

NO. 50069-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONNA RAE LOGE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-01566-1

BRIEF OF RESPONDENT/RESPONSE TO MOTION OF
APPELLANT'S COUNSEL TO WITHDRAW

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SERVICE	<p>Zachary Walker Jarvis 2025 1st Ave Ste 830 Seattle, Wa 98121-2179 Email: [DEFENSE EMAIL ADDRESS]</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the right, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 15, 2017, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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I. COUNTERSTATEMENT OF THE ISSUES

Whether counsel has correctly determined that there are no non-frivolous issues on appeal, where:

1. The information was not deficient;
2. The trial court properly accepted Loge's waiver of jury trial as having been made knowingly, intelligently, and voluntarily;
3. The State amply proved beyond a reasonable doubt that Loge assaulted Officer Luna while he was performing his official duties;
4. There is no indication Loge received ineffective assistance of counsel;
5. The trial court's findings of fact and conclusions of law were more than sufficient to facilitate appellate review;
6. The trial court properly imposed mandatory legal financial obligations; and
7. The trial court properly imposed twelve months of community custody?

II. STATEMENT OF THE CASE

The State accepts the statement of the case presented in counsel's motion, as supplemented in the argument portion of this brief.

III. ARGUMENT

COUNSEL HAS CORRECTLY DETERMINED THAT THERE ARE NO NON-FRIVOLOUS ISSUES ON APPEAL.

Counsel has cited as potential appellate issues seven points:

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?

Motion to Withdraw, at 2. Counsel correctly notes that these claims lack merit. *Id.*

When a court-appointed attorney files a motion to withdraw on the ground that there is no basis for a good faith argument on review, pursuant to *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) and *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), the motion to withdraw must:

- (1) be accompanied by a brief referring to anything in the record that might arguably support the appeal. (2) A copy of counsel's brief should be furnished the indigent and (3) time allowed him to raise any points that he chooses; (4) the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Theobald, 78 Wn.2d at 185, quoting *Anders*, 386 U.S. at 744.

Counsel has complied with this procedure. The State concurs

counsel's assessment of the issues, as discussed below. Further, Loge has not as of this date filed a pro se brief or statement of additional grounds. The Court should therefore grant counsel's motion to withdraw and affirm the ruling of the court below.

1. The information was not deficient.

Counsel notes the correct standards of review under *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). A review of the information in this case shows there was no error under either standard.

As charged below, a person is guilty of third-degree assault if she:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or

* * *

(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; or

* * *

(h) Assaults a peace officer with a projectile stun gun; or

RCW 9A.36.031(1); *see also* WPIC 35.21, WPIC 35.23.02.

Third-degree assault includes no non-statutory elements. *State v. Brown*, 140 Wn.2d 456, 467, 998 P.2d 321 (2000). Further, the provision that the assault not amount to first- or second-degree assault is also not an element. *See State v. Dukowitz*, 62 Wn. App. 418, 422, 814 P.2d 234 (1991) ("not amount to" language not an element of fourth-degree

assault); *State v. Ward*, 108 Wn. App. 621, 627, 32 P.3d 1007 (2001), *aff'd*, 148 Wn.2d 803 (2003) (“not amount to” language not an element of felony violation of a court order). Finally, the common law definitions of assault are not essential elements of assault. *State v. Davis*, 119 Wn.2d 657, 663-64, 835 P.2d 1039 (1992).

The information here provided:

On or about December 13, 2016, in the County of Kitsap, State of Washington, the above-named Defendant, (1) with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or herself or another person, did assault another; and/or (2) did assault 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; and/or (3) [for incidents occurring on or after July 24, 2005], did assault a peace officer with a projectile stun gun; to wit: JAMES NMI LUNA; contrary to the Revised Code of Washington 9A.36.031(1)(a) and/or (g) and/or (h).

This language directly tracked the statute, cited the statute, and included all elements. There was no deficiency whatsoever in the charging language.

2. *The trial court properly accepted Loge’s waiver of jury trial as having been made knowingly, intelligently, and voluntarily.*

A defendant may waive the right to a jury trial so long as she acts knowingly, intelligently, voluntarily, and free from improper influences. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). This Court

will not presume that the defendant waived her jury trial right unless there is an adequate record showing that the waiver occurred. *Id.* In examining the record, the Court considers whether the defendant was informed of her constitutional right to a jury trial. *Id.* The Court also examines the facts and circumstances generally, including the defendant's experience and capabilities. *Id.* A written waiver, as CrR 6.1(a)4 requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right. *Id.* An attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *Id.* Nevertheless, an extended colloquy on the record is not required. *Pierce*, 134 Wn. App. at 771. Washington requires only a personal expression of waiver from the defendant. *Id.*

Here, Loge entered a written waiver. CP 14. The trial court conducted a colloquy, at which Loge immediately volunteered that the jury waiver had been read to her and that she had signed it. RP (2/2 – McAuliffe) 3.¹ She professed to understand it completely. RP (2/2 – McAuliffe) 4. She had no questions about it. *Id.* She averred that no one had forced her to sign it. RP (2/2 – McAuliffe) 5.

The trial court nevertheless informed Loge that she had the right to a jury trial under the state and federal constitutions, that she was entitled to

¹ There are reports of multiple reports of proceedings from the same date. The State

challenge jurors both peremptorily and for cause, that the State had to convince all twelve jurors beyond a reasonable doubt. RP (2/2 – McAuliffe) 4-5. Loge then reaffirmed that she wished to proceed without a jury. RP (2/2 – McAuliffe) 5.

There is nothing in the record to suggest that Loge was not fully capable of understanding the choice she was making. Nor is there any indication of improper influence upon her. Based on the totality of the circumstances, the trial court properly accepted Loge’s waiver as knowing intelligent and voluntary.

3. *The State amply proved beyond a reasonable doubt that Loge assaulted Officer Luna while he was performing his official duties.*

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the

therefore identifies them by both date and court reporter.

prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, as counsel notes, the evidence shows that Kitsap County Jail Corrections Officer James Luna² was carrying out his duties (escorting the duty nurse in the jail) when Loge grabbed his arm, then put her own arm around Luna's neck and scratched him, painfully digging her nails into his neck. *See Motion to Withdraw*, at 8. The trial court accepted these facts. CP 16. These facts meet all the elements of RCW 9A.36.031(1)(g) as described above.³

² Luna was an employee of the Kitsap County Sheriff's Office. RP (2/27) 28.

³ "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."

4. *There is no indication Loge received ineffective assistance of counsel.*

Although counsel suggests ineffective assistance of counsel might be a possible appellate issue, he identifies no even potential deficiency on the part of trial counsel. The State notes none either.

5. *The trial court's findings of fact and conclusions of law were more than sufficient to facilitate appellate review.*

The purpose of requiring written findings and conclusions following a bench trial is to ensure efficient and accurate appellate review. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). Here, the trial court's findings and conclusions were extensive and more than adequate for appellate review. *See* CP 15-19.

6. *The trial court properly imposed mandatory legal financial obligations.*

The State concurs with counsel's analysis of this issue. It further notes that no non-mandatory legal financial obligations were imposed. RP (3/10) 6.

7. *The trial court properly imposed twelve months of community custody.*

The State concurs with counsel's analysis of this issue as well.

IV. CONCLUSION

For the foregoing reasons, Loge's conviction and sentence should be affirmed, and counsel should be permitted to withdraw.

DATED August 15, 2017.

Respectfully submitted,

TINA R. ROBINSON
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A handwritten signature in black ink, appearing to read 'RS', with a long horizontal flourish extending to the right.

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Transmittal Information

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