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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PHILIP G. URRY,CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 08-0723
Appellee,	DEPARTMENT E
v.	**MEMORANDUM DECISION**
DONALD LEE CONDRA,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Mohave County

Cause No. CR 2006-0543

The Honorable Steven F. Conn, Judge

AFFIRMED

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

Jeffrey A. James — Flagstaff
Attorney for Appellant

H A L L, Judge

¶1 Donald Lee Condra (defendant) appeals from his convictions and sentences for four counts of forgery, two counts of theft, and one count each of fraudulent schemes and artifices

and computer tampering. He contends two of his pre-trial motions were improperly denied: a motion for change of judge for cause, and a motion to suppress evidence. Defendant also claims the trial court erred in permitting the State to present evidence that he had entered into a consent order with the Arizona Department of Financial Institutions. Finally, defendant argues the trial court improperly excused a juror for cause in the midst of trial. For the reasons that follow, we reject these arguments and therefore affirm.

BACKGROUND

¶2 The trial evidence is as follows.[1] In 2004, the Mohave County Public Works Department (Public Works) hired defendant to serve as a senior engineer technician for the flood control district. Defendant was subsequently delegated the responsibility of processing applications submitted by local developers requesting Letters of Map Revisions (LOMR) from the Federal Emergency Management Agency (FEMA).[2] In this capacity,

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[1] We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

[2] As part of its oversight of a federal flood insurance program, FEMA issues flood insurance rate maps. These maps indicate whether land is located within an area of "special flood hazard" thereby requiring flood insurance for development of the land to proceed. Developers of such property who engineer improvements to the land that lessen the land's susceptibility to flooding may request a change in the property's flood plain designation so that flood insurance is

defendant ensured the applications were properly completed before forwarding them to FEMA along with the requisite fee payable to FEMA.

¶3 In the spring of 2005, T & M Ranching and Development (T & M) submitted to Public Works a LOMR application and two accompanying checks totaling $5,000.00 to be forwarded to FEMA. In February 2006, T & M received the requested LOMR from Public Works. T & M subsequently discovered that the LOMR was forged, and the checks submitted in connection with the LOMR application had been deposited into a bank account held by Expedited Networks, a company defendant owned. Around the same time period, another LOMR applicant, C. David Custom Homes (C. David Homes), learned that the $800.00 check it had submitted to defendant in connection with the LOMR request had been altered to reflect Expedited Networks as the payee and then deposited into defendant's bank account.

¶4 Meanwhile, in January 2006, the Mohave County Planning and Zoning Department (Planning and Zoning), which was located in the same building as—and accessible by—Public Works, discovered three of its computers were missing. D.K., Public Works' computer coordinator, similarly discovered a high-powered

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not required before proceeding with development. A LOMR shows that FEMA has approved a change in a property's flood plain designation. Before forwarding a LOMR application to FEMA, Mohave County must provide a "signature of support" indicating the county's acknowledgement that proper permits have been issued and it otherwise does not object to the requested change.

Dell Precision 450 computer was missing from Public Works. County officials informed local law enforcement of the missing computers. On March 26, 2006, defendant informed Public Works of his resignation effective immediately.

¶5 On March 30, 2006, Sergeant D.C. of the Kingman Police Department and T.F., an investigator with the Mohave County Attorney's Office, attempted to execute a warrant to search for the missing computers at what they believed to be defendant's residence. Informed by defendant's father that defendant did not reside at the location, D.C. and T.F. eventually proceeded to the office of Expedited Mortgage, a mortgage brokerage business defendant had recently established. E.S., defendant's wife and Expedited Mortgage's "branch manager," was working at the office when D.C. and T.F. arrived. D.C. and T.F. informed E.S. they were investigating the possible theft of computers and asked whether they could look at the computers in the office. E.S. responded affirmatively, and informed D.C. and T.F. that the computers "showed up" the previous month. About fifteen minutes after they arrived at the office, D.C. and T.F. spoke with defendant on the phone about the T & M checks and the missing computers.

¶6 Noticing that the computers' serial number tags had been removed, D.C. contacted D.K. and requested she come to the office to identify the computers. D.K. did so and determined

four of the computers at Expedited Mortgage's office were the four computers missing from Public Works and Planning and Zoning. D.K. also determined that the computers' registries had been altered in an apparent attempt to disguise their identities, and Mohave County's emergency management plan software had been deleted from one of the computers.

¶7 Based on the foregoing, the State charged defendant with four counts of forgery, class four felonies in violation of Arizona Revised Statutes (A.R.S) section 13-2002 (2001); two counts of theft, class three felonies in violation of A.R.S. § 13-1802 (2001);[3] one count of fraudulent schemes and artifices, a class two felony in violation of A.R.S. § 13-2310 (2001); and one count of computer tampering, a class two felony in violation of A.R.S. § 13-2316(A)(2) (2001).[4]

¶8 The jury found defendant guilty as charged. The trial court sentenced defendant to concurrent and consecutive mitigated terms that effectively result in an eight-year sentence of imprisonment. Defendant timely appealed, and we

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[3] At the time of the offenses, and as charged by the State, the thefts were class three felonies because the value of the property involved was three thousand dollars or more. The statute currently designates a theft of property valued over three thousand dollars but less than four thousand dollars as a class four felony. A.R.S. § 13-1802(G) (Supp. 2009).

[4] *See* A.R.S. § 13-2316(E) (designating as a class two felony computer tampering pursuant to subsection A, paragraph 2, when the computer system or network tampered with is a critical infrastructure resource).

have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (Supp. 2008).

DISCUSSION

I. Change of Judge

¶9 Before trial commenced, the trial court advised counsel at an omnibus hearing of a possible conflict because the court "knows the victim David Cooley . . . ."[5] Defendant subsequently filed a motion to change judge for cause pursuant to Arizona Rule of Criminal Procedure 10.1. Defendant's motion was based on an allegation that the Honorable Steven Conn would be prejudiced based on Judge Conn's social relationship with C. David Cooley (C. David), the owner of C. David Homes. Alternatively, defendant requested Judge Conn voluntarily recuse himself pursuant to Canons 2 and 3 of the Judicial Code of Conduct.

¶10 Judge Conn refused to recuse himself, and the Honorable James Chavez conducted a hearing on defendant's motion for change of judge for cause. Based on the testimony of C. David and Judge Conn, Judge Chavez denied defendant's motion finding defendant failed to show that Judge Conn had "an interest or prejudice in the case . . . ." Defendant now

[5] In response, the minute entry reflects "Counsel has no objection." The transcript of the omnibus hearing is not in the record.

contends that the failure to disqualify Judge Conn resulted in a trial that was not fair or impartial.[6] We find no abuse of discretion in Judge Chavez' denial of defendant's motion and concur that defendant failed to establish bias or prejudice.[7]

¶11 A defendant is entitled to a trial "presided over by a judge who is completely impartial and free of bias or prejudice." *State v. Neil*, 102 Ariz. 110, 112, 425 P.2d 842, 844 (1967). A defendant "challenging a trial judge's impartiality must overcome a strong presumption that trial judges are free of bias and prejudice. Overcoming this burden means proving a hostile feeling or spirit of ill-will, or undue friendship or favoritism towards one of the litigants." *State v. Cropper*, 205 Ariz. 181, 185, ¶ 22, 68 P.3d 407, 411 (2003) (internal citations and quotations omitted). A defendant needs to show "a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *Id.* (internal citations and quotations omitted).

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[6] As indicative of his purported unfair trial, defendant points to Judge Conn's adverse rulings regarding defendant's motion to suppress, the admissibility of defendant's consent order, and the dismissal of a juror. Unfavorable rulings do not warrant a change of judge under Rule 10.1 unless they "display a deep-seated favoritism or antagonism." *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997).

[7] "The determination of a Rule 10.1 motion lies within the discretion of the trial judge, and [this court] will not interfere absent an affirmative showing of abuse [of discretion]." *State v. Shackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997).

¶12 Here, Judge Conn and C. David testified that they know each other through their mutual membership in the Rotary Club in Kingman. They testified that they frequently sit at the same table (with six others) during the Rotary Club's weekly lunch meetings. Judge Conn also testified that their daughters were very good friends in junior high and high school. The testimony reveals, however, that Judge Conn and C. David never discussed this case, and indeed, Judge Conn stated that he did not know C. David's connection to this case. Finally, Judge Conn testified that he was not biased or prejudiced in a manner that would affect this case.

¶13 Defendant failed to present any facts establishing a bias or prejudice that would have disqualified Judge Conn from hearing his case. Accordingly, the court did not abuse its discretion in denying defendant's motion for change of judge. *Id.* at 186, ¶ 24, 68 P.3d at 412.[8]

II. Motion to Suppress

¶14 Defendant filed a pretrial motion to suppress evidence seized as a result of the search of Expedited Mortgage's office. He argued the warrantless search was unconstitutional because

[8] Because defendant failed to present facts to rebut the presumption that Judge Conn was free of bias and prejudice, we similarly find no error in Judge Conn's failure to recuse himself. *See* Ariz. R. Sup. Ct. 81, commentary to Canon 2 (2004) ("A judge shall avoid all impropriety and appearance of impropriety."); Ariz. R. Sup. Ct. 81, Canon 3(E) (2004) (specifying situations in which judges must recuse themselves).

E.S. did not properly consent, and even if she did, the subsequent search exceeded the scope of her consent. After conducting an evidentiary hearing, the trial court denied the motion. Defendant claims the court abused its discretion in denying the motion because the search of the computers' software and operating systems exceeded the scope of E.S.'s consent, and defendant expressly denied permission for the search. We disagree.

¶15 In reviewing a motion to suppress, we review only the facts presented to the superior court at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We view those facts "in the light most favorable to sustaining" the superior court's decision. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003). We defer to the superior court's determinations of the credibility of the officers and the reasonableness of the inferences they drew. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). However, we review the superior court's legal decisions de novo. *Id.* We will not reverse a superior court's decision on a motion to suppress absent clear and manifest error. *Dean*, 206 Ariz. at 161, ¶ 9, 76 P.3d at 432 (internal quotation omitted).

¶16 A warrantless search is valid if the search is conducted after voluntary consent is given. *State v. Paredes*,

167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991). "The voluntariness of a defendant's consent to search is a question of fact determined from the totality of circumstances." *Id.* (internal citation omitted). It is the State's responsibility to establish by clear and convincing evidence that a defendant's consent was freely and intelligently given. *Id.*

¶17 At the suppression hearing, T.F. testified that, upon his arrival at the Expedited Mortgage office, E.S. informed him that she was defendant's wife and the manager and co-owner with defendant of the company. T.F. stated he informed E.S. he was looking for defendant and investigating forged check documents and missing county computers. T.F. asked E.S. whether she would "mind if we looked at [her] computers and she said no, not at all. We could look. . . . [W]e could go ahead and look and she had nothing to hide." T.F. further testified that E.S. cooperated fully as he, D.C., and D.K. searched the computers, and she never requested they leave. E.S. also did not object when she was informed the search would include accessing the "programs of the computer." Indeed, T.F. stated E.S. either logged on to the computers to give D.K. access or she gave D.K. the necessary password. Upon learning the computers were the missing county computers, T.F. allowed E.S. to retain the equipment so she could retrieve certain data. Informed that the police would then pick up the computers, E.S. did not object.

Indeed, after transferring the data, E.S. unplugged the computers and made them “ready to go” before informing D.C. the next day that the computers could be retrieved. Finally, T.F. testified that when he spoke with defendant on the phone while police were at the office, defendant never objected to searching or taking the computers, and in fact, defendant specifically gave permission to look for receipts showing the computers were purchased from Expedited Networks.

¶18 Defendant, on the other hand, testified at the suppression hearing that he told T.F. on the phone that he could not search the office without a search warrant and that E.S. did not have authority to consent to a search. E.S. testified that she permitted the search because she believed T.F. and D.C. had a search warrant.

¶19 In denying the motion to suppress, the trial court evaluated the testimony from the suppression hearing and essentially found T.F.’s testimony to be more credible. Accepting this finding, as we must, the totality of circumstances regarding E.S.’s consent to search the office—as reflected in T.F.’s testimony—shows E.S. voluntarily and intelligently consented to the search. We therefore reject defendant’s argument that the trial court should have granted the motion to suppress based on defendant’s testimony that he told T.F. not to search the office without a warrant. The trial

court obviously did not find defendant's testimony credible. Similarly unavailing is defendant's argument that the search of the computers' software and internal operating systems exceeded the scope of E.S.'s consent to only "look at" the computers. T.F.'s testimony shows E.S. also consented to an internal search of the computers. On this record, we find no abuse of discretion in denying defendant's motion to suppress.

III. The Consent Order

¶20 On August 19, 2006, defendant consented to the entry of an order by the Arizona Department of Financial Institutions immediately revoking his mortgage broker license and terminating the business of Expedited Mortgage (Consent Order). By signing the Consent Order, defendant agreed to not contest various factual findings and conclusions of law regarding false statements he had made in his license application and application for employment with Mohave County.

¶21 Before trial, the State moved in limine to admit the Consent Order into evidence as an admission by a party opponent pursuant to Arizona Rule of Evidence 801(d)(2). Defendant subsequently moved in limine to exclude the Consent Order on the basis it was irrelevant to the charged offenses in this case and it was unduly prejudicial. *See* Ariz. R. Evid. 401-03. The trial court found that defendant, by initialing each page, manifested an adoption of the facts set forth in the Consent

Order, but nonetheless concluded that evidence of defendant's misrepresentations in his employment application was not relevant to the fraudulent scheme alleged, and determined such evidence was also unduly prejudicial. The trial court held the Consent Decree inadmissible except for the limited purpose of impeaching defendant's trial testimony.

¶22 Defendant now contends that the court abused its discretion in determining the Consent Order constituted an admission by defendant under Arizona Rule of Evidence 801. Defendant's argument presumes the Consent Order was admitted into evidence. The record, however, reflects it was not and defendant does not argue that the trial court erred in ruling the Consent Order was relevant for impeachment purposes. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."). Moreover, we note that on redirect defense counsel questioned defendant about the Consent Order, thereby affording him the opportunity to explain that he did not agree with the findings of fact in the Consent Order and that he executed it only to avoid monetary penalties. Thus, defendant suffered no prejudice from the trial court's determination that the Consent Order was admissible under Rule

801. Accordingly, we will not find reversible error on this basis. *See State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994) (noting that, absent prejudice, an erroneous evidentiary ruling will not be reversed on appeal).

IV. Dismissed Juror

¶23 Finally, defendant asserts the trial court improperly dismissed juror 174603. Defendant apparently is referring to the juror Mr. C. who was dismissed for misconduct in the midst of trial after the court learned he had approached defense counsel during a break in the proceedings and requested a business card.

¶24 Although a defendant in a criminal case is entitled to a fair and impartial jury, he is not entitled to any particular jury. *State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978). If the record does not affirmatively establish that a biased jury was secured, we will affirm. *Id.* Defendant has not directed us to any evidence that the jury that decided his case was not fair or impartial, and our independent review of the record did not disclose any such evidence.

¶25 Moreover, Arizona Rules of Criminal Procedure (Rule) 18.4(b) permits the trial court, on its own initiative, to remove a juror for cause whenever there are reasonable grounds to believe that the juror cannot render a fair and impartial verdict. "There is no time limit, and jurors may be removed

after evidence is presented where there are sufficient jurors to enable the trial to continue. . . . Whether to excuse a juror for cause is within the sound discretion of the trial court." *State v. Evans*, 125 Ariz. 140, 142, 608 P.2d 77, 79 (App. 1980).

¶26 Here, a sufficient number of jurors remained to decide this case after Mr. C. was excused. Also, by contacting defense counsel during the pendency of trial, Mr. C. violated an express order of the trial court. The court could therefore be properly concerned that Mr. C. would not follow other instructions that are designed to ensure the jury acts fairly and impartially in reaching its verdicts. Under these circumstances, we find no abuse in the court's discretion to excuse the juror.[9]

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[9] Defendant also requests we apply the cumulative error doctrine to find he is eligible for a new trial. However, the Arizona Supreme Court has specifically held that cumulative error only applies to cases involving allegations of prosecutorial misconduct. *See, e.g., State v. Hughes*, 193 Ariz. 72, 78-79, ¶ 25, 969 P.2d 1184, 1190-91 (1998) (stating general rule of not recognizing cumulative error with the exception of claims involving prosecutorial misconduct). Defendant raises no issue of prosecutorial misconduct, and we do not have the authority to reverse an opinion of the Arizona Supreme Court. *Myers v. Reeb*, 190 Ariz. 341, 342, 947 P.2d 915, 916 (App. 1997). In any event, because we find no error, we cannot find cumulative error.

CONCLUSION

¶27 Defendant’s convictions and sentences are affirmed.

/s/

PHILIP HALL, Judge

CONCURRING:

/s/

SHELDON H. WEISBERG, Presiding Judge

/s/

JOHN C. GEMMILL, Judge