DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0702
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JOE KANARD JONES, JR., Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Coconino County

Cause No. 2008-1053

The Honorable Mark R. Moran, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
Attorney for Appellant

W I N T H R O P, Judge

¶1 Joe Kanard Jones, Jr. ("Appellant") appeals his conviction for sale of a narcotic drug (cocaine), a class two

felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-3408(A)(7) (2010).[1] He argues that the trial court committed reversible error when it precluded him from impeaching a State's witness, the confidential informant ("the informant") who purchased the cocaine from him, with that witness's prior felony convictions. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[2]

¶2 On December 11, 2008, a grand jury issued an indictment, charging Appellant with two counts of sale of a narcotic drug (Counts I and III), each a class two felony, and two counts of use of a wire or electronic communication in a drug-related transaction (Counts II and IV), each a class four felony. *See* A.R.S. §§ 13-3408(A)(7), -3417 (2010). The charges stemmed from separate alleged incidents occurring on February 7 and 13, 2008, involving the informant, who himself was attempting to work off drug charges by cooperating with the police in a series of controlled purchases from other drug dealers.

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[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

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

¶3 Before trial, Appellant filed a motion to allow him to impeach the informant with the informant's prior convictions under Rule 609(a) of the Arizona Rules of Evidence.[3] Appellant asserted that he had not yet been provided access to the informant's criminal history and "cannot at this time explicitly state which of the witness'[s] convictions are admissible for impeachment purposes under 609(a)." In response, the State filed a disclosure notice indicating that the informant had been convicted on October 10, 1996, of three felony counts of disorderly conduct with a weapon for an incident that occurred on December 28, 1995, and one felony count of a narcotics drug violation for an incident that occurred on May 30, 1996. The State also requested that the court preclude Appellant from impeaching the informant with his prior convictions. As support for its request, the State pointed out that the informant had been released from confinement on his 1996 convictions on February 20, 1999, and argued that the convictions were

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[3] Rule 609(a) provides as follows:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, if the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

therefore inadmissible under Rule 609(b) because more than ten years had elapsed from the date the informant had been released from custody, and the probative value of the prior convictions was outweighed by their prejudicial effect.[4] Appellant replied that the convictions qualified for admission for impeachment purposes under Rule 609(a), and that "the ten year temporal limitation under 609(b) might not apply." Appellant posited that the ten-year time limit of Rule 609(b) might be calculated from the date of the informant's release from confinement (February 20, 1999) until the date he was interviewed by defense counsel (February 20, 2009) regarding his involvement in the charges against Appellant, and, therefore, whether the ten years had run "is literally a question of hours or minutes." Appellant clarified, however, that he did not base his motion on that reasoning:

> The defense does not ask the Court to rule on this motion based on whether [the informant's] testimony falls within a few minutes of the ten year time limit of 609(b). The defense asks this Court to allow [the informant's] felony convictions to be

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[4] Under Rule 609(b),

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

> admitted into evidence as they are probative of the veracity of the information he has provided, probative of his credibility as a witness in this case, and are not clearly inadmissible under Rule 609(b).

¶4 At the July 8, 2009 pretrial conference, counsel presented oral argument regarding their respective positions on Appellant's Rule 609 motion. Defense counsel contended that, although the informant's convictions might fall outside the ten-year limitation period of Rule 609(b), "our argument was that it was so close that it should be allowed and that it shouldn't be a bright line rule." Defense counsel further contended "that the probative value [of the convictions] outweighs the prejudicial value." After taking Appellant's Rule 609 motion under advisement, the trial court denied the motion.

¶5 Appellant's trial began on July 28, 2009. The evidence presented at trial indicated as follows: On February 7, 2008, Appellant sold approximately 4.68 grams of cocaine, a useable amount, to a confidential informant working with the Northern Arizona Metro Narcotics Task Force. On February 13, 2008, Appellant, accompanied by two other individuals, sold approximately 2.62 grams of cocaine, a useable amount, to the same informant. The transactions were captured on videotape and audio recorded by four undercover officers who monitored the interaction between Appellant and the informant. Before each of the sales, the informant and his car were searched by police

officers to ensure he had no money or contraband on his person or in his car. He was given funds to buy the drugs and outfitted with an audio body wire device, then followed by officers to the location for the drug transaction. After the transaction, the officers followed the informant to a secluded location, where he turned over the drugs he had purchased, and he and his car were searched again to ensure he had no other money or contraband.

¶6 The jury found Appellant guilty of Count I (for the February 7 sale) but not guilty of Counts II-IV. After determining that Appellant had one prior felony conviction for enhancement purposes and was on probation at the time of the current offense, the trial court sentenced Appellant to a presumptive term of 9.25 years' incarceration in the Arizona Department of Corrections ("ADOC"), and credited him with 248 days of pre-sentence incarceration.

¶7 We have jurisdiction over Appellant's timely appeal. *See* Ariz. Const. art. 6, § 9; A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), -4033(A)(1) (2010).

ANALYSIS

¶8 Appellant argues that the trial court committed reversible error in determining that he could not impeach the informant with the informant's prior felony convictions. He maintains that he was entitled to do so because (1) his state

and federal constitutional guarantees to confront witnesses "trump the Rules of Evidence," (2) the trial court erred in determining that the ten-year time limit of Rule 609(b) ran up until the time the witness testified, rather than "the time of the events about which testimony is to be given," and (3) even if the trial court properly computed the ten-year time limit, it abused its discretion in determining that the probative value of the felony convictions did not substantially outweigh their prejudicial effect.

¶9 In general, we review for an abuse of discretion the trial court's determination whether to admit prior felony convictions for impeachment purposes under Rule 609. *See State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001); *State v. Williams*, 144 Ariz. 433, 439, 698 P.2d 678, 684 (1985). However, we review questions of law *de novo*. *See State v. Roberson*, 223 Ariz. 580, 582, ¶ 8, 225 P.3d 1156, 1158 (App. 2010).

¶10 In the trial court, Appellant did not raise the claim that his constitutional rights to confront the witnesses against him "trump the Rules of Evidence" or rely on the argument that the ten-year limit of Rule 609(b) stopped running at "the time of the events about which testimony is to be given." Rather, he disavowed any reliance on the ten-year limitation period of Rule 609(b), arguing instead that the rule "shouldn't be a bright

line rule" and the court should consider whether "the probative value [of the convictions] outweighs the prejudicial value."[5] Because Appellant failed to raise and preserve these claims in the trial court, he has waived them, including any constitutional objection, *see State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981), absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-26, 115 P.3d 601, 607-08 (2005). A defendant bears the burden to demonstrate prejudice and may not rely on mere speculation to carry that burden. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶11 After thoroughly reviewing the record, we find no error, much less fundamental, prejudicial error. The trial court's application of Rule 609 to preclude Appellant from impeaching the informant in the manner he desired did not violate the Sixth Amendment of the United States Constitution or Article 2, Section 24, of the Arizona Constitution. *See generally Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (recognizing that "[t]he right to present relevant testimony is

[5] Given Appellant's position in the trial court, he arguably invited any alleged error. "By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error." *Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953); *accord State v. Armstrong*, 208 Ariz. 345, 357 n.7, ¶ 59, 93 P.3d 1061, 1073 n.7 (2004) (stating that the invited error doctrine exists to prevent a party from injecting error into the record and later profiting from that error on appeal).

not without limitation" but is subject to "other legitimate interests in the criminal trial process" (citations omitted)); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988) (noting that the Sixth Amendment does not provide an "absolute right" to unlimited cross-examination); *State v. Gilfillan*, 196 Ariz. 396, 402-03, ¶¶ 19-23, 998 P.2d 1069, 1075-76 (App. 2000) (recognizing that "[t]he Sixth amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system" (citations omitted)).

¶12 Further, even if we were to assume *arguendo* that error occurred and that it was fundamental, Appellant has failed to demonstrate prejudice from that assumed error. At trial, Appellant was able to thoroughly impeach the informant with the fact that the informant had been arrested for the sale of methamphetamine in 2007 and entered agreements to target relatives and friends to avoid prison and probation. The jury acquitted Appellant of three of the four counts alleged – the counts that relied most on the informant's credibility – and convicted him solely of the count in which he was the only person with the informant during the transaction. Further, the transaction was videotaped, audio recorded, and monitored by four police officers, and the informant's vehicle was thoroughly searched both before and after the transaction. Appellant has not demonstrated that prejudice occurred.

¶13 As to Appellant's argument that the ten-year limit of Rule 609(b) stopped running at "the time of the events about which testimony is to be given," we also find no error, much less fundamental, prejudicial error, despite his citation to *State v. Ihnot*, 575 N.W.2d 581, 585 (Minn. 1998), in which the Minnesota Supreme Court applied the date of the charged offense to a Rule 609 time limit involving a defendant.[6] Substantial case law indicates that the ten-year time limit runs at least until the start of trial, and may run until the date upon which the witness is called to testify. *See United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986) (date trial begins); *United States v. Cathey*, 591 F.2d 268, 274 n.13 (5th Cir. 1979) (date trial begins, but recognizing merit in using the date a witness testifies); *Trindle v. Sonat Marine, Inc.*, 697 F. Supp. 879, 881-83 (E.D. Pa. 1988) (date witness testifies; discussing numerous cases); *People v. Naylor*, 864 N.E.2d 718, 723-24 (Ill. App. Ct. 2007) (date trial begins); *Whiteside v. State*, 853 N.E.2d 1021, 1026-28 (Ind. Ct. App. 2006) (date witness testifies); *State v. Munger*, 597 N.W.2d 570, 573 (Minn. Ct. App. 1999) (limiting *Ihnot* to cases in which "the witness whose credibility was subject to impeachment by evidence of a prior conviction was also the defendant charged with a

[6] *See also United States v. Foley*, 683 F.2d 273, 277 (8th Cir. 1982) (appearing to apply the date of the charged offense as the date of termination of the ten-year time limit).

criminal offense") (review denied Aug. 25, 1999); *see also State v. Noble*, 126 Ariz. 41, 43, 612 P.2d 497, 499 (1980) (indicating without deciding that the time limit runs at least until the start of trial). Applying either rule supported by this substantial case law, we conclude that the ten-year time limit for admitting the informant's prior convictions for impeachment purposes had passed.

¶14 In this case, the State filed a notice indicating that the informant had been convicted on October 10, 1996, of three felony counts of disorderly conduct with a weapon for an incident that occurred on December 28, 1995, and one felony count of a narcotics drug violation for an incident that occurred on May 30, 1996. With regard to the disorderly conduct with a weapon charges, the informant was sentenced to nine months in ADOC, and with regard to the narcotics drug violation, he was sentenced to a concurrent term of 2.5 years' incarceration in ADOC. He was released from confinement on these convictions on February 20, 1999. More than ten years later, on June 25, 2009, defense counsel filed the motion requesting that Appellant be allowed to impeach the informant with these prior felony convictions. Trial began on July 28, 2009, and the informant testified on July 30 and 31, 2009. Thus, whether the ten-year time limit ran until the start of trial or until the informant testified, the time for admitting

the informant's prior convictions for impeachment purposes had passed.

¶15 Additionally, we find no abuse of the trial court's discretion in determining that the probative value of the informant's prior felony convictions did not substantially outweigh their prejudicial effect. Rule 609(b) allows for the admission of remote prior convictions "very rarely and only in exceptional circumstances." *Green*, 200 Ariz. at 500, ¶ 20, 29 P.3d at 275 (citation omitted); *accord Blankinship v. Duarte*, 137 Ariz. 217, 220, 669 P.2d 994, 997 (App. 1983) (citation omitted). In this case, as the trial court recognized, the informant's prior convictions did not involve dishonesty or false statements. Further, although the informant admitted at trial that he had sold methamphetamine in 2007, we conclude that the trial court did not clearly abuse its discretion in concluding that Appellant had not shown that his was a rare case presenting "exceptional circumstances" that warranted admission of the informant's remote prior convictions.[7] Accordingly, we find no abuse of the trial court's discretion in its determination that the probative value of the informant's prior

[7] Moreover, even if we were to assume *arguendo* that the trial court abused its discretion, given the record before us, we conclude that the error would be harmless. *See State v. Van Adams*, 194 Ariz. 408, 416, ¶ 23, 984 P.2d 16, 24 (1999) (recognizing that harmless error exists when no reasonable probability exists that the verdict would have been different had an error not been committed (citation omitted)).

convictions did not substantially outweigh their prejudicial effect.

CONCLUSION

¶16 We affirm Appellant's conviction and sentence for sale of a narcotic drug.

_____/s/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
DANIEL A. BARKER, Judge