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

DIVISION ONE
FILED: 02/25/10
PHILIP G. URRY, CLERK
BY: JT

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| STATE OF ARIZONA, | ) | |
| | ) | 1 CA-CR 09-0658 |
| Appellee, | ) | |
| | ) | DEPARTMENT E |
| v. | ) | |
| | ) | MEMORANDUM DECISION |
| KENNY EUGENE GIPSON, | ) | (Not for Publication - |
| | ) | Rule 111, Rules of the |
| Appellant. | ) | Arizona Supreme Court) |
| _____ | ) | |

Appeal from the Superior Court of Yavapai County

Cause No. P-1300-CR-0020080529

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

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

DeRienzo and Williams, PLLC
by Craig Williams
Attorneys for Appellant — Prescott Valley

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**W E I S B E R G,** Judge

**¶1** Kenny Eugene Gipson ("Defendant") appeals from the revocation of his intensive probation and the sentences imposed for the underlying offenses that resulted in his being placed on probation. 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, he finds no arguable ground for reversal. We have granted Defendant an opportunity to file a supplemental brief, but he has not done so. 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).

**¶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).

**BACKGROUND**

**¶3** In May 2008, Defendant was charged by indictment with: Count I, Unlawful Imprisonment (Victim One); Count II, Aggravated Assault (Victim One); Count III, Use of a Deadly Weapon or Dangerous Instrument; Count IV, Possession of Marijuana; Count V, Possession of Drug Paraphernalia, Count VI, Unlawful Imprisonment (Victim Two); and Count VII, Assault (Victim Two). On June 19, 2008, Defendant pled guilty to Counts II, V, and VI, and in return, the State dismissed the other Counts. On July 14, 2008, the court ordered Defendant to spend 45 days in the Yavapai County Jail and placed him on intensive probation for 36 months. The court also ordered Defendant to pay a $20 time payment fee and probation fees of $50 a month.

**¶4** On July 1, 2009, Defendant was arrested and charged with one count of sexual abuse. The following day, his probation officer submitted a Petition to Revoke Probation.

**¶5** At a hearing on the petition, Defendant's probation officer testified that Defendant had been receiving services at a Veteran's Administration ("VA") facility at the time of his arrest. Police officer Steven Surak testified that he had been called to the VA facility regarding allegations against Defendant made by D.D., a volunteer at the VA and the victim of the alleged sexual abuse. D.D. had reported to the VA police that Defendant had come up behind her and had run his hand up her left breast. Officer Surak then interviewed D.D., and she repeated her allegation. A background check revealed that D.D. had convictions for theft, an offense involving dangerous drugs, and tampering with evidence.

**¶6** Officer Surak also interviewed Defendant, who said that he had given D.D. "a little bit of a shoulder hug" while standing behind her and had thanked her but had done nothing more. Defendant denied touching D.D.'s breast; he said that D.D. had winked at him and asked him out, and that she often flirted with the fellows in the dining room.

**¶7** In addition, Officer Surak testified that he had received a written statement from A.C., another VA volunteer, who said he had seen Defendant fondle D.D.'s breast and heard her tell him to stop it. A.C.'s statement also related that when he went to lunch with D.D., he saw Defendant make a gesture that suggested cupping

D.D.'s breast. The officer was unable to interview A.C., however, and his report stated that Defendant did not remember seeing D.D. in the dining room.

**¶8** Officer Surak further testified that the VA police took a witness statement from M. who said that he had been in the VA store when the incident purportedly occurred and that D.D. had approached him later in the parking lot. D.D. had asked if M. could verify what had happened and had demonstrated by standing in front of M. and running her hand down his chest. M.'s statement reported that he merely had seen D.D. and Defendant talking.

**¶9** The court found by a preponderance of the evidence that Defendant had violated standard condition one of his probation by committing a misdemeanor assault by touching D.D. with intent to injure, insult, or provoke her. The court revoked Defendant's probation. At the disposition hearing held on August 21, 2009, the court sentenced Defendant to a slightly aggravated term of 1.25 years on Count II; a slightly aggravated term of 1.25 years on Count VI; and to 180 days in jail, already served, on Count V. The court ordered that all sentences run concurrently and credited Defendant for 186 days of presentence incarceration. Defendant later pled guilty to one count of sexual abuse and was sentenced to a concurrent 1.75 year term.

**¶10** The court must find a probation violation by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). Furthermore, Rule 27.8 also allows the court to consider "any

reliable evidence . . . including hearsay." In *State v. Salinas*, 23 Ariz. App. 232, 234, 532 P.2d 174, 176 (1975), for example, we upheld a revocation based exclusively on hearsay evidence: a probation officer testified to defendant's admissions to another probation officer, and we concluded that the evidence was sufficiently reliable and met the State's burden. *Id*. at 233-34, 532 P.2d at 175-76.

**¶11** We also have acknowledged that if conflicting evidence is presented, as here, the trial court must assess the witnesses' credibility and resolve the conflict. *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). We will affirm the trial court unless its ruling is arbitrary or unsupported by any theory of the evidence. *Id*. We view the facts in the light most favorable to upholding the trial court's ruling. *State v. Vaughn*, 217 Ariz. 518, 519 n. 2, ¶ 3, 176 P.3d 716, 717 n. 2 (App. 2008). Here, Defendant's counsel cross-examined Officer Surak at length, and Defendant could have testified or called any witnesses he chose to rebut the State's case. Under the circumstances, we find no error.

**CONCLUSION**

**¶12** We have read and considered counsel's brief 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. So far as the record reveals, Defendant was

represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits and that there was sufficient evidence for the jury to find that the offenses were committed by Defendant.

**¶13** 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.*

**¶14** We affirm the revocation of probation and the sentences imposed on the underlying offenses.

/S/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/S/_____
PHILIP HALL, Judge

/S/_____
JOHN C. GEMMILL, Judge