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
FILED: 03/22/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0072
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
ANGEL DANIEL GONZALEZ, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR2008-1208

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

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

K E S S L E R, Judge

¶1 Angel Daniel Gonzalez ("Gonzalez") appeals his convictions for possession of dangerous drugs and possession of

drug paraphernalia. He argues that the trial court erroneously denied his request to remove two jurors for cause, requiring him to use two of his peremptory strikes to remove those jurors when he would have used those strikes to remove two other jurors. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 In August 2008, Bullhead City police observed Gonzalez enter an apartment that they had under surveillance. A search warrant team entered the apartment and "immediately noticed . . . a white haze," which one officer later identified as methamphetamine smoke. The officers found a usable amount of methamphetamine on Gonzalez.

¶3 Gonzalez was charged with possession of dangerous drugs——methamphetamine——under Arizona Revised Statutes ("A.R.S.") section 13-3407(A)(1) (Supp. 2011),[2] a class 4 felony; possession of drug paraphernalia, A.R.S. § 13-3415(A) (2010), a class 6 felony; and misconduct involving weapons, A.R.S. § 13-3102(A)(4) (Supp. 2011), a class 4 felony.

¶4 During jury selection, Gonzalez sought to remove two jurors for cause. The first juror, R, knew the prosecutor. R

[1] We view "the evidence in the light most favorable to sustaining" the conviction and "resolve all reasonable inferences" against Gonzalez. *See State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

[2] We cite the current version of any statute when no material revisions have occurred since the underlying events.

told the court that she worked as an administrative assistant for the Mohave Area General Narcotics Enforcement Team ("MAGNET") in the same building as the prosecutor and that she interacted with the prosecutor "on a daily basis." When asked whether she trusted the prosecutor, she replied "Yes." On occasion, she would speak to him about cases.

¶5 Because of her job, R also knew the police officers that would testify at trial. The officers worked for MAGNET. R stated that she had formed no opinion about police officers in general. She stated that neither her job nor her contact with law enforcement and the prosecutor would "make it difficult for [her] to sit as a juror."

¶6 The second juror that Gonzalez requested the court remove for cause was M. M's brother was a MAGNET detective in Lake Havasu. M had "a lot of close friends" in law enforcement, and he knew "half the P.D. in Lake Havasu." He also had an uncle that had previously worked in law enforcement in California. He stated that he had a "soft spot" for law enforcement. M did not, however, know any law enforcement officers in the Bullhead City area. As far as he knew, his brother had no connection with Gonzalez's case. When asked whether his "soft spot" would cause him to prefer one party over another, he replied "I don't think it will." Later, when asked whether "anything about [his] brother's work or [his]

relationships with members of the Lake Havasu City Police Department [would] prevent [him] from being fair and impartial," he replied "No."

¶7 The trial court denied Gonzalez's request to remove R and M for cause. The court acknowledged that R knew the prosecutor and the police witnesses. The court also weighed her statement that she works at MAGNET against the prosecutor's statement that "she is not an employee of the county attorney's office." The court determined that R "seems to -- she works at the MAGNET office." Ultimately, it denied the strike because R "said repeatedly that she could be fair and impartial."

¶8 The trial court also denied the request with respect to M. The court took into account M's soft spot for law enforcement, but nevertheless denied the motion because M "also answered that he . . . could be fair and impartial."

¶9 Gonzalez made no further objections regarding jury selection. Gonzalez then used two of his peremptory challenges to remove R and M, and used his four remaining challenges to remove four other jurors. Before opening statements, Gonzalez told the court that had he not used peremptory challenges on R and M, he would have used them on two other jurors (K and O) who were selected for the jury.

¶10 Gonzalez was concerned with Juror K because she had nephews in law enforcement, and she "seemed to speak positively

of them." Juror K informed the court that her relationship with her nephews would not affect her ability to be fair and impartial.

¶11 Gonzalez was concerned with Juror O because she had been a crime victim and her grandson had experienced legal problems and had been arrested numerous times. In the 1990's, Juror O owned a business in Lake Havasu, and "a transient came in and broke up [her] counter area because he was angry." She had informed the court that neither her grandson's legal troubles nor her experience as a crime victim would affect her ability to be fair and impartial.

¶12 The jury found Gonzalez guilty of possession of dangerous drugs and possession of drug paraphernalia. He was acquitted of misconduct involving weapons. The court sentenced Gonzalez to mitigated terms of eight and three years, respectively, to run concurrently. Gonzalez timely appealed his conviction and sentence.

¶13 Gonzalez also filed a motion to vacate the judgment pursuant to Arizona Rule of Criminal Procedure 24.2 based on the trial court's refusal to remove R and M for cause. At that point, R swore in an affidavit that she was "employed by the City of Kingman as a secretary," was "paid, supervised and evaluated by other employees of the City of Kingman," and had "never been employed, paid, supervised or evaluated by the City

of Bullhead City, the Bullhead City Police Department nor the Mohave County Attorney's Office." The trial court denied the motion. Gonzalez did not separately appeal that order.

¶14 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 13-4033(A)(1) (2010).

DISCUSSION

¶15 Gonzalez argues that the trial court erred in denying his request to remove jurors R and M for cause. Because those jurors were not removed for cause, he used two peremptory challenges to remove them. He contends that he would have otherwise used those challenges to remove K and O, whom he claims were not impartial. Because K and O ultimately served on the jury, he argues he was deprived of a fair trial, amounting to reversible error.

¶16 We conclude that the trial court did not err in refusing to strike M for cause, but even assuming it did err with regard to R, the error was harmless because the resulting jury was fair and impartial.

¶17 A juror shall be excused from service when there is "reasonable ground to believe that [the] juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). Because the trial judge sits in the best position to observe a prospective juror's demeanor, *State v. Oliver*, 169 Ariz. 589, 592, 821 P.2d 250, 253 (App. 1991), "[a] trial court's decision

not to excuse a juror for cause will be set aside only for a clear abuse of discretion," *State v. Medina*, 193 Ariz. 504, 511, ¶ 18, 975 P.2d 94, 101 (1999).

¶18 Several standards guide a court's determination of when a juror should be removed for cause. First, persons "biased or prejudiced in favor of or against either of the parties" are statutorily barred from serving as jurors. A.R.S. § 21-211(4) (2002). Likewise disqualified is anyone "interested directly or indirectly in the matter." A.R.S. § 21-211(2). A person "interested directly or indirectly" in the case includes persons with "a desire to see one side prevail in litigation or an alignment with or loyalty to one party or side." *State v. Eddington*, 228 Ariz. 361, 363, ¶ 11, 266 P.3d 1057, 1059 (2011) [hereinafter *Eddington II*].[3]

¶19 Second, "[a] juror's inclination to credit the testimony of police officers more than other witnesses is grounds for dismissing the juror." *State v. Bingham*, 176 Ariz. 146, 147, 859 P.2d 769, 770 (App. 1993).

¶20 Third, having friends or relatives in law enforcement does not automatically make one prejudiced in favor of law enforcement and unable to render a fair verdict. *See State v. Cruz*, 218 Ariz. 149, 158, ¶ 29, 181 P.3d 196, 205 (2008). Nor

[3] Even though *Eddington II* was decided after the trial court in this case made the decision not to strike the jurors for cause, this does not change our analysis.

does the fact that a prospective juror has been the victim of a crime similar to the one the defendant is charged with disqualify him from serving as a juror. *State v. Rose*, 121 Ariz. 131, 139, 589 P.2d 5, 13 (1978). Furthermore, a prospective juror with preconceived notions of a defendant's guilt is not automatically disqualified from serving. *Medina*, 193 Ariz. at 511, ¶ 19, 975 P.2d at 101. "The defendant must show the potential juror is unable to lay aside preconceived notions and render a fair and impartial verdict based on the evidence presented at trial." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). "A juror with preconceived notions may be rehabilitated during voir dire if an ability and willingness to be impartial is demonstrated." *Id.* It is not necessary for the juror to "speak in absolutes." *Oliver*, 169 Ariz. at 592, 821 P.2d at 253 (citation and internal quotation marks omitted). As long as the juror "indicates he 'believes' he can set aside his personal feelings and follow the court's instructions, it is not necessary that he state that he will do so." *Id.* (citation omitted).

¶21 Because Arizona adopts the cure-or-waive rule, a defendant must use his peremptory challenges to remove the alleged interested or biased jurors to be able to challenge the trial court's decision not to remove those jurors for cause on appeal. *State v. Rubio*, 219 Ariz. 177, 181, ¶ 12, 195 P.3d 214,

218 (App. 2008). But even if the defendant satisfies this requirement, no reversible error has occurred if the resulting jury is fair and impartial. *Id.* at 179, ¶ 6, 195 P.3d at 216 (citing *State v. Hickman*, 205 Ariz. 192, 201, ¶ 41, 68 P.3d 418, 427 (2003)).

A. Juror M

¶22 The trial court did not err when it decided not to remove M for cause. The fact that M has a brother and friends in law enforcement does not automatically disqualify him from jury service. *See Cruz*, 218 Ariz. at 158, ¶ 29, 181 P.3d at 205. To the extent that M's ability to render a fair verdict was questionable based on preconceived notions, i.e. his "soft spot" for law enforcement, he was rehabilitated during voir dire.

¶23 When first asked whether his friends and family in law enforcement would affect his ability to be impartial, M replied "I don't think it will." Because speaking in absolutes is not required, this statement alone justified the trial court's decision in this case. *See Oliver*, 169 Ariz. at 592, 821 P.2d at 253. Even if absolute terms were necessary, M met that standard. Further into the jury-selection process, when asked the same question, M replied "No." Thus, deferring to the trial court's ability to judge the credibility of M, we cannot hold

the trial court abused its discretion by deciding not to remove M for cause.

B. Juror R

¶24 A closer question is presented by Juror R because there was evidence she was employed by or worked with MAGNET. In *Eddington II*, our supreme court held that "a peace officer currently employed by the law enforcement agency that investigated the case is an 'interested person' who is disqualified from sitting as a juror." 228 Ariz. at 365, ¶ 18, 266 P.3d at 1061. The court's holding did "not depend on the particular officer's knowledge of witnesses or facts of the case or the officer's belief in his or her ability to be fair and impartial." *Id.* In so holding, the court clarified that it was not overruling *State v. Hill*, 174 Ariz. 313, 848 P.2d 1375 (1993). *Id.* at ¶ 16. In *Hill*, our supreme court held that a police officer may sit on a jury despite the officer's "acquaintance" with the prosecutor, coroner, and the prosecutor's investigator and despite his statement that he presumed investigations were complete and thorough. 174 Ariz. at 319, 848 P.2d at 1381. Although the court in *Hill* recognized that "the impartiality of a potential juror who is personally acquainted with individuals involved in the prosecution is necessarily suspect," *id.*, it held this presumption was rebutted

by the repeated avowals from the juror that he would be fair and impartial, *id.* at 321, 848 P.2d at 1383.

¶25 In *Eddington II*, the court squared its holding with *Hill* based on factual differences. 228 Ariz. 361, ¶ 16, 266 P.3d at 1061. The court found that the juror in *Hill* was a "police officer," but the crime was investigated by "deputies." *Id.* The different terms indicated that they worked for different law enforcement agencies. *Id.* Thus, *Eddington II* interpreted *Hill* as standing for the proposition that "simply being a peace officer, without more, does not disqualify one from jury service in a criminal case." *Id.* However, being a peace officer of the investigating agency automatically precludes the officer from serving on the jury as an "interested person." *Id.* at ¶ 18.

¶26 At the time the trial court denied the proposed strike for cause, R had testified that she was employed by MAGNET. Similar to the peace officer in *Eddington II*, R worked for the same law enforcement agency that investigated the crime. She knew several of the witnesses, interacted with the prosecutor on a daily basis, and occasionally spoke with the prosecutor about cases. R also performed administrative tasks for the

prosecutor. As such she was an interested party and disqualified from serving on the jury.[4]

¶27 Unlike the juror in *Eddington II*, R is not a peace officer. But this does not sufficiently distinguish *Eddington II*. R did not perform any investigative work, but she interacted with the prosecutor on a daily basis. She openly admitted that she trusted the prosecutor. Her trust in the prosecutor and her daily interaction with him indicates "loyalty to one party or side," and this is enough to constitute an "interest" in the outcome of the case. *See Eddington II*, 228 Ariz. 361, ¶ 11, 266 P.3d at 1059.

¶28 *Hill* is not controlling here because the connection between R and the prosecutor is more than the "acquaintance" referred to in *Hill*. This is not a case in which the venireperson was a police officer merely working for a different agency. Here, the evidence shows that R worked for the law enforcement agency that investigated the charged crime.

[4] R's post-trial affidavit that indicates she was employed by the City of Kingman does not change our conclusion. Based on her voir dire testimony, the trial court expressly found that R was employed by MAGNET and although she later claimed she was a City of Kingman employee, she never denied that she was assigned to work with MAGNET. The court never changed its ruling on her being employed by MAGNET and the only evidence before the court at the time it ruled was that she was so employed. Thus, we will assume the trial court erred in not removing R for cause, but we find no prejudice.

¶29 R may have lacked specific knowledge about Gonzalez's case, and she plainly stated that she could be fair and impartial. But these factors do not justify the trial court's decision. *See Eddington II*, 228 Ariz. 361, ¶ 18, 266 P.3d at 1061 ("Our conclusion does not depend on the particular officer's knowledge of witnesses or facts of the case or the officer's belief in his or her ability to be fair and impartial."). "[A]vowals of impartiality . . . do not render a venireperson with a direct or indirect interest in the matter eligible to sit on the jury." *State v. Eddington*, 226 Ariz. 72, 77, ¶ 12, 244 P.3d 76, 81 (App. 2010) [*Eddington I*].

¶30 Accordingly, R's removal was necessary "(1) [to] preserv[e] the right to a fair trial by impartial jurors, (2) [to] ensur[e] that jurors derive their knowledge about the case solely from information presented at trial to the jurors collectively, and (3) [to] protect[] the appearance of fairness, which helps instill public confidence in the judicial system." *Eddington II*, 228 Ariz. 361, ¶ 8, 266 P.3d at 1059 (explaining the goals underlying § 21-211). We therefore conclude the court abused its discretion in refusing to remove R for cause based on her voir dire testimony.

C. The Resulting Jury

¶31 Even though the trial court abused its discretion in refusing to remove R for cause, this alone does not require

reversal. For there to be reversible error, Gonzalez must prove that the resulting jury was not fair and impartial. *See Hickman*, 205 Ariz. at 201, ¶ 41, 68 P.3d at 427. *Hickman* qualified that rule by also indicating that there is no reversible error when the defendant fails to exhaust his peremptory challenges, thereby keeping "an objectionable juror" from being forced upon him. *Id.* We have clarified that "objectionable juror" means one who is biased or incompetent and subject to a challenge for cause. *Rubio*, 219 Ariz. at 179, ¶ 6, 195 P.3d at 216. Gonzalez's argument centers on Jurors K and O. His argument fails because both of these jurors sufficiently demonstrated that they were able to be fair and impartial.

¶32 Juror K's relationship with her nephews——law enforcement officers——does not automatically disqualify her as a juror. *See Cruz*, 218 Ariz. at 158, ¶ 29, 181 P.3d at 205. She unequivocally said that her relationship with them would not affect her ability to be fair and impartial. Thus, Gonzalez's inability to peremptorily remove Juror K did not result in a partial jury.

¶33 Juror O's status as a prior property-crime victim does not make her a partial juror. *See Rose*, 121 Ariz. at 139, 589 P.2d at 13 ("Having been the victim of a crime similar to one with which the defendant is charged does not mandate a venireman's dismissal. Actual prejudice must first be shown.").

Gonzalez's charged offenses were not even similar to the property crime that was carried out against Juror O, and Juror O plainly stated that her past experience as a victim and her grandson's legal problems would "not at all" affect her ability to remain impartial.

¶34 Gonzalez argues that even if the jury was impartial, he was denied due process. As we understand Gonzalez's argument, regardless of whether the new jury was fair and impartial, he contends the scales were tipped against him by requiring him to use peremptory strikes against jurors who should have been stricken for cause, thus effectively giving the State more peremptory strikes than the defendant. However as *Hickman* and *Rubio* make clear, the test for reversible error in this context is whether the defendant was actually prejudiced by the jury having a biased or incompetent juror. *Supra* ¶¶ 21 and 31. Gonzalez's argument fails because he was not actually prejudiced as the empanelled jurors were not biased or incompetent. The error was cured; the scales were not actually tipped. The outcome here reflects that substantial justice has been done. *See* Ariz. Const. art. 6, § 27 ("No cause shall be reversed for technical error . . . when upon the whole case it shall appear that substantial justice has been done."); A.R.S. § 13-3987 (2010) (providing that error in trial proceedings shall

not render the proceeding invalid unless it actually prejudiced the defendant in respect to a substantial right).

¶35 Since jurors K and O, both of whom ultimately served on the jury, were not biased or prejudiced, there is no reversible error.

CONCLUSION

¶36 For the foregoing reasons, we affirm Gonzalez's conviction and sentence.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
ANDREW W. GOULD, Judge