DIVISION ONE
FILED: 8/13/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0098
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
SEAN RAY SEMALLIE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-137321-001

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 This appeal is filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969). Counsel for Sean Ray Semallie asks this Court to search the record for fundamental error. Semallie was given an opportunity to file a supplemental brief in propria persona. Semallie has not done so although he has requested counsel raise three issues in this appeal. After reviewing the record, we affirm Semallie's conviction and sentence for aggravated assault, a class five felony.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment and resolve all reasonable inferences against Semallie. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 On July 19, 2011, the general manager of a motel observed Semallie and another individual swimming naked in the pool after receiving a complaint from a guest. The manager told them to leave the pool because some of the motel's guests included children. The men seemed intoxicated and began "cursing and slurring." When they returned to their room, one of the men called the front desk making slurs and requesting new sheets. The manager took the new sheets to the room, and Semallie answered the door. Semallie cursed and slurred at the manager, took the sheets the manager gave him, hit the manager on the arm twice, and slammed the door in his face. The manager then told

the men through the closed door that he was calling the police "to get you out of here."

¶4 When the officers arrived, the manager informed them of the situation and requested that they remove the men from the premises. The officers and the manager approached the room, knocked on the door, and announced their presence. When no one answered, the manager opened the door with a passkey and cut the security lock with bolt cutters. Inside, both men were still naked and refused to leave or get dressed. The officers then decided to arrest Semallie for assaulting the manager, and both officers had to restrain Semallie to put handcuffs on him. While Semallie was still in the room, the other individual spit at both officers, and the officers put a black spit mask[1] on him and handcuffed him. Two more officers arrived, took Semallie outside, and attempted to put shorts on him. When one of the officers stood after pulling up the shorts, Semallie spit in his face. The spit covered the officer's face, eyes, nose, and mouth, which was open at the time. The officer immediately used a wipe on his face to kill bacteria and other biohazardous material. Another officer put a spit mask on Semallie.

[1] The spit mask is a netting placed over the head that allows the individual to breathe and talk, but protect others from spitting.

¶5 The State charged Semallie with aggravated assault for spitting on the officer, a class five felony, and assault for striking the manager, a class three misdemeanor. During trial, the State admitted pictures of the officers as they looked on that night, and a picture of the other individual in the spit mask. The officer Semallie spit on testified about the treatment he received to ensure he did not contract a disease. The officer received medical attention and treatment including "blood tests, some other preventative—antiseptic topical stuff that I had to use; and then, over the course of a year, I ha[d] to go back over different periods of time—for blood tests." These treatments affected his job, his life and his family. Semallie testified, in his own defense, that he did not spit on the officer, but he did admit to a prior felony conviction. At the close of the evidence, the trial court properly instructed the jury on the elements of the offense. The jury found Semallie guilty of the aggravated assault charge, but not guilty of the assault charge.

¶6 The trial court conducted the sentencing hearing in compliance with Semallie's constitutional rights and Rule 26 of the Arizona Rules of Criminal Procedure. The court considered the physical and emotion toll on the victim, the egregiousness of the act, and Semallie's prior felony conviction, which he had admitted during his testimony. The court did not consider that

Semallie was H.I.V. positive at the time of the act because the State had not shown proof beyond a preponderance of the evidence. The trial court sentenced Semallie to 3 years' imprisonment with credit for 183 days presentence incarceration.

DISCUSSION

¶7 We review Semallie's conviction and sentence for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Counsel for Semallie has advised this Court that after a diligent search of the entire record, she has found no arguable question of law. However, Semallie has requested counsel raise three issues: insufficiency of the evidence; introduction of a photograph of his co-defendant who was not present for trial; and imposition of an aggravated sentence. We take each issue in turn and find no error.

¶8 Semallie first contends that the evidence was insufficient to prove aggravated assault. "In determining the sufficiency of the evidence, we view the evidence in the light most favorable to sustaining the verdict, and we resolve all inferences against the defendant." *State v. Davolt*, 207 Ariz. 191, 212 ¶ 87, 84 P.3d 456, 477 (2004). We will reverse a court's conviction only if "there is a complete absence of probative facts to support its conclusion." *State v. Carlisle*, 198 Ariz. 203, 206 ¶ 11, 8 P.3d 391, 394 (App. 2000). Assault,

under Arizona Revised Statutes § 13-1203(A)(3) (West 2013)[2], is the knowing touching of another person "with the intent to injure, insult or provoke such person." Under A.R.S. § 13-1204(A)(8), a person commits aggravated assault when they commit assault against a person they know is a peace officer. First, the State provided extensive testimony from multiple witnesses describing the spitting incident including the type of conduct and the individuals involved. The witnesses indicated that Semallie's action was not accidental or mistaken. Instead, Semallie waited until the officer stood up and the spit covered the officer's face. This testimony showed that Semallie's act of spitting in the officer's face was intended to injure, insult or provoke the officer. Second, the State provided testimony and pictures showing the victim in police uniform. From this evidence, it was clear that the victim was clearly identified as a peace officer that night. Accordingly, the State presented sufficient evidence that Semallie committed aggravated assault against a police officer.

¶9 Semallie next contends that the court erred in admitting a photograph of his co-defendant. At trial, the court overruled Semallie's relevance objection to the admission of the photograph. "Trial courts have broad discretion in admitting

[2] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

photographs." *State v. Bocharski*, 200 Ariz. 50, 56 ¶ 27, 22 P.3d 43, 49 (2001). Under Arizona Rule of Evidence 401, evidence is relevant if "it has any tendency to make a fact of [consequence] more or less probable than it would be without the evidence." Photographs are relevant "to aid the jury in resolving an issue of the case." *State v. Tucker*, 215 Ariz. 298, 313 ¶ 47, 160 P.3d 177, 192 (2007). During trial, the State's witnesses as well as the defendant referred extensively to the spit masks that both the co-defendant and Semallie wore. In fact, Semallie admitted that the officers placed a spit mask on him later that night. The State introduced the photograph of Semallie's co-defendant to provide the jury with a visual depiction of a spit mask, similar to the one Semallie wore. This helped the jury resolve this issue. Therefore, the court did not abuse its discretion in admitting the photograph of Semallie's co-defendant.

¶10 Semallie finally contends that the court erred in imposing an aggravated sentence. Under A.R.S. § 13-703(B), a person is sentenced as a category two repetitive offender when he "stands convicted of a felony and has one historical prior felony conviction." A category two repetitive offender convicted of a class five felony can receive a maximum term of three years. *See* A.R.S. § 13-703(I). Although a jury must find or a defendant must admit any circumstances "necessary to establish the range within which a judge may sentence the defendant[,]"

when a jury finds or a defendant admits a single aggravating circumstance, the judge may find and consider additional circumstances by a preponderance of the evidence in considering a sentence up to the maximum. *State v. Martinez*, 210 Ariz. 578, 585 ¶ 26, 115 P.3d 618, 625 (2005). Once Semallie admitted on the stand that he had a prior felony conviction, the court could consider other circumstances. The court considered the emotional toll on the victim and his family, which the officer testified to on the stand, as well as the egregiousness of the act, which the court found existed from the act of spitting in the face of a police officer. The court did not consider Semallie's H.I.V. status because the State could not prove by a preponderance of the evidence that he was H.I.V. positive. Thus, the court did not err in imposing the maximum sentence of three years.

¶11 We have read and considered counsel's brief and fully reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Semallie was represented by counsel at all stages of the proceedings and the sentence imposed was within the statutory limits. We decline to order briefing and we affirm Semallie's conviction and sentence.

¶12 Upon the filing of this decision, defense counsel shall inform Semallie of the status of his appeal and of his

future options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Semallie shall have thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review. On the Court's own motion, we extend the time for Semallie to file a pro per motion for reconsideration to thirty days from the date of this decision.

CONCLUSION

¶13 We affirm.

__/s/_____
RANDALL M. HOWE, Judge

CONCURRING:

__/s/_____
PETER B. SWANN, Presiding Judge

_/s/_____
LAWRENCE F. WINTHROP, Judge