). A reviewing court must defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874–75.

iv. *Ineffective Assistance of Counsel*

Defense counsel must perform competently. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984); *In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001) (failure to investigate mental defense); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (failure to propose voluntary intoxication instruction); *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003) (failure to present diminished capacity defense); *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (failure to investigate); *State v. Shaver*, 116 Wn. App. 375, 65 P.3d 388 (2003) (failure to move to exclude prior conviction evidence); *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004) (failure to pursue lesser-included offenses); *State v. Stowe*, 71 Wn. App. 182, 858 P.2d 267 (1993) (failure to research consequences of guilty plea); *State v. Saunders*, 120 Wn.

App. 800, 86 P.3d 232 (2004) (failure to argue same course of criminal conduct at sentencing)

To prove ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced her, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *Thomas*, 109 Wn.2d 222, 225–26. This standard is “highly deferential and courts will indulge in a strong presumption of reasonableness” until the defendant shows in the record the absence of legitimate or tactical reasons supporting trial counsel's conduct. *Thomas*, 109 Wn.2d at 226 (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)).

v. Sufficiency of Findings of Fact and Conclusions of Law

In a bench trial the trial court must enter findings and conclusions. CrR 6.1(d); *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998) (failure to enter written findings may be prejudicial if defendant can show delayed written findings were “tailored” to meet issues raised on appeal). The findings must be sufficient with findings on each of the essential elements. *See State v. Fitzpatrick*, 5 Wn. App. 661, 491 P.2d 262 (1971).

“Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d

182 (2014) (*citing State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). ‘“Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Id.* at 106. Finally, a reviewing court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Remand is generally only proper where a trial court enters a conclusion of law finding a defendant guilty of a crime but omits a finding as to an essential element necessary to support that conclusion. *State v. Alvarez*, 128 Wn.2d 1, 19–22, 904 P.2d 754 (1995); *State v. Avila*, 102 Wn. App. 882, 886–87, 896–97, 10 P.3d 486 (2000), *review denied*, 143 Wn.2d 1009, 21 P.3d 290 (2001).

vi. *Mandatory Legal Financial Obligations at Sentencing*

For mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, 175 Wn. App 420, 306 P.3d 1022 (2013). As this Division stated in *Lundy*, “...our courts have held that these mandatory obligations are constitutional so long as “there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants.” 176 Wn. App at 102 (footnote omitted); *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

A \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA

collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. *See Curry*, 62 Wn. App. at 680–81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166; *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, a trial court's “finding” of a defendant's current or likely future ability to pay them is surplusage. *Lundy*, 176 Wn. App at 103.

There is a very different analysis requiring an individualized inquiry prior to the imposition of discretionary legal financial obligations. *State v. Blazina*, 182 Wn.2d 836, 344 P.3d 680 (2015). In *Blazina*, the court emphasized the importance of adhering to the statutory procedural safeguards calling for an individualized inquiry prior to imposing discretionary LFOs in accordance with RCW 10.01.160(3). *State v. Flippo*, 187 Wn.2d 106, 113, 385 P.3d 128 (2016). However, that procedural inquiry is distinct from a court's substantive authority to impose discretionary LFOs, and the lack of such an inquiry does not render a judgment and sentence facially invalid. *Id.* at 114.

vii. *Community Custody*

A standard range sentence is calculated by appropriately scoring prior felony convictions and/or other current offenses. *In re Goodwin*, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (inclusion of “washed out” prior convictions); *State v. Weber*, 127 Wn.2d 252, 149 P.3d 646 (2006) (whether juvenile adjudications can be included in the offender score without violating *Apprendi/Blakely*). A defendant with no prior felony convictions is eligible to receive a first-time offender waiver. RCW 9.94A.650.

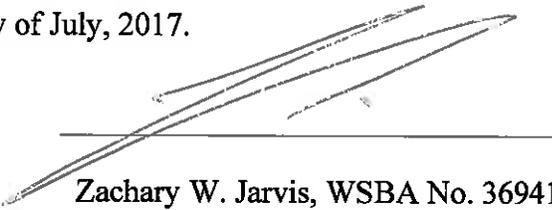
The correct term of community custody for a defendant who receives a first time offender waiver is twelve months. *Personal Restraint of Isadore*, 151 Wn.2d 294, n. 153, 88 P.3d 390 (2004). Although she was apparently eligible, Ms. Loge did not receive a first time offender waiver. CP 34-44.

Assault in the Third Degree is Class C felony. RCW 9A.36.031(2). The maximum sentence for a Class C felony is 5 years (60 months) of confinement, a fine of \$10,000, or both. RCW 9A.20.021(1)(c). Assault in the Third Degree is a crime against persons under RCW 9.94A.411(2)(a) and thus is punishable by 12 months of community custody. RCW 9.94A.702(1)(c) (“If an offender is sentenced to a term of confinement for one year or less for one of the following offenses, the court may impose up to one year of community custody”).

VII. CONCLUSION

Based on the above, Ms. Loge respectfully requests that this court independently review the record to determine whether this appeal is “wholly frivolous”. *Anders, supra*.

Respectfully submitted this 24th day of July, 2017.



Zachary W. Jarvis, WSBA No. 36941
Attorney for Appellant

DECLARATION OF SERVICE

I hereby declare that on July 24, 2017, I filed MOTION TO WITHDRAW AS COUNSEL PURSUANT TO *ANDERS v. CALIFORNIA*, RAP 15.2(i) & RAP 18.3(a) with the Court of Appeals for Division II via Electronic Filing for the Court of Appeals (Division II) and delivered via US Mail and E-mail the same to:

Mr. Randall Avery Sutton
Kitsap County Prosecutor
614 Division St.
Port Orchard WA 98366-4614
rsutton@co.kitsap.wa.us

Additionally, I mailed copies of MOTION TO WITHDRAW AS COUNSEL PURSUANT TO *ANDERS v. CALIFORNIA*, RAP 15.2(i) & RAP 18.3(a) to the addresses I know to be associated with Ms. Loge, whom I believe to be homeless:

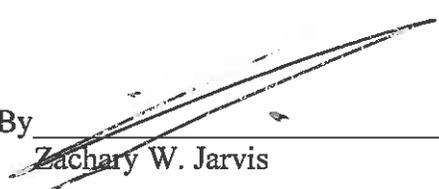
Ms. Donna Rae Loge
(c/o Salvation Army)
832 6th St.
Bremerton, WA 98337

Ms. Donna Rae Loge
General Delivery
602 Pacific Avenue
Bremerton, WA 98331

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated July 24, 2017.

By _____


Zachary W. Jarvis

HART JARVIS CHANG, PLLC

July 24, 2017 - 11:26 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50069-8
Appellate Court Case Title: State of Washington, Respondent v. Donna R. Loge, Appellant
Superior Court Case Number: 16-1-01566-1

The following documents have been uploaded:

- 7-500698_Briefs_20170724112426D2637607_4479.pdf
This File Contains:
Briefs - Anders
The Original File Name was LOGE 500698 Anders Motion.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Zachary Jarvis - Email: zjarvis@hartjarvischang.com

Address:

2025 1ST AVE STE 830

SEATTLE, WA, 98121-2179

Phone: 425-615-6346

Note: The Filing Id is 20170724112426D2637607