DIVISION ONE
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. GABRIEL ANTHONY LOPEZ, Appellant.	)	1 CA-CR 09-0298 DEPARTMENT B MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-115411-001DT

The Honorable James T. Blomo, Judge *Pro Tempore*

AFFIRMED AS MODIFIED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee — Phoenix

James Haas, Maricopa County Public Defender
by Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant — Phoenix

W E I S B E R G, Judge

¶1 Gabriel Anthony Lopez ("Defendant") appeals from his conviction and the sentence imposed following a jury trial. His counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon,* 104 Ariz. 297, 299,

451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, counsel finds no arguable ground for reversal. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). This court granted Defendant an opportunity to file a supplemental brief raising any claims of error, and he has done so.

¶2 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001). We view the facts in the light most favorable to sustaining the verdict. *See State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005).

BACKGROUND

¶3 Defendant was charged by indictment with aggravated assault, a class 3 dangerous felony, following his arrest for striking D. with a glass beer bottle. The State alleged that Defendant had a 1997 class 6 felony conviction for criminal damage, a prior historical class 3 dangerous felony conviction in 1997 for aggravated assault, and several other aggravating circumstances.

¶4 Defendant appeared for an initial pretrial conference in May 2008 and was advised of the comprehensive pretrial conference of June 27, 2008 and of the trial date of August 28, 2008. He appeared at the pretrial conference on June 27 but did not appear on August 15 for the trial management conference. Defense counsel said that she had not spoken to Defendant since the prior

conference. The court continued the trial to September 8 but granted the State's motion to try Defendant in absentia.

¶5 Trial took place on September 10 and 11, 2008. D. testified that he and his fiancée, M., went to a strip club on March 7. They sat in a VIP area with limited seating. While D. was talking with other patrons, a man entered the VIP area, sat next to M., and began talking to her. D. turned his head to talk to the club manager and turned back in time to see M. run out of the club. D. followed, and M. told him that "a guy groped her." D. reported the incident to the manager, who removed the perpetrator.

¶6 As he was being removed, D. was standing nearby when the perpetrator's companion, Defendant, said to D., "We're sorry. I'm just going to finish my beer. . . . And as he was shaking my hand, he pulled me close, and at the same time, he hit me with the bottle." D. had put his beer bottle down just before Defendant shook his hand.[1] D. admitted that he was angry about the incident with M. but denied attempting to hit Defendant either before or after being struck with the bottle. He admitted that after the police arrived and while standing in the parking lot, he was yelling in Defendant's direction asking why he had been hit. D. was treated at a hospital and required 48 stitches to close wounds on his face. He also was unable to see clearly out of his left eye

[1]D. identified Defendant from a photograph that was admitted into evidence.

for about three days. The State introduced a videotape taken inside the club and played it for the jury.

¶7 M. testified that she and D. were sitting on a couch in the VIP area when Defendant's friend sat directly behind her and made lewd comments. When Defendant's friend grabbed her chest, M. became angry and walked out. D. followed, and M. explained what had happened. D. suggested they return to the club and ask that the friend be removed from the area. M. returned to sit in the VIP section while the bouncers and manager spoke to Defendant and his friend. She saw D. put down his bottle to shake Defendant's hand and heard Defendant apologize to D. She then heard a "very loud bang" and saw blood on D. She identified Defendant as the person who struck D. After the police arrived, she and D. went outside to speak to the officers and have photographs taken.

¶8 The manager testified that D. asked him to handle "a situation" because Defendant's friend had been hitting on M. D. was irritated but not upset. The manager told Defendant and his friend they had to leave, and as they were leaving, and without any provocation by D., Defendant hit D. on the side of the head so that the bottle shattered. The manager said that D. had not acted "in any way that was aggressive towards [Defendant]."

¶9 Officer B.L. testified that he responded to the scene and saw that Defendant was being held by security guards. The officer took photographs of D.'s injuries and said that Defendant was

"cooperative" and "respectful" and that D. was irritated but controlled.

¶10 The jury found Defendant guilty as charged. It also found that the State had proven that the offense involved the infliction of serious physical injury and had caused the victim emotional, physical, or financial harm.

¶11 Defendant was arrested in December 2008 and was sentenced to a mitigated term of 10.5 years with credit for 131 days of presentence incarceration. He was ordered to pay restitution of $5,205 to the Victim Compensation Fund. Appellate counsel notes an error in the sentencing minute entry, which failed to state that Defendant was sentenced for a class 3 dangerous *repetitive* felony. The sentencing transcript makes clear that Defendant was sentenced as a repetitive offender. Thus, pursuant to A.R.S. § 13-4037(A)(2001), we correct the April 7, 2009 minute entry to show that Defendant was sentenced for a dangerous, repetitive class 3 felony. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (when record reveals superior court's true intention, remand is unnecessary).

¶12 In his supplemental brief, Defendant first asserts that while in jail, he was diagnosed with a bipolar disorder with major depressive and manic episodes. He argues that his disorder prevented him from controlling his actions at the time he committed this offense. To the extent that Defendant is arguing that had he been diagnosed and treated sooner, he would not have committed the

assault on D., that is not a legal defense. Defendant could have appeared at trial to explain his perception of a threat from D. but did not do so. The trial court did, however, treat Defendant's mental health as a mitigating factor at sentencing.

¶13 Defendant also argues that his sentence should have been ordered to run concurrently rather than consecutively with a sentence imposed after a guilty plea to a robbery committed on July 9, 2008, a class 4 felony, with one prior dangerous felony conviction. The plea agreement provided for at least a presumptive term but did not address the concurrent/consecutive question.[2] The trial court found that Defendant's mental health slightly outweighed the aggravating factors and imposed a presumptive term of 4.5 years for the robbery and a consecutive mitigated term of 10.5 years for the assault on D. Because Defendant committed two different crimes on different occasions against different victims, the trial court did not err in ordering consecutive sentences.

¶14 Defendant next argues that his character witness would have testified that D. tried to threaten Defendant outside the club. Defendant could have informed his lawyer of this witness and called the witness to testify, but Defendant chose not to maintain contact with his counsel before trial.

¶15 Defendant objects that there was no audio to accompany the videotape of the incident. The club manager testified that

there was a video recording, and no evidence suggested that an audio portion existed.

¶16 Defendant further asserts that the prosecutor asked leading questions of D. Defense counsel had an opportunity to object to any such questions but did not do so. "Failure to object at trial to an error or omission . . . waives the issue on appeal unless the error amounts to fundamental error." *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994). No fundamental error occurred because leading questions, although not the best practice, may be allowed in the trial court's discretion. *State v. Duffy*, 124 Ariz. 267, 273-74, 603 P.2d 538, 544-45 (App. 1979). To the extent that some questions were leading, they were permissible to establish foundation and develop D.'s testimony. We find no error.

¶17 Defendant next claims error because no charges were brought against the person who groped M. Whether charges were brought is not part of this record, but even if they were not, Defendant was convicted only for his own action in striking D.

¶18 Defendant argues that before the assault, he saw D. and M. arguing and suggests M. was afraid of D. and would say anything. Defense counsel tested M.'s veracity and her observations on cross-examination; no other witness saw or heard an argument. Defendant

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[2]At the change of plea hearing on a separate charge of robbery, Defendant said that he understood the agreement and resulting increase in sentencing range on the aggravated assault conviction.

also claims that D. threatened to kill him. Defendant could have appeared for trial to offer his testimony but did not do so.

¶19 Defendant questions why the manager did not testify that he heard D. threaten Defendant. Defense counsel asked D. if he had a verbal confrontation with Defendant, and D. denied that any confrontation occurred. On cross-examination, the manager admitted that he did not hear the entire exchange between D. and Defendant but watched their body language and said that neither appeared upset or aggressive. Officer B.L. testified that his report noted that D. said he had had a verbal confrontation with Defendant just before the assault but D. also had said the verbal exchange was when Defendant acted like he wanted to shake hands. The jury's function was to resolve any conflicts in the testimony and to determine what occurred. "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974).

¶20 Defendant objects that the prosecutor called him by the name of "Demon." The manager testified that he knew Defendant only by that name until the prosecutor told him Defendant's given name; he did not know if the name related to Defendant's work as a tattoo artist. The prosecutor, however, referred to Defendant as "Gabriel", and defense counsel did not object to anyone's use of "Demon."

¶21 Finally, Defendant argues that the injuries to D. were minor and not serious. The jury saw photographs of D. taken after the assault showing extensive cuts and bleeding and could observe D.'s face at trial. Defense counsel had copies of D.'s medical records, cross-examined D. about his injuries, and argued that the injuries were not severe. The jury was instructed that serious physical injury "creates a reasonable risk of death or . . . causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." Sufficient evidence existed for the jury to find that D. suffered permanent disfigurement.

CONCLUSION

¶22 We have read and considered the briefs of counsel and Defendant and have searched the entire 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. The record reveals that Defendant was represented by counsel at all stages of the proceedings, that the sentence imposed was within statutory limits, and that sufficient evidence existed for the jury to find that Defendant committed the offense.

¶23 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of Defendant's future options, unless counsel's review

reveals 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). Defendant has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona.*

¶24 Accordingly, we affirm Defendant's conviction and sentence.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

_/S/_____
PATRICIA K. NORRIS, Presiding Judge

_/S/_____
MARGARET H. DOWNIE, Judge