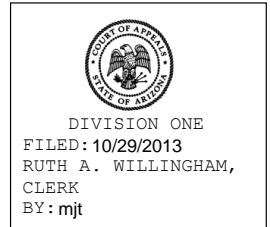


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0628
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT DEALS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-142391-006

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

Law Office of Nicole Farnum Phoenix
By Nicole T. Farnum
Attorneys for Appellant

G O U L D, Judge

¶1 Robert Deals ("Appellant") appeals the trial court's denial of a motion to strike a juror for cause. Appellant argues that because the court denied his motion, he was forced to use a

peremptory strike and, as a result, another allegedly biased juror remained on the jury. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant was charged with one count of conspiracy, one count of illegally conducting an enterprise, one count of possession of marijuana for sale, one count of transportation of marijuana for sale, and one count of money laundering. He was tried in absentia.

¶3 During voir dire, the court questioned the prospective jury panel about whether they would be influenced by Appellant's absence during the trial. Juror 9 indicated that she thought Appellant's absence "kind of shows that he's guilty." The court attempted to rehabilitate Juror 9, and she ultimately stated that she "would try really hard to" determine the facts only from the evidence presented, even though she "already kind of [had her] own opinion on it." Appellant moved to strike Juror 9 for cause. The court denied Appellant's motion, and Appellant subsequently used a peremptory strike to remove Juror 9 from the panel. Appellant thereafter passed the panel for cause.

¶4 Following trial Appellant was found guilty as charged. After Appellant was sentenced, he filed a timely notice of appeal. This Court has jurisdiction under Arizona Constitution

Article VI, Section 9, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

¶5 Appellant argues the court erred in refusing to strike Juror 9 for cause. Appellant contends that he was prejudiced by this error because he was forced to peremptorily strike Juror 9; as a result, he was unable to strike Juror 39, another allegedly biased juror.

¶6 The curative use of a peremptory challenge is subject to harmless error review. *State v. Hickman*, 205 Ariz. 192, 198, ¶ 28, 68 P.3d 418, 424 (2003). Even if a court errs in refusing to strike a biased juror, a defendant must still show he suffered prejudice. *Id.* If the trial jury that is ultimately impaneled consists of fair and impartial jurors, "the fact that the defendant had to use a peremptory challenge to achieve [an impartial jury] does not mean the Sixth Amendment was violated." *United States v. Martinez-Salazar*, 528 U.S. 304, 313, (2000); *State v. Rubio*, 219 Ariz. 177, 179, ¶ 5, 195 P.3d 214, 216 (App. 2008) ("[A] defendant's curative use of a peremptory strike to remove a prospective juror who should have been stricken for cause is subject to harmless error review.").

¶7 Thus, to determine whether Appellant was prejudiced by the court's refusal to strike Juror 9 for cause, we must examine whether Juror 39 was biased. *Rubio*, 219 Ariz. at 179, ¶ 6, 195

P.3d at 216 (stating that a defendant must show that the remaining juror was biased and subject to a challenge for cause).

¶8 Appellant has waived any claim of prejudice because he did not move to strike Juror 39 for cause. See *Rubio*, 219 Ariz. at 180, ¶ 8, 195 P.3d at 217 (“[E]ven if a prospective juror’s answers show he or she cannot be fair and impartial, the defendant waives any error by failing to timely challenge that juror.”); *State v. Bravo*, 131 Ariz. 168, 171, 639 P.2d 358, 361 (App. 1981) (“Even though the answers of a venireman demonstrate that he cannot be fair and impartial, the challenge may be waived.”). While Appellant objected to Juror 9, he passed the rest of the panel for cause, including Juror 39.

¶9 Furthermore, the record does not indicate that Juror 39 was biased. Juror 39’s statements throughout voir dire indicate that he would be fair and impartial. When he was told to disregard the fact Appellant would be absent during trial, he responded, “I’m okay with it.” When asked whether his father’s experience having been arrested would affect his “ability to be fair and impartial in this case,” he answered “No.” Juror 39 did state that he had “a bad opinion of those kind of people” when telling the court that he had worked with an individual he suspected of being a drug dealer. However, when the court stated that he “would have to lay those [opinions] aside and just judge this case based upon the evidence presented in this courtroom,”

Juror 39 responded that he could do so. See, e.g., *State v. Lavers*, 168 Ariz. 376, 390-91, 814 P.2d 333, 347-48 (1991) (upholding trial court's refusal to strike juror who said news reports would haunt his memory but he could decide case based solely on evidence admitted at trial); *State v. Comer*, 165 Ariz. 413, 423-26, 799 P.2d 333, 343-46 (1990) (finding no error in refusing to strike juror who said defendant was probably guilty, but later stated he could try to form a final opinion based on evidence).

¶10 On the record before us, we conclude that Juror 39 was not biased. Therefore, Appellant was not prejudiced by the court's refusal to strike Juror 9 for cause. We conclude Appellant received a trial by a fair and impartial jury. *Martinez-Salazar*, 528 U.S. at 313, ("So long as the jury that sits is impartial . . . the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.").

CONCLUSION

¶11 For the foregoing reasons, Appellant's convictions and sentences are affirmed.

/S/

ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Judge

/S/

DONN KESSLER, Judge