DIVISION ONE
FILED: 03/05/2013
RUTH A. WILLINGHAM, CLERK
BY: sls

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

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 12-0146 |
| | ) | |
| Appellee, | ) | DEPARTMENT C |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| STETSON ROY LEWIS, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-114800-001

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

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**S W A N N**, Judge

**¶1** Defendant Stetson Roy Lewis appeals his convictions and sentences for aggravated assault and threatening or intimidating. This case comes to us as an appeal under *Anders*

*v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal and found no arguable nonfrivolous question of law, and asks us to review the record for fundamental error. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant has filed a supplemental brief *in propria persona* in which he raises several issues for appeal.

**¶2** We have searched the record for fundamental error and considered the issues identified by Defendant. We find no fundamental error, and therefore affirm.

*FACTS AND PROCEDURAL HISTORY*

**¶3** In April 2011, Defendant was indicted for aggravated assault against victims R.M. and S.L. under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2), and for threatening or intimidating by word or conduct to cause physical injury to S.L. and the M. family, or to cause serious damage to their property, under A.R.S. § 13-1202(A)(1). The indictment alleged that all three offenses were dangerous, and, with respect to the threatening or intimidating charge, alleged that the offense was a felony under A.R.S. § 13-1202(B)(2) because of Defendant's membership in a criminal street gang. Defendant entered a not guilty plea at arraignment and the matter proceeded to a jury trial.

**¶4** At trial, the state presented evidence of the following facts. On the afternoon of March 24, 2011, R.M., S.L., and their three-year-old child went to a bus stop in Phoenix, Arizona, and saw Defendant, who they believed was drinking alcohol. Defendant approached the family and offered R.M. a toy car for the child. When R.M. declined the offer, Defendant became angry, pulled a knife from his pants pocket, pointed the blade at R.M., and stated that he was going to cut R.M. (according to R.M.'s recollection) or the family (according to S.L.'s recollection), causing both R.M. and S.L. to fear that they might be stabbed. R.M. stepped between Defendant and his family, S.L. took the child behind the bus stop to call for police assistance, and Defendant returned to his seat on the bus-stop bench and pocketed the knife. A police officer responded to the scene, observed that Defendant appeared intoxicated and agitated, and found an open knife in Defendant's pants pocket. Other law enforcement personnel testified that Defendant has a neck tattoo associated with the criminal street gang Diné Pride, and had previously proclaimed lifelong membership in that gang.

**¶5** At the conclusion of the state's case-in-chief, Defendant moved for judgments of acquittal on the counts as to S.L. The motions were denied.

**¶6** For his defense, Defendant testified that he had been using his knife at the bus stop to remove a label from a bottle of vodka -- from which he had drunk "a few swigs" -- but had put the knife away when he saw R.M., S.L., and their child. He testified that he offered a toy car to the family and teased them when the offer was declined, but then returned to his seat on the bus-stop bench. According to Defendant, he confronted R.M. to "put him in check" only after he heard R.M. call him a derogatory name, and during that confrontation he never brandished or threatened to use his knife. Defendant testified that he had been a member of a prison gang years before but denied continuing his membership outside of prison.

**¶7** After hearing closing arguments and considering the evidence, the jury found Defendant not guilty of aggravated assault against S.L., but guilty of aggravated assault against R.M., and guilty of threatening or intimidating. The jury further found that both of the offenses for which Defendant was found guilty were dangerous offenses, and that Defendant was a member of a criminal street gang.

**¶8** At the sentencing hearing, the state proved to the court that Defendant had four prior felony convictions: a 1995 conviction for assault on a peace officer, a class 6 felony and non-dangerous offense; a 1998 conviction for aggravated DUI, a class 4 felony and non-dangerous offense; a

2001 conviction for aggravated DUI, a class 4 felony and non-dangerous offense; and a 2004 conviction for aggravated robbery, a class 3 felony and non-dangerous offense.

**¶9** The court entered judgment on the jury's verdicts and found that the state had "shown aggravators . . . in terms of the dangerousness, use of the knife, [and] the additional prior felony convictions." The court sentenced Defendant to concurrent aggravated sentences of 12.5 years of imprisonment for the aggravated assault conviction and 5 years of imprisonment for the threatening or intimidating conviction, and credited Defendant with 341 days of presentence incarceration.

**¶10** Defendant timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

*DISCUSSION*

**¶11** Defendant raises several issues for review in his supplemental brief. We address each in turn.

*I. INEFFECTIVE ASSISTANCE OF COUNSEL*

**¶12** Defendant first contends that his counsel failed to make necessary objections and "refused and disregarded [to say] what [Defendant] needed him to say . . . at the closing arguments." This is essentially a claim of ineffective assistance of counsel. We do not consider ineffective assistance of counsel claims on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such

claims must be raised in a petition for postconviction relief under Ariz. R. Crim. P. 32. *Id.*

*II. ADMISSION OF EVIDENCE OF PRISON GANG MEMBERSHIP*

**¶13** Defendant next contends that a mistrial was warranted because evidence that he "had been in prison before and was a known prison gang member" was improperly admitted during the state's case in chief. Defendant is correct that the state, in proving Defendant's gang membership, put forth evidence tending to show that Defendant was previously incarcerated. A sheriff's deputy testified on direct examination that he was a member of the jail intelligence unit, was responsible for interviewing jail inmates and gathering information about their gang affiliations, had interviewed Defendant and photographed his tattoos in June 2010, and had at that time obtained Defendant's self-proclamation of membership in the Diné Pride gang. Further, an investigator for the state department of corrections testified that Diné Pride is a gang of prison origins.

**¶14** Defendant neither objected to the evidence nor requested a mistrial at trial. To the extent that the evidence tended to show that Defendant was previously incarcerated for past crimes or wrongful conduct, its admission was not an abuse of discretion (let alone fundamental error) under Ariz. R. Evid. 404(b). Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

person in order to show action in conformity therewith" but may be admissible for other purposes. Here, the evidence was admissible for another purpose -- to prove a principal issue in the case: that Defendant was a "criminal street gang member" as defined in A.R.S. § 13-105(8), an element of felony threatening or intimidating under A.R.S. § 13-1202(B)(2).

*III. SUFFICIENCY OF THE EVIDENCE*

**¶15** Defendant finally contends that the evidence was insufficient to support his convictions. When reviewing the sufficiency of the evidence, we do not reweigh the evidence. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We view the evidence in the light most favorable to sustaining Defendant's convictions and resolve all reasonable inferences against him. *Id.* We conclude that the evidence was sufficient to support the convictions.

**¶16** First, there was sufficient evidence to support Defendant's conviction for aggravated assault against R.M. A person commits aggravated assault under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2) by intentionally placing another in reasonable apprehension of imminent physical injury while using a deadly weapon or dangerous instrument, such as a knife (*see* A.R.S. § 13-105(12) & (15)). R.M. and S.L. testified that Defendant pointed a knife at R.M. and threatened to use it on R.M. or the family, and R.M. testified that he feared he might be stabbed.

In these circumstances, R.M.'s fear of imminent physical injury was reasonable.

**¶17** The evidence concerning Defendant's display of the knife and his threats was also sufficient to support Defendant's conviction for threatening or intimidating. A person commits the offense of threatening or intimidating when he threatens or intimidates, by word or conduct, "[t]o cause physical injury to another person or serious damage to the property of another." A.R.S. § 13-1202(A)(1). If the defendant is a member of a criminal street gang, the offense is a felony. A.R.S. § 13-1202(B)(2). Here, the evidence concerning Defendant's neck tattoo and self-proclaimed criminal street gang membership was sufficient to support the felony conviction. *See* A.R.S. § 13-105(9).

**¶18** Defendant contends that the jury should have been presented with video evidence and a recording of S.L.'s call to 911. But the convictions were sufficiently supported without such evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) (substantial evidence may be either direct or circumstantial). Further, because nothing in the record shows that such evidence exists, there is no basis for Defendant to claim his rights were violated under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985).

**¶19** Defendant also contends that the witnesses lied and had "mismatching statements." This argument fails because witness credibility was for the jury to assess. *State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007). Moreover, R.M. and S.L.'s testimonies were materially consistent.

*IV. REMAINING ISSUES*

**¶20** The record reflects that Defendant received a fair trial. Defendant was present and represented by counsel at all critical stages. The state's closing and rebuttal arguments were proper. The court ordered and considered a presentence report before sentencing, gave Defendant the opportunity to speak at the sentencing hearing, and stated on the record the evidence and materials it considered and the factors it found in imposing the sentence.

**¶21** The sentences imposed were lawful. Pursuant to A.R.S. § 13-105(22)(a)(iv) and (22)(b), and A.R.S. § 13-703, the sentencing ranges were enhanced by Defendant's 1998, 2001, and 2004 convictions.[1] Pursuant to A.R.S. § 13-701(D)(2) and *State v. Bly*, 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980), the court properly imposed aggravated sentences based on Defendant's use of a deadly weapon or dangerous instrument. The court

[1] Defendant's 1995 conviction did not qualify as a historical prior felony conviction under A.R.S. § 13-105(22), and therefore had no effect on the sentencing range enhancement.

correctly calculated Defendant's presentence incarceration credit.

*CONCLUSION*

**¶22** We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentences.

**¶23** Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has 30 days from the date of this decision to file a petition for review *in propria persona*. Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SAMUEL A. THUMMA, Judge