DIVISION ONE
FILED: 08/16/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0464
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
JOHN CHARLES MCCLUSKEY,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201000823

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Craig Soland, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

P O R T L E Y, Judge

¶1 John Charles McCluskey ("Defendant") appeals his convictions and sentences. He argues that the court erred when

it denied his challenges for cause during voir dire and that his consecutive sentence for weapons misconduct was illegal. For the following reasons, we affirm his convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant and two other inmates escaped from the Golden Valley prison facility on the evening of July 30, 2010. Defendant and another escapee found a semi truck stopped along the highway and held the two drivers at gunpoint. A woman joined the escapees, and Defendant drove the truck to Flagstaff. Once they got to a Flagstaff truck stop, the truck drivers were told to lie down and not move or they would be killed. Defendant and his two compatriots left, but Defendant and the woman were arrested a few weeks later at a campground.

¶3 Defendant was indicted for escape in the second degree, a class 5 felony (count 1); two counts of kidnapping, each a class 2 felony (counts 2 and 3); two counts of armed robbery, each a class 2 felony (counts 4 and 5); two counts of aggravated assault, each a class 3 felony (counts 6 and 7); and one count of misconduct involving weapons, a class 4 felony (count 8). Defendant pled not guilty but a jury found him guilty as charged, and found one aggravating factor: the presence of an accomplice. At his sentencing, the court found that Defendant had one historical prior felony conviction, and sentenced him to prison as follows: three years for the escape;

seventeen years for each kidnapping count; seventeen years for each armed robbery count; fourteen years for each aggravated assault count; and six years for the weapons misconduct charge. The court ordered counts 2, 4, and 6 to run concurrently with each other but consecutive to count 1, and ordered counts 3, 5, and 7 to run concurrently with each other but consecutive to counts 2, 4, and 6. Count 8 was ordered to run consecutive to counts 3 and 5. We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033(A) (West 2012).

DISCUSSION

¶4 Defendant argues that the trial court erred when it denied his motion to strike six jurors for cause. He contends that he was "robbed of peremptory strikes" because he was forced to use peremptory strikes on jurors who "should have been excused for cause," which gave the State an unfair advantage during the trial.

¶5 We review the trial court's denial of the challenges for cause for an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, 158, ¶ 28, 181 P.3d 196, 205 (2008) (citations omitted); *State v. Blackman*, 201 Ariz. 527, 533, ¶ 13, 38 P.3d 1192, 1198 (App. 2002) (citation omitted) ("Because the trial court has the opportunity to observe prospective jurors first hand, the trial

judge is in a better position than are appellate judges to assess whether prospective jurors should be allowed to sit.").

¶6 Arizona Rule of Criminal Procedure 18.4(b) allows a party to challenge a juror for cause "[w]hen there is reasonable ground to believe that a juror cannot render a fair and impartial verdict . . . ." Jurors should be removed for cause if they have "serious misgivings about the ability to be fair and impartial," but a court is not required to "remove jurors who ultimately assure the trial court that they can be fair and impartial." *Blackman*, 201 Ariz. at 533, ¶ 12, 38 P.3d at 1198 (citations omitted). Furthermore, our supreme court has held that "[e]ven if a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause, . . . an otherwise valid criminal conviction will not be reversed unless prejudice is shown." *Cruz*, 218 Ariz. at 158, ¶ 28, 181 P.3d at 205 (citation omitted). Accordingly, we focus on whether the rulings resulted in prejudice. *See id.*

¶7 During the jury selection process, Defendant challenged the following individuals for cause: (1) Ms. P., based on her health problems, including her need to use the restroom frequently, and due to statements she made "indicating she had preconceptions about [Defendant's] guilt"; (2) Ms. L., based on her need for a restroom break every fifteen minutes; (3) Mr. L., based on his friendships with corrections officers

and a deputy in the local Sheriff's Department, and because he would "tend to believe police officers as more credible"; (4) Ms. W., based on her "significant ties to law enforcement" and because she thought police were more honest than others; (5) Mr. V., who had worked as a probation officer and a criminal prosecutor and whose son was a police officer in Arizona; and (6) Mr. M., based on the fact that he had a newspaper in court with him and had read about the Defendant that morning, and because he had "close ties to law enforcement." The court denied all six challenges. Defendant then used four of his peremptory challenges to remove four of the six challenged veniremen. Mr. L. and Ms. L. were selected to sit as jurors, but they did not deliberate on Defendant's guilt.

¶8 Despite the challenges for cause, the court determined that the veniremen could be fair and impartial jurors, and that any medical or physical limitations would not impair their ability to serve on the jury and be fair. In fact, the court asked whether anyone was unable to listen to the evidence and the jury instructions and follow the law as set forth by the court. The challenged veniremen told the court that they could be fair and impartial. The court, therefore, did not abuse its discretion by denying the challenges for cause.

¶9 Moreover, despite the fact that Defendant had to use peremptory challenges to remove four of the six challenged

veniremen, reversal is not required "if a fair and impartial jury was ultimately empanelled." *State v. Garza*, 216 Ariz. 56, 65, ¶ 32, 163 P.3d 1006, 1015 (2007) (citing *State v. Hickman*, 205 Ariz. 192, 197, ¶ 22, 68 P.3d 418, 423 (2003)). Even if we assume for the sake of argument that Defendant could not get a fair trial if the six challenged veniremen were seated, the fact remains that he used his strikes to remove four of the six members, and that any possible taint the remaining two may have caused was removed when they were selected to be the alternates and never called to participate in the deliberations.

¶10 Furthermore, after the jury was empanelled, the court provided preliminary jury instructions that directed the jurors to determine the facts from the testimony and evidence produced in court and to assess the credibility of the witnesses. The court explicitly stated that "[y]ou must determine the facts in this case only from the evidence produced in court." During the final jury instructions at the end of the trial, the jurors were told that they had to determine the credibility of the witnesses, were provided with examples of how to evaluate testimony, and were advised to consider "testimony in light of all of the evidence in the case." The court also instructed the jury that they had to determine the facts based on the evidence — the testimony and exhibits — presented in court, and could not be influenced by sympathy or prejudice. We presume the jurors

followed the instructions, *State v. Dann*, 205 Ariz. 557, 570, ¶ 46, 74 P.3d 231, 244 (2003) (citation omitted), and Defendant has not demonstrated any prejudice resulting from the court's denial of his challenges for cause. Accordingly, there is no basis to reverse Defendant's convictions.

¶11 Defendant also argues that the court erred when it ordered his sentence for weapons misconduct to be served consecutively to his kidnapping, armed robbery, and aggravated assault sentences. We disagree.

¶12 We review de novo whether a trial court erred when it imposed consecutive sentences. *State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App. 2006) (citation omitted). Arizona Revised Statutes section 13-116 (West 2012) states that a court cannot order consecutive sentences for the same conduct. In *State v. Gordon*, our supreme court provided the necessary analysis when it stated that we must

> consider[] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge — the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116.

161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989).

¶13 Here, the trial testimony demonstrated that Defendant and his accomplice were armed when they entered the truck.[1] The fact that Defendant had a gun was enough to convict him of misconduct involving weapons because he was a prohibited possessor and was not legally entitled to possess a firearm immediately before the kidnapping, aggravated assault, and armed robbery. *See Urquidez*, 213 Ariz. at 52, ¶ 8, 138 P.3d at 1179 (citations omitted). Additionally, the subsequent kidnapping and armed robbery offenses would still have been committed even if Defendant did not have a weapon, because he drove the truck while his accomplice pointed a gun at the truck drivers. *See State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 169, 177 (1993) (citing *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211) (consecutive sentences are not proscribed "[i]f the remaining evidence satisfies the elements of the other crime[s]"). Accordingly, the consecutive sentence for misconduct involving weapons did not violate § 13-116.

[1] One of the truck drivers testified that "two people entered the truck with guns."

CONCLUSION

¶14 Based on the foregoing, we affirm Defendant's convictions and sentences.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Judge

/s/
_____
LAWRENCE F. WINTHROP, Chief Judge