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

STATE OF ARIZONA,	)	No. 1 CA-CR 08-0692
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
KEVIN R. BLAISE	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-005547-001 DT

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

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

Maricopa County Office of the Legal Advocate — Phoenix
By Bruce F. Peterson, Legal Advocate
Consuelo M. Ohanesian, Deputy Legal Advocate
Kevin R. Blaise — Florence
In *Propria Persona* Appellant

G E M M I L L, Judge

¶1 Kevin R. Blaise appeals his convictions for one count of first-degree murder, four counts of aggravated assault, and

one count of weapons misconduct. Blaise'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 she 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). Blaise has filed a supplemental brief *in propria persona* raising several issues he contends require the reversal of his convictions and sentences. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Blaise was indicted in February 2007 on one count of first-degree murder, four counts of aggravated assault, and one count of misconduct involving weapons. After a six-day jury trial he was convicted of all counts. The evidence at trial established the following facts, which we view, along with all reasonable inferences therefrom, in the light most favorable to upholding the verdicts. *See State v. Powers,* 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶3 At about midnight on the night of March 5, 2006, five women who were long-time friends, D.H., Ty.R., Ta.R., M.R., and L.H., decided to go to a nightclub. The first nightclub they stopped at was closed, so they drove to Amvets nightclub and went inside. The club was fairly crowded that night. D.H. saw

Blaise inside near the back of the club. The club closed shortly after the women arrived when a fight broke out inside.

¶4 As people were exiting, the parking lot became very full. People were standing around and talking and it was difficult for vehicles to leave. The five women eventually made their way to their vehicle and prepared to leave. Blaise and a woman, L.P., were standing next to a vehicle that was parked ten to fifteen feet from where the women were parked. L.P. pointed at their vehicle and told Blaise: "[T]here they go, right there."[1] She then walked to the other end of the parking lot.

¶5 The five women got into the vehicle and began to leave. A man later identified as S.R. was standing next to Blaise, and he drew a weapon. L.H. shouted: "Let's go. [S.R.] has a gun." S.R. fired several shots into the air. Blaise also had a gun, and he got into a crouching position and fired several shots into the women's vehicle. L.H. suffered a gunshot wound to her head above her right eye, and she was also shot in the back and foot. D.H. and M.R. each suffered gunshot wounds to their left foot. Ty.R. drove the women to the hospital. L.H. died from the gunshot wound to her head.

¶6 Following the jury trial Blaise was sentenced to life imprisonment with the possibility of release after twenty-five

[1] The record indicates that Ty.R., Ta.R., L.H., and M.R. were involved in a drive-by-shooting the previous night that targeted a friend of L.P.

years for the first-degree murder conviction, 11.25 years' imprisonment for each of the aggravated assault convictions, and 10 years' imprisonment for the weapons misconduct conviction. The trial court ordered the sentences to run consecutively. Blaise was credited with 749 days of presentence incarceration. Blaise has timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) (2003), 13-4031 (2001) and -4033 (Supp. 2009).

DISCUSSION

¶7 Blaise raises numerous issues in his supplemental brief. He first argues the evidence was insufficient to support the first-degree murder and aggravated assault convictions. We review the sufficiency of evidence presented at trial to determine if substantial evidence exists to support the verdict. *See State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Evidence is sufficient when it is "more than a [mere] scintilla and is such proof" as could convince reasonable persons of a defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981).

¶8 Blaise asserts there was no evidence he was the person who fired the weapon that killed L.H. and that injured D.H. and M.R. D.H. testified at trial, however, that she saw Blaise get into a crouched position, point his gun at the vehicle, and fire

the gun four or five times. Ty.R. gave nearly identical testimony; she saw Blaise squat down and fire his weapon towards their vehicle. M.R. testified she did not see Blaise fire the weapon, but saw him "squatted down" and holding a gun immediately prior to the shootings. A firearms specialist from the Phoenix Crime Laboratory testified the bullets recovered from the bodies of L.H. and D.H. were consistent with having been fired from the same weapon, and the evidence at trial showed Blaise was the only person firing a weapon in the direction of the vehicle.[2] Based on this testimony, we find substantial evidence was admitted at trial that Blaise was the shooter. To the extent Blaise challenges the credibility of these witnesses, it was for the jury to weigh the evidence and determine credibility.[3] *See State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004).

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[2] A defense witness testified she might have seen a person firing an assault rifle in the direction of the vehicle. However, the victims were shot with .9 millimeter caliber bullets, and there was testimony that an assault rifle would not generally fire this type of bullet. Moreover, a police officer testified the defense witness had not told police about an assault rifle in her interview with the police after the incident, and no cartridges from an assault rifle were recovered from the parking lot.

[3] Blaise also asserts an unsubstantiated claim that the prosecutor knowingly used false evidence to obtain the convictions. Our review of the record reveals nothing to support such a claim, and, in any event we rarely address unsubstantiated assertions. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶9 Blaise also argues he could not have been responsible for killing L.H. because the trial testimony established he had been in a crouched-down position when he fired his weapon and "[t]here was scientific evidence that the way the bullet entered [L.H.]'s head, the gun man had to be standing up." During a police interview, D.H. stated Blaise had been standing up when the shooting started and that he had then ducked down. The interviewing detective testified at trial that the shot to L.H.'s head "would be consistent with a description being given [by D.H.] that the person began – the suspect began firing and then continued to slide down the back or the side of the car that he was leaning up against. So the very first shot would be very consistent [with] being in a more upright position and then sliding down the car as the shots continue." We find there was evidence from which jurors could reasonably conclude that Blaise fired the shot that killed L.H.

¶10 Blaise next points out that he was indicted three separate times for these offenses. He states he has not seen the first two indictments "to compare and determine what new evidence was given to the three different Grand Juries," and he "would like the Appeal Court to look into this just to see if those three indictments [were] in the guidelines of the law." Blaise did not raise any objections below regarding his indictments, and we therefore review only for fundamental error.

See State v. Henderson, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶11 The record indicates the State twice re-filed this case to correct the charges against Blaise – first, to allege first-degree murder rather than second-degree murder, and second, to add allegations of aggravating factors. We perceive no error here, fundamental or otherwise. Blaise also states he would like to "inspect, reproduce, and copy all Grand Jury master list[s]" to determine if there was a basis for challenging the jury selection procedures. We find no evidence in the record that he made such a request to the trial court, and accordingly we find no error on appeal.

¶12 Prior to trial, Blaise requested access to the medical records of M.R., D.H., and L.H. The trial court ordered the records be turned over to the court for an *in camera* inspection. The court ultimately found nothing exculpatory was contained therein. Blaise argues he should have been granted access to the medical records. We have reviewed these records on appeal and agree with the trial court's conclusion that they contain nothing exculpatory. Additionally, we find no support for his assertion that the assistant county attorney assigned to the case "took out the stuff about [the] victims/witnesses that was favorable to the defense."

¶13 Blaise next argues the prosecutor improperly vouched

for a witness during closing arguments by stating "[w]e know that the defendant is a prohibited possessor. He had a gun. He is a convicted felon, and he knew he had a gun." He also contends the prosecutor commented on evidence that was not presented to the jury when he stated that the shooter had been standing ten feet from the victims. Evidence properly admitted at trial supports each of the prosecutor's statements. Once evidence is properly admitted, the prosecutor can comment on it in closing argument and "urge the jury to draw reasonable inferences." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993). We find no error here.

¶14 On the fourth day of the trial, a juror and the prosecutor happened to be in the same elevator following the court's recess for lunch. The juror said to the prosecutor, "You are more nervous than I am," to which the prosecutor did not respond. The prosecutor promptly reported the incident to the trial court, which reminded the jurors to not contact the attorneys during the trial. Blaise suggests this constitutes a basis for reversal. He did not request a mistrial below, however, and the court did not err on this record by failing to sua sponte declare a mistrial.

¶15 Blaise next contends the court erred by permitting the State to present evidence of his prior convictions. Count Six of the indictment, however, alleged Blaise had knowingly

possessed a handgun while being a prohibited possessor. Evidence of his prior convictions was therefore necessary for the State to prove he was a prohibited possessor. *See* A.R.S. §§ 13-3101(A)(7) and 13-3102(A)(4) (Supp. 2009).

¶16 He also contends the trial court was "vindictive" towards him throughout trial and sentencing. He points out that the trial court granted several requests to delay the trial date and denied his motion for judgment of acquittal made pursuant to Arizona Criminal Procedure Rule 20. He also asserts the court ignored his presentence memorandum during sentencing. We see no evidence of vindictiveness, however; the trial date was delayed several times at Blaise's request and, because there was sufficient evidence to support the convictions, the trial court was required to deny his Rule 20 motion. Moreover, the trial court stated at sentencing that it had considered the presentence memorandum.

¶17 Prior to the jury reaching its verdict, Blaise stipulated to one of the aggravating factors alleged for counts two through five -- that "[t]he victim or, if the victim has died as a result of the conduct of the defendant, the victim's immediate family suffered physical, emotional or financial harm." A.R.S. § 13-701(D)(9). In exchange, the State withdrew its allegations of aggravating factors on count six. Blaise now claims he did not understand what he was doing and he was misled

into believing he would receive a lesser sentence by stipulating. The trial court had a lengthy exchange with Blaise to ensure he was aware that by stipulating he waived his right to have a jury determine aggravating factors, and Blaise explicitly stated no one had promised him anything in exchange for the stipulation and that he understood what he was doing. Moreover, Blaise was given presumptive rather than aggravated sentences. We therefore perceive no prejudice.

¶18 Blaise asserts that his rights under the Sixth Amendment to the United States Constitution were violated when, during M.R.'s testimony, several spectators began to audibly cry. He did not move for a mistrial at that time, however, and the trial court did not err in failing to sua sponte declare a mistrial. Moreover, the trial court excused the jurors and asked the spectators to either stop audibly crying or to leave the courtroom, and nothing in the record suggests they did not comply.

¶19 Blaise next argues the court erred in imposing consecutive rather than concurrent sentences. He cites no legal authority for his assertion, and we find none. Each offense constituted a separate act, and we discern no issue of double punishment presented here. Imposition of consecutive sentences was therefore within the trial court's discretion. *See State v. Harper*, 177 Ariz. 444, 445-46, 868 P.2d 1027, 1028-

29 (App. 1993); *see also* A.R.S. §§ 13-711 (Supp. 2009) and 13-116 (2001).

¶20 He next identifies in his supplemental brief several persons who did not testify at trial and who he claims would have provided testimony essential to his defense. Nothing in the record indicates the court precluded these witnesses from testifying, and Blaise did not ask for a continuance during the trial in order to secure their testimony. We see no error here.

¶21 Blaise also challenges the process by which the alternate jurors were selected. He claims one juror was selected as an alternate because she asked several questions during the trial and was skeptical of the State's evidence. According to court rule, however, jurors are randomly selected as alternates by the court clerk. *See* Ariz. Crim. P. R. 18.5. This procedure was followed here. He also suggests the jurors were rushed into reaching a verdict because several jurors had made vacation plans, but there is no evidence in the record to support this assertion. Additionally, he claims the entire jury panel should have been stricken because the potential jurors had "already made up their minds that [he] was guilty." He did not make a motion below to strike the panel, however, and we do not perceive any evidence to support this claim. The court followed proper voir dire procedure to select an unbiased jury.

¶22 Last, Blaise raises an ineffective assistance of

appellate counsel claim. We do not reach the merits of this claim because such claims are not appropriate on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (precluding the review of ineffective assistance of counsel claims on direct appeal). Instead, Blaise must raise this claim in a petition for post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. *Id*.

¶23 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, Blaise 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.

¶24 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 Blaise 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. Blaise 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

¶25 The convictions and sentences are affirmed.

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

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
PATRICK IRVINE, Judge