

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

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DEC 13 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0087
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MORRISTON NEAL CARSON,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201002238

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Diane Leigh Hunt

Tucson
Attorneys for Appellee

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By Matthew A. Ritter

Florence
Attorney for Appellant

K E L L Y, Judge.

¶1 After a jury trial, appellant Morriston Carson was convicted of possession of a dangerous drug and possession of drug paraphernalia based on a Casa Grande police officer's discovery of a plastic bag containing methamphetamine on top of Carson's

parked car. The trial court imposed concurrent, “slightly less th[a]n presumptive” terms of imprisonment, the longest of which was four years.

¶2 In the sole claim of error on appeal, Carson contends the trial court erred when it denied his motion to strike for cause three prospective jurors who had indicated they would tend to find law enforcement witnesses more credible than other witnesses. During voir dire, defense counsel asked the prospective jurors if “anybody presumptively, without knowing anything about the testimony, without knowing anything about the persons, just one is law enforcement, one is a defendant, would anybody tend presumptively to believe the law-enforcement officer?” Jurors G., S., and D. generally agreed that they would give a law-enforcement officer’s testimony more credibility as “against another kind of witness.”

¶3 The trial court then addressed each prospective juror individually, asking if he or she could “start at zero and not make any decision about whether [witnesses] are telling the truth until you hear and see the way they testify on the stand”; could “single out each individual witness and judge each of their testimony in exactly the same way”; and could “look at the individual witness, judge their credibility by the exact same standards that you use with any other witness, regardless of whether they have a uniform on” or “are a defendant.” Each of the prospective jurors agreed they could.

¶4 Carson moved to strike G., S., and D. for cause, arguing that they had “expressed directly . . . that they would give presumptive credibility to the testimony of law enforcement” officers. The trial court determined the prospective jurors had been “properly rehabilitated” and had “expressed that they can be fair and impartial and weigh

each witness's credibility in the same way by the same standards." Carson used two of his peremptory strikes to strike G. and S. from the jury, but did not strike D., striking four other prospective jurors instead.

¶5 First, we cannot say the trial court erred in denying Carson's motion to strike the three jurors. As the state points out, a juror who initially shows some bias or partiality may serve on a jury if he or she is properly rehabilitated. A trial judge "may use the voir dire to convince a juror" of his or her responsibility "to put his [or her] opinions aside and weigh the evidence as the law requires," "thereby rehabilitating an initially suspect venire[person]." *State v. Clabourne*, 142 Ariz. 335, 344, 690 P.2d 54, 63 (1984); *see also State v. Martinez*, 196 Ariz. 451, ¶ 28, 999 P.2d 795, 803 (2000). That is exactly what happened here. The court questioned the prospective jurors more closely about their views and their ability to set aside their personal opinions and experience relating to law enforcement personnel and each agreed that he or she could follow the law.

¶6 Moreover, even if each of the jurors had not been properly rehabilitated, reversal is not required. Our supreme court has adopted the rule "requir[ing] a showing of prejudice before a case will be reversed when a defendant uses a peremptory challenge to remove a juror the trial court should have excused for cause." *State v. Hickman*, 205 Ariz. 192, ¶¶ 20-21, 68 P.3d 418, 422 (2003). And, "a defendant is required to use an available peremptory strike to remove an objectionable juror whom the trial court has refused to remove for cause" if he wishes to maintain any error was prejudicial, and thereby preserve his claim for appeal. *State v. Rubio*, 219 Ariz. 177, ¶ 12, 195 P.3d 214,

218 (App. 2008). In this case, Carson did not strike D. from the panel and has therefore waived any challenge to her presence on the jury. *Id.* Furthermore, as to G. and S., Carson must demonstrate that, notwithstanding his use of all available peremptory strikes, he was deprived of a “fair and impartial” jury. *Hickman*, 205 Ariz. 192, ¶ 41, 68 P.3d at 427. Carson has articulated no objection to any of the other jurors who deliberated in his case. Because he therefore has not demonstrated any cognizable prejudice arising from the trial court’s ruling, he is not entitled to relief.

¶7 Carson’s convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge