

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04-13-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0249
 Appellee,)
) DEPARTMENT D
 v.)
) **MEMORANDUM DECISION**
 DAVID SANTOS LOPEZ,)
) (Not for Publication -
 Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-159259-001 DT

The Honorable Cari A. Harrison, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals Section
Attorneys for Appellee

Maricopa County Public Defender's Office Phoenix
By Spencer D Heffel, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 David Santos Lopez ("Lopez") appeals his convictions

and sentences for two counts of aggravated assault, class-three felonies, and one count of unlawful imprisonment, a class-six felony. Lopez's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. See *Smith v. Robbins*, 528 U.S. 259 (2000). Lopez was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. For the following reasons, we affirm Lopez's convictions and sentences but modify his sentences to reflect one additional day of presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶3 Prior to being arrested, Lopez was living in a one-room studio apartment with his wife, M.L., and their three children, M, G, and C. On the evening of September 18, 2008, Lopez got into a heated argument with his son, M. Lopez was upset with M because Lopez did not want M's girlfriend to spend the night at the apartment. Lopez eventually told M and his girlfriend that they needed to leave the apartment.

¶14 After M and his girlfriend left the apartment, Lopez and M.L. began arguing about why Lopez made them leave. As the argument between Lopez and M.L. became more heated, Lopez suddenly grabbed a screwdriver and stabbed M.L. six times while she was lying on the couch. Lopez stabbed M.L. three times in the right shoulder, once in the right forearm, once in the left arm, and once in the chest.

¶15 After stabbing M.L. with the screwdriver, Lopez told M.L. that she was free to leave the apartment. M.L. testified that she was afraid to leave because Lopez was carrying a box cutter in his hand and was repeatedly opening and closing the blade of the box cutter. M.L. feared that Lopez would stab her in the back with the box cutter if she tried to leave. M.L. also chose not to leave the apartment because Lopez told her that she could not take their kids, her purse, or her shoes with her when she left.

¶16 M.L. testified that at some point during the night, Lopez held the box cutter to her face and made a small cut on her cheek. M.L. also testified that Lopez told her "to be ready to be on the news" because "he was going to kill me that night."

¶17 The couple's minor daughter, C, testified that she observed the attack. C testified that she heard Lopez tell M.L. that "he was going to cut [M.L.'s] face so that no one would want her." C also testified that Lopez told M.L. that he would

not let M.L. put any medicine on her injuries because he wanted her to get gangrene. When C started crying, Lopez told C "to be quiet or else [she] was next."

¶18 Lopez continued to pace around the apartment until about two or three in the morning the following day. M.L. testified that Lopez fell asleep for about five to ten minute periods throughout the night and that when Lopez woke up, he was still very angry.

¶19 Lopez left the apartment the following morning to take G to school. After dropping G off at school, Lopez returned to the apartment. At around three in the afternoon, M.L. and C left the apartment because Lopez told M.L. that she needed to go get her paycheck from work so that she could pay the rent due on their apartment. M.L. testified that she did not intend on contacting the police before leaving the apartment that day, but after speaking with C about what happened the night before, M.L. changed her mind.

¶10 M.L. contacted the police at a check-cashing center. She informed the police that Lopez had attacked her with a box cutter and a screwdriver the previous night. Officer J.S. testified that she drove to the check-cashing center and spoke to M.L. and C separately. M.L. told Officer J.S. that she wanted the police to go to her apartment because she feared that her eight-year-old son, G, may not be safe in the apartment with

Lopez. Officer J.S. made a request to have police officers check the apartment to ensure that G was safe. Office J.S. then drove M.L. and C to the apartment because M.L. did not have her own transportation.

¶11 Officers B.C. and F.R. were the first police officers to arrive at the apartment. The officers knocked on the apartment door and asked Lopez if they could talk to G to ensure that he was safe. Officers B.C. and F.R. eventually received a radio call from Officer J.S. that there was probable cause to arrest Lopez for assaulting M.L. with a box cutter and a screwdriver. After the officers arrested Lopez and had secured him in the patrol car, Officer F.R. entered the apartment to speak with G to ensure that he was safe and to find out if he witnessed the attack. Officer F.R. asked G if his father owned a box cutter. Officer F.R. testified that G immediately retrieved a box cutter from a toolbox located underneath a table and handed it to him.

¶12 Officer J.S. and M.L. arrived at the apartment sometime after G had given Officer F.R. the box cutter. M.L. asked Officer J.S. to enter her apartment to photograph her injuries. While Officer J.S. was taking photographs of M.L.'s injuries, Officer B.C. asked G if Lopez had attacked M.L. with a screwdriver. G confirmed that Lopez had attacked M.L. with a screwdriver, and G immediately retrieved a screwdriver from a

toolbox and handed it to the officer.

¶13 Prior to trial, Lopez filed a motion to suppress the screwdriver and box cutter found at the apartment. Lopez alleged that the officers did not have a search warrant or reasonable suspicion to search the apartment. The court held a hearing on the motion, during which the court heard testimony from M.L. as well as Officers F.R., B.C., and J.S.

¶14 At the conclusion of the hearing, the court denied the suppression motion. The court held that the police officers who first arrived at the apartment had probable cause to arrest Lopez and that “[i]t would have been imprudent for the officers to effect the arrest and leave the eight-year-old child in the home alone.” In addition, the court found that the discovery of the screwdriver and box cutter would have been inevitable.

¶15 Lopez was convicted by a twelve-member jury of one count of aggravated assault with a screwdriver, one count of aggravated assault with a box cutter, and one count of unlawful imprisonment. The jury issued separate findings that both counts of aggravated assault were dangerous offenses. In addition, the jury issued separate findings that all three offenses were domestic-violence offenses.

¶16 At the aggravation phase of the trial, the State alleged the following aggravators: (1) the offenses caused physical, emotional, or financial harm to the victim, (2) the

offenses involved the infliction or the threatened infliction of serious physical injury, and (3) the offenses were domestic-violence offenses committed in the presence of a child. The jury found beyond a reasonable doubt that all three offenses caused physical, emotional, or financial harm to the victim and that all three offenses were domestic-violence offenses committed in the presence of a child. The jury was unable to reach a unanimous decision on whether any of the three offenses involved the infliction or the threatened infliction of serious physical injury.

¶17 At the sentencing hearing, the court found three categories of aggravating circumstances to be applicable. First, the court relied on the jury's finding that all three offenses caused physical, emotional, or financial harm to the victim. Second, the court relied on the jury's finding that all three offenses were domestic violence offenses committed in the presence of a child. Third, the court found beyond a reasonable doubt that Lopez had two allegeable prior felony convictions. The court designated the current convictions as non-repetitive offenses and found that there were no mitigating circumstances. The court therefore sentenced Lopez to an aggravated prison term for all three convictions.

¶18 Lopez was sentenced to sixteen years for each of the two aggravated assault convictions and four-and-a-half years for

the unlawful imprisonment conviction. The court ordered the sentences to be served concurrently. The court also imposed a consecutive term of community supervision equal to one seventh of his prison term.

¶19 Lopez timely appeals his convictions and sentences. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (Supp. 2010).¹

DISCUSSION

¶20 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentences imposed fall within the range permitted by law, and the evidence presented supports the convictions. As far as the record reveals, Lopez was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶21 We have determined, however, that the trial court incorrectly calculated that Lopez was entitled to 186 days of presentence incarceration credit. Pursuant to A.R.S. § 13-

¹ We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

712(B) (Supp. 2010), a defendant is entitled to presentence incarceration credit for “[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment.” The record reveals that Lopez was taken into custody on September 20, 2008. He remained in custody until he was sentenced on March 26, 2009. Lopez, therefore, was incarcerated for a total of 187 days prior to sentencing, and he should be awarded one additional day of presentence incarceration credit. We hereby modify Lopez’s sentence to reflect this change. See Ariz. R. Crim. P. 31.17(b) (Supp. 2009); *State v. Stevens*, 173 Ariz. 494, 495-96, 844 P.2d 661, 662-63 (App. 1992) (correcting a miscalculation in credit by modifying the sentence without remanding to the trial court).

¶22 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel’s obligations in this appeal have ended. Counsel need do no more than inform Lopez of the disposition of the appeal and his future options, unless counsel’s review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Lopez has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶23 The convictions and sentences are affirmed, with the

modification that Lopez is entitled to one additional day of presentence incarceration credit.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
PATRICK IRVINE, Judge