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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. IVAN HERNANDEZ-OLVERA, Appellant.	)	1 CA-CR 09-0316 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-174172-001 SE

The Honorable Teresa A. Sanders, Judge

AFFIRMED

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

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

Ivan Hernandez-Olvera — Florence
Appellant

O R O Z C O, Judge

¶1 Ivan Hernandez-Olvera (Defendant) appeals his conviction and sentence for first degree murder, a class one dangerous felony.

¶2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defense counsel, however, advises this Court that Defendant wishes us to address eight specific issues, and we do so below. Defendant was afforded the opportunity to file a supplemental brief in propria persona, and he has done so. Defendant raises additional issues, which are also addressed below.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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, and -4033.A.1 (2010).[1] Finding no reversible error, we affirm.

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

FACTS AND PROCEDURAL HISTORY

¶4 Defendant was charged with first degree murder, a class one dangerous felony. A jury of twelve and two alternates was empanelled. We view the facts and all reasonable inferences in the light most favorable to upholding the verdict. *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶5 On November 17, 2007, F.A. was at work when she complained to her boss about "weird" text messages from Defendant, her ex-boyfriend.[2] Phone records also indicated that Defendant placed approximately 110 phone calls to F.A. on November 17, 2007. Defendant testified that after her shift, F.A. allegedly left with Defendant voluntarily, intending to have a light dinner. Defendant testified that, because he waited in the parking lot for hours for F.A.'s shift to end, his car battery died. Defendant and F.A. took F.A.'s car and Defendant drove. Defendant explained that he had a gun with him because he felt like he needed protection from an altercation he was engaged in earlier in the day. Defendant drove and placed the gun, which was in his jacket, at F.A.'s feet.

¶6 Defendant testified that "[t]here was a disagreement" and that the "atmosphere changed." Defendant said that F.A. retrieved the gun from her feet, was allegedly pointing the gun

[2] We note that Defendant maintains he and F.A. were still in a boyfriend/girlfriend relationship.

at Defendant, so Defendant stopped the car and they both exited. Defendant further testified that he tried to get the gun away from F.A., but just heard the "detonations." Defendant said that "fear, or panic, or terror" just blinded him and he "took the gun out of her hands, and [he] left the scene."

¶7 A witness testified he observed a car pulled over on the side of the road and heard F.A. and a man arguing over the top of the car.[3] The witness testified that the tone of the man's "voice changed to angry" and that when he opened the driver's side back door, F.A. came around to the driver's side of the car. The witness indicated that he saw the man pull what looked like a gun from his waist and "did a circle in her chest" and then F.A. fell to the ground.

¶8 Defendant testified that while he had a cell phone with him at the time of the shooting, he did not call the police or 911, but instead coordinated with his friend to get a car and "wound up in Nogales." At trial, Defendant was questioned about leaving F.A. in the street to bleed to death and responded that he did not think he "should be judged . . . for being blind" to the situation. Defendant testified that he was "blinded by

[3] The witness indicated that although he could not positively identify Defendant, the man who was arguing with F.A. over the top of the car had a similar hairstyle to that of Defendant.

confusion" and he hoped everything "would turn out to just be a dream."

¶9 In Nogales, Defendant spent the day with a man he tried to sell his car to and upon returning to his car, he encountered police. Defendant ran from the police, but was subsequently apprehended in a store and taken into custody. Officers found a gun and F.A.'s purse in Defendant's car. Defendant identified the gun found in his car in Nogales as his gun. All of the shell casings found at the scene of the crime matched those unique to Defendant's gun.

¶10 F.A.'s family members testified that F.A. was frightened of Defendant. F.A.'s aunt testified that F.A. moved in with her after F.A. moved out of the apartment she and Defendant shared. A police officer testified that he was called to F.A.'s aunt's home, where F.A. was staying, in response to shots fired. F.A.'s aunt testified that later the same day, F.A. had a civil standby to move her belongings from the apartment F.A. shared with Defendant. A crime lab technician examined the shell casings found at F.A.'s aunt's house and determined they matched shell casings found at the scene where F.A. was shot; the shell casings from F.A.'s aunt's house and the scene where F.A. was shot were unique to Defendant's gun. Additionally, F.A.'s father testified that eleven days before

F.A. was shot, she called him to come meet her at a restaurant because Defendant had followed her. F.A.'s father indicated F.A. was "very nervous," upset and was fearful of Defendant because he had "threatened to kill her."

¶11 The jury found Defendant guilty of first degree murder and found it to be a dangerous offense. At sentencing, the court noted that the evidence presented at trial was "overwhelming" and that "the court was firmly convinced that the defendant stalked, terrorized, and intentionally shot [F.A.] seven times, intending to kill her." The trial court considered the evidence presented at trial, a presentence report and letters and statements from F.A.'s family as well as multiple aggravating factors prior to sentencing Defendant to life imprisonment.

DISCUSSION

¶12 Defendant and Defendant's counsel raise various issues on appeal. We discuss each in turn.

Judicial bias

¶13 Defendant requested defense counsel raise the issue that the female judge who presided over Defendant's trial was "likely biased because the victim was also female." A trial judge is presumed to be unbiased. *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997); *State v. Hurley*, 197 Ariz.

400, 404, ¶ 24, 4 P.3d 455, 459 (App. 2000). To rebut the presumption, a party must prove bias or prejudice by a preponderance of the evidence. *Hurley*, 197 Ariz. at 404-05, ¶ 24, 4 P.3d at 459-60. Defendant fails to cite any portion of the record demonstrating any alleged bias by the trial judge. Therefore, Defendant has not met his burden.[4] Additionally, our review of the entire record on appeal demonstrates no indication of judicial bias or prejudice towards Defendant.

Ineffective assistance of counsel

¶14 In defense counsel's opening brief, he notes that Defendant requested he argue that Defendant "was denied the effective assistance of trial counsel" in five ways. As defense counsel correctly points out, this argument is not properly raised on appeal but instead must be raised in a petition for post-conviction relief. *State v. Torres*, 208 Ariz. 340, 345, ¶ 17, 93 P.3d 1056, 1061 (2004). Because no such petition has yet been filed, we do not address these arguments.

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[4] With the exception of one citation to the record for a prosecutorial misconduct argument, neither the opening brief nor the supplemental opening brief provides any citations to the record. By not citing to the record, Defendant has not complied with Arizona Rule of Criminal Procedure 31.13.c.(1)(vi) or Arizona Rule of Civil Appellate Procedure 13(a)6. Because Defendant's brief is not totally deficient, in our discretion, we decide the issues raised on the merits. *See State v. Van Alcorn*, 136 Ariz. 215, 216-17, 665 P.2d 97, 98-99 (App. 1983).

Prosecutorial misconduct

¶15 Defendant makes various allegations of prosecutorial misconduct during trial. We will reverse a conviction for prosecutorial misconduct if "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), *overruled in part on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). Defendant must show that the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

¶16 Defendant provides only one citation to the record. There, the prosecutor comments that he is prosecuting Defendant's case because the prosecutor initially assigned to the case was substituted because he had a conflict. Defendant is essentially complaining that the conflict-free attorney, rather than the conflicted attorney, prosecuted his case. We find no error.

¶17 Defendant asserts that: the prosecutor was suspended and placed on probation; the prosecutor is a "paranoid

individual;" we should consider the prosecutor's alleged "feelings of racism and hate;" and the alleged "lies by the state attorney." Although a disciplinary report for the prosecutor is not contained within the record, we take judicial notice of a summary of the Arizona Supreme Court's review of the allegations as they are public record.[5] *See* Ariz. R. Evid. 201. The disciplinary action against the prosecutor was for behavior in a matter unrelated to Defendant's case. Additionally, a review of the record indicates there were no inappropriate comments made by the prosecutor. Nor were there any objections made by Defendant at any point during trial on the basis of the prosecutor's comments or behavior. We find no error.

No plea was offered

¶18 Defendant requested that defense counsel raise the issue that he was not offered a plea agreement. Criminal defendants have no constitutional right to a plea agreement, and the State is not required to offer one. *State v. Jackson*, 170 Ariz. 89, 91, 821 P.2d 1374, 1376 (App. 1991). In this case, the State did not offer Defendant a plea agreement; however, he had no constitutional right to receive one.

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[5] We note that on December 1, 2009, the Arizona Supreme Court issued a judgment and order against the prosecutor in this case, suspending him for thirty days and placing him on probation after his reinstatement.

Threats by detention officers during trial

¶19 Defendant asked his defense counsel to raise the issue that he was threatened by detention officers during the trial. This appeal from his criminal convictions and sentences, however, is not the proper forum to raise such a claim and thus, we do not address these arguments.

Composition and alleged prejudice of jury

¶20 Defendant indicates that there were "signs of hate and racism" by the jury. Defendant also asked defense counsel to raise the issue that he was dissatisfied with the composition of the jury and that Defendant believes because he is Hispanic, racism contributed to his conviction. The Arizona Supreme Court has held that "unless the record affirmatively shows that [the] defendant was not tried by a fair and impartial jury, then there is no error." *State v. Thomas*, 133 Ariz. 533, 537, 652 P.2d 1380, 1384 (1982) (discussing a defendant's right to an impartial jury in the context of Arizona Rule of Criminal Procedure 18.4.c). Additionally, a defendant is not entitled to a particular jury, only a fair one. *State v. Morris*, 215 Ariz. 324, 334, ¶ 40, 160 P.3d 203, 213 (2007).

¶21 The record of jury selection does not show the empanelment of any racially biased jurors. Jurors eighteen and nineteen were properly dismissed for demonstrating a bias

against Spanish speakers. None of the potential jurors who stated they could not be fair and impartial served on the jury. In this case, Defendant makes no showing that the jury was anything other than fair and impartial. Nor does the record affirmatively support Defendant's contention that he did not receive a fair or impartial jury. *See Thomas*, 133 Ariz. at 537, 652 P.2d at 1384. Accordingly, we find no error.

No tests performed & not permitted to present evidence

¶22 Defendant requested his counsel raise the issue that there was no gunshot residue test performed, which would have conclusively proved that he did not fire the weapon that killed F.A. Additionally, Defendant asked his counsel to raise the issue that he was not permitted to present evidence at his trial. Disagreements over appropriate defense strategy, like a claim of ineffective assistance of counsel, will not be considered on a direct appeal regardless of their merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002); *Henry*, 189 Ariz. at 547, 944 P.2d at 62. Therefore, we will not consider Defendant's assertions that he was not permitted to present evidence or that no gunshot residue test was performed. We note, however, that Defendant did testify at trial. Additionally, Defendant fled the scene of the crime and travelled to Nogales. He was not apprehended and taken into

custody until nearly twenty-four hours after the shooting, which would have made a gunshot residue test difficult to perform in a timely manner.

Sufficiency of the evidence, assertions of innocence and defenses

¶23 Defendant asserts various issues regarding the insufficiency of the evidence and claims "it was all speculation." Defendant also asks us to consider defenses such as "accident," "self-defense," and also "justification." Defendant claims actual innocence and argues that the State failed to prove that he "pulled the trigger" or acted with premeditation. We construe Defendant's arguments as challenging the sufficiency of the evidence presented at trial, and review the facts in the light most favorable to sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189.

¶24 "When reviewing the sufficiency of the evidence, an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." *State v. Barger*, 167 Ariz. 563, 568, 810 P.2d 191, 196 (App. 1990). We will "overturn the trial court's findings only if no substantial evidence supports them." *State v. Rodriguez*, 205 Ariz. 392, 397, ¶ 18, 71 P.3d 919, 924 (App. 2003). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's

guilt beyond a reasonable doubt." *State v. Miles*, 211 Ariz. 475, 481, ¶ 23, 123 P.3d 669, 675 (App. 2005) (quoting *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996)). We will reverse a conviction for insufficiency of evidence "if there is a complete absence of probative facts to support [the jury's] conclusion." *Id.* (internal quotations and citations omitted).

¶25 At trial, Defendant maintained the shooting was an accident and he had acted in self-defense. The medical examiner testified that she had performed an autopsy on F.A. and determined F.A. had been shot eight times. There were shots to F.A.'s arms consistent with defensive wounds, a shot to her pubic region and a fatal shot to the back. There was also eyewitness testimony that someone who had the same hairstyle as Defendant was observed at the scene of the shooting arguing with F.A. and then later fleeing after gunshots were fired. Defendant himself testified that he was involved in a physical altercation with F.A. where shots were fired and that he left the scene.

¶26 The jury could have reasonably concluded, based on the evidence and testimony presented, that Defendant did not act in self-defense. The State is not required to disprove "every conceivable hypothesis of innocence when guilt has been

established by circumstantial evidence." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985). It was for the jury to weigh witness testimony and assess credibility, and we will not substitute our judgment for that of the jury. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). We find there was sufficient evidence to support the jury's verdict.

CONCLUSION

¶27 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶28 The record reflects that Defendant received a fair trial. The court held the appropriate pretrial hearings. The State presented evidence sufficient to allow the jury to convict Defendant of first degree murder. The jury was properly comprised of twelve jurors and two alternates. The court properly instructed the jury on the elements of the offense, the

State's burden of proof beyond a reasonable doubt and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by jury polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing, and imposed a legal sentence on the charge arising out of the crime of which Defendant was convicted.

¶29 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.[6]

[6] Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of his decision.

¶30 For the foregoing reasons, Defendant's conviction and sentence are affirmed.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
DIANE M. JOHNSEN, Judge

/S/
_____
JON W. THOMPSON, Judge