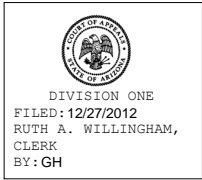


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

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 11-0909
)	
Appellee,)	DEPARTMENT D
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
JON RAGEN MOORE,)	Rule 111, Rules of the
)	Arizona Supreme Court)
Appellant.)	
)	
)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201000701

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General	Phoenix
By Kent E. Cattani, Chief Counsel,	
Criminal Appeals/Capital Litigation Section	
and Liza-Jane Capatos	
Attorneys for Appellee	

Diane S. McCoy, Mohave County Appellate Defender	Kingman
Attorneys for Appellant	

G O U L D, Judge

¶1 Defendant, Jon Ragen Moore, appeals from his convictions after a jury trial on two counts of sale of dangerous drugs (methamphetamine), each a Class 2 felony. The

charges arise from defendant's sale in Lake Havasu City on May 12 and May 13, 2010, of .12 grams and .99 grams of methamphetamine to Antonio Jeffrey Salas, a confidential informant for the Lake Havasu City Police Department.¹ On December 13, 2011, the trial court sentenced defendant to concurrent mitigated 5 year and 6 year sentences of imprisonment, and defendant timely appealed. On appeal, defendant argues: (1) that the trial court erred when it precluded him from impeaching Salas with three prior drug related felony convictions and a misdemeanor conviction for giving false information to government agencies, and (2) that the court erred in admitting improper "character evidence" based on Salas's involvement as an informant in an unrelated criminal case.

¶2 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and 13-4033 (West 2012). For reasons set forth below, we affirm.

¹ We view the evidence in the light most favorable to sustaining the jury's convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

DISCUSSION

Prior Felony and Misdemeanor Convictions

¶3 The charges in this case involve two hand-to-hand drug transactions between Salas and defendant that took place in Salas's van. In the first transaction, Salas contracted to buy \$120 worth of methamphetamine, but defendant only delivered \$20 dollars' worth; in the second transaction, Salas contracted for, and defendant delivered, the full \$120 worth of methamphetamine.

¶4 Both Salas and defendant testified at trial, but while Salas testified that defendant sold him methamphetamine on each occasion, defendant denied any involvement with drugs. Defendant testified that he was trained in motorcycle repair. He maintained that, at their initial meeting, he and Salas only discussed parts for Salas's damaged Yamaha motorcycle and that, on the second occasion, he merely brought Salas a "computer read out" for "rebuild kits" for carburetors for the motorcycle, which cost "\$120 without shipping and handling." Defendant denied receiving any money from Salas. Although the police monitored and photographed the two transactions² from afar and Salas used a concealed audio recording device during each one, the State had no visual record of the actual exchanges to offer

² Although photographs of the first transaction exist, for unknown reasons, the State only introduced photographs of the second transaction at trial.

as evidence at trial. Furthermore, the quality of the tape recording appears to have been problematic. Therefore Salas's credibility as a witness was central to the State's case and, consequently, a hotly contested issue at trial.

¶5 Salas has two prior felony convictions for prohibited possession of a firearm that the State conceded could be used by defendant at trial pursuant to Rule 609 of the Arizona Rules of Evidence to impeach Salas. However, prior to trial the State moved to preclude defendant from using three prior federal felony convictions for "offer[ing]/agree[ing] to distribute [a] controlled substance"³ for impeachment purposes because the convictions were considerably more than ten years old and also because they were not germane to the issue of Salas's "honesty." The State also moved to preclude defendant from using a thirteen-year-old misdemeanor conviction for providing "False Inf[ormation] to Gov[ernment] Agencies" for impeachment purposes.

¶6 Defendant argued that all four of Salas's priors were admissible despite their age and the time limitations of Rule 609. He contended that the drug convictions were probative of the fact that "for his entire life [Salas] [had] been operating in the criminal underworld specifically as it relates to drugs" and therefore "highly relevant to his credibility in front of

³ The convictions dated from 1987 and 1991.

this jury at this trial." The misdemeanor conviction was admissible because it was "highly probative . . . because it goes to [Salas's] truth or honesty and therefore to his credibility." According to Defendant, all of these priors were "significantly probative especially when we are talking about the State having to rely on Mr. Salas's statement to police officers in order to meet its burden in this case."

¶7 After conducting a hearing on the motion, the trial court precluded the admission of Salas's three drug related felonies as well as the false information misdemeanor. Regarding the felonies, the court reasoned, "Rule 609 is very clear . . . that you cannot bring up felony convictions that are more than ten years old absent the defendant being in custody that would make that less than ten years in length." It precluded their use because they were "way remote" and because there was no evidence that defendant had spent any time in custody that would bring the prior felony convictions within the time limits of Rule 609. Regarding the false information misdemeanor prior, the Court stated:

With regard to the false information that is a . . . conviction that the court would normally allow if that misdemeanor conviction was within the statutory time period which is [ten]⁴ years. That is before the [ten]

⁴ While the court actually calls it the "five" year period, it appears that the court misspoke and intended to say "ten" years pursuant to Rule 609. In any case, the error is not relevant to the arguments on appeal as the misdemeanor conviction was

year period. There is nothing that brings it within the [ten] year period, and the court is denying the use of a misdemeanor false information conviction.

The matter proceeded to trial, and defendant impeached Salas only with his two prior convictions for possession of a weapon. The jurors ultimately credited Salas's testimony over defendant's in finding defendant guilty of the felony charges in this case.

¶8 On appeal, defendant argues that the trial court abused its discretion when it precluded him from also using the two drug felonies and the false information for Rule 609 impeachment purposes. Specifically, defendant argues that the trial court incorrectly interpreted the rule as imposing a "per se limitation" on the use of felonies and misdemeanor convictions more than ten years old. We agree.

¶9 When reviewing a trial court's ruling on the admissibility of prior convictions under Rule 609, we "will overturn the trial court's determination only if it proves to have been a clear abuse of discretion." *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001) (citations omitted). A trial court abuses its discretion if it makes an error of law, fails to consider the evidence, makes some other substantial error of law, or if no substantial evidence supports

clearly more than ten years old.

its conclusion. *Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982). We defer to the trial court's factual determinations, but, "to the extent its ultimate ruling is a conclusion of law, we review de novo." *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009). Therefore a trial court "may commit an abuse of discretion if it errs in applying the legal test to its findings." *Id.* Our review of the record leads us to the conclusion that the trial court did so in this case.

¶10 Rule 609 permits a party to impeach a witness with a prior conviction "if (1) it was for a crime 'punishable by death or imprisonment in excess of one year' or an offense that 'involved dishonesty or false statement, regardless of the punishment;' and (2) its probative value outweighs its prejudicial effect." *Green*, 200 Ariz. at 498, ¶ 8, 29 P.3d at 273; Ariz. R. Evid. 609(a). However, we also recognize that "as . . . convictions become older they have increasingly less probative value on credibility." *Id.* (citations omitted). That is why Rule 609(b) permits admission of a remote or stale conviction - i.e., one that is more than ten years old - only if the court determines, "in the interests of justice," that its probative value "substantially outweighs its prejudicial effect." *Green*, 200 Ariz. at 498 & n.2, ¶ 8, 29 P.3d at 273 & n.2.

¶11 On appeal, the State argues that, contrary to defendant's assertion, the trial court's rulings were not based on its determination that the rule imposed a "per se limitation" on convictions older than ten years, but rather on the court's application of the requisite 609 balancing for its ultimate determination that the probative value of the stale convictions here were outweighed by their possible prejudicial effect. The State concedes that "[t]he record is somewhat unclear regarding the trial court's interpretation of Rule 609(b)," but relies on the general proposition that trial courts are "presumed to know and apply the law" to argue that the record here may be viewed as supporting that presumption. See *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997) ("Trial judges are presumed to know the law and to apply it in making their decisions.") As further evidence of this, the State points to the fact that: (1) at the hearing on the motions, defense counsel noted that Rule 609 grants the court the discretion to admit prior convictions that are older than ten years "if the court . . . decides they are substantially probative and substantially outweigh the potential prejudice to the witness," and (2) the prosecutor also acknowledged that the court had discretion when it argued "there is no reason for the court to use its discretion" because the felony priors were "very old" and did not involve dishonesty. Because the court "did not take issue with defense counsel's

accurate statement of the law" at the hearing, the State presumes that the trial court applied the proper legal standard even though it did not explicitly say so. Our reading of the record leaves us unpersuaded by the State's argument.

¶12 Despite the references to the court's discretionary authority at the hearing and in the parties' motions, the trial court seems to have focused on the time limitations of Rule 609 in reaching its decision to preclude. For example, it stated at the outset of the hearing,

I read 609 as pretty black and white. If the defendant had these prior convictions it would be pretty clear that I wouldn't be allowing the State to use them to impeach him if he were to testify only the ones that fall within the time limits.

When the court stated its reasons for its rulings, in particular its ruling on the false information conviction which it otherwise would have admitted, it made no mention of any balancing considerations, but clearly based its decision to exclude on the time limits of Rule 609. While the record is unclear as to the court's interpretation of Rule 609(b), it is clear that the trial court explicitly relied on the time limitation of the Rule to exclude the older priors. Although we will infer the necessary findings to affirm a trial court, we will do so only if the implied findings do not conflict with the court's express findings. *Zamora*, 220 Ariz. 67, ¶ 7, 202 P.3d at 532 (citations omitted).

¶13 We find nothing in the record that supports the State's "presumption" argument. Sufficient evidence convinces us that the trial court misinterpreted Rule 609's time limits as exclusively curtailing its admission of the priors. *Grant*, 133 Ariz. at 455-56, 652 P.2d at 528-29. See also *State v. Chapple*, 135 Ariz. 281, 297, n. 18, 660 P.2d 1208, 1224, n.18, (1983) (A court abuses its discretion if the reasons given for its actions are "legally incorrect.")

¶14 However, while the trial court may have erred in precluding defendant's use of the additional priors, our analysis does not stop here. We will not reverse a conviction for evidentiary error if we can determine that the error was harmless. *State v. Van Adams*, 194 Ariz. 408, 416, ¶ 23, 984 P.2d 16, 24 (1999). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Our review of the record convinces us that the error was harmless in this case.

¶15 Testimony at trial established that Salas earned his entire living by his work as a confidential informant and that he was paid \$200 each time he set up a buy, but only if he was successful and returned with drugs. Defendant's defense at trial was that, Salas, a known drug user and felon, was

successful as a confidential informant because he was a skilled "con man" who knew how to manipulate individuals to effectuate his controlled buys and earn his living. Defendant suggested that, in his case, Salas duped the police into paying him for two successful buys by using drugs that Salas already possessed.

¶16 Clearly Salas's prior felony convictions for attempting/offering to distribute a controlled substance, as well as his conviction for false reporting to a government agency would have been relevant to the defendant's theory and to his impeachment of Salas's credibility. Nonetheless, the record establishes that defendant was able to fully impeach Salas at trial and put forth his defense theory without evidence of Salas's older priors. Salas testified that he had two prior federal felony convictions from 1998 and 2008 that involved being a felon in possession of a weapon; that prior to 2005 he used methamphetamines in "a variety of ways," including injecting, smoking and snorting; that he used methamphetamines on two occasions while he was an informant to prove that he "wasn't a narc;" that he went to prison in 1997; that he drank and gambled while he worked as an informant; that his job is to deceive people and appear to be something that he is not; that he was never tested for drug use and declined to take a drug test while working as an informant; that his nickname in prison was "Machiavelli;" that while acting as an informant he had also

twice bought drugs in "uncontrolled settings;" and that his sole source of income to support himself and his pregnant girlfriend came from his confidential informant work. Defense counsel used all of this information to argue in closing that defendant was "set up" by Salas, "a convicted felon, professional liar who would do whatever it takes to make some money" and who had "the means, the motive, and the opportunity to pull it off."

¶17 The evidence at trial was that the two buys in this case were both visually monitored by the Lake Havasu police; that they searched Salas and his van, both before and after each buy, to make sure that he had no other drugs on him or money other than the bills they provided him for the buy; and that the officers met with Salas immediately after each buy and searched him and his vehicle again, impounding the drugs he had bought. Salas was provided with an audio recording device that he employed to record each transaction, and the tapes⁵ were played at trial for the jury. Defendant conceded that his voice was on the tape, and the tape contains one discussion of "20 and rock" and a second conversation with defendant asking for "\$120." Given this evidence and the fact that defendant was able to

⁵ The tapes are not a part of the record on appeal, therefore we must assume that they support the jury's verdicts. See *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) (matters not included in the record on appeal are presumed to support the action of the trial court).

impeach Salas with his prior drug use and weapon felonies, we are convinced, beyond a reasonable doubt, that any error the trial court made in precluding defendant's use of Salas's older conviction was harmless in this case.⁶

Improper Character Evidence

¶18 During his cross-examination of Salas, defense counsel elicited the fact that, in addition to earning money in exchange for his services to police, Salas once served as an informant to "work off" some charges he had. Salas testified that the occasion was "[t]he Kiplyn Davis murder case where a 13 year old girl was raped and murdered by five guys, yes." On redirect, the prosecutor clarified that that occasion was before Salas started working for Lake Havasu police, for whom he worked "strictly for payment." The following exchange then took place between the prosecutor and Salas:

[Pros.]: [W]as this first case that you worked as a confidential informant was it this Kiplyn Davis case?

[Salas]: Yeah, it was the Kiplyn Davis murder case out of Spanish Fork, Utah.

[Pros.]: And that's the case that you were working off certain charges?

⁶ Although defendant cites the Confrontation Clause in his argument heading, defendant does not argue this on appeal, but focuses his argument on the trial court's misinterpretation of Rule 609. We therefore need not address this on appeal. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (opening briefs must present significant arguments, setting forth appellant's position on issues on appeal, and failure to argue a claim usually constitutes waiver and abandonment).

[Salas]: That is the only case that I worked on that I actually worked off charges.

[Pros.]: And briefly what - - how is it you became an informant in that case?

[Defense Counsel]: Objection, Your Honor, relevance.

[The Court]: No, I think that was brought up during your cross-examination. The objection is overruled.

[Salas]: I was placed in a holding facility and one of the defendants that actually participated in the murder of this girl started speaking to me. Then I was asked by the FBI to come forward to go in front of the grand jury and they got their five convictions on the murder of Kiplyn Davis, the murder and rape of Kiplyn Davis.

[Defense Counsel]: Objection, Your Honor. May we approach?

[The Court]: Overruled.

[Pros.]: I have no further questions, Your Honor.

¶19 On appeal, defendant argues that the trial court's failure to sustain his objections permitted the State to provide improper Rule 608 character evidence about an unrelated criminal case that was not relevant to truthfulness but served only to paint Salas "in a falsely positive light." He claims the evidence caused him "undue prejudice" because it "improperly bolstered [Salas's] credibility" as the State's main witness with the implication that Salas's "information . . . led to convictions for a heinous crime."

¶20 Defendant did not raise his Rule 608 character evidence objection before the trial court, but only objected to the testimony's "relevance." Objection to admission of evidence on one ground will not preserve other issues relating to admission on other grounds. *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). Defendant has therefore forfeited his right to obtain relief on this argument on appeal unless he can show that fundamental error occurred. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶21 Fundamental error is "error going to the foundation of the case, error that takes from defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* Furthermore, the burden rests squarely with defendant to "establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

¶22 Any error that occurred in the admission of the additional statements is not fundamental and defendant cannot prove that he was prejudiced by it.⁷ *Id.* First, Salas's additional description of how he became an informant is no more damaging than his initial testimony about the actual nature of

⁷ We do not reach the State's argument that any error was "invited error" because we affirm on the ground that any error was not prejudicial. Thus, even assuming without deciding that the trial court was wrong about Defendant "opening the door," we would still affirm.

the murder case that defendant elicited during cross examination. Second, the record shows that the State did not in any way attempt to use the testimony to bolster Salas's credibility as an informant for law enforcement or to paint Salas in a "positive light." Finally, Salas's testimony about his role in the murder case is no more self serving and, arguably, less "bolstering" regarding his credibility, than the following testimony that defense counsel also elicited during cross examination:

[Defense Counsel]: Mr. Salas, you don't like drug dealers, do you?

[Salas]: No.

[Defense Counsel]: You would say that you are hostile towards them?

[Salas]: I don't know if hostile is the word.

[Defense Counsel]: You have used that word though before?

[Salas]: I don't recall in the way you are putting it if I have.

[Defense Counsel]: Let's say you are prejudiced towards drugs dealers.

[Salas]: I don't like people that give drugs to kids and spread them through the community.

¶23 Our review of the record convinces us beyond a reasonable doubt that any error that occurred in the admission of the rebuttal testimony did not affect the verdicts in this

case. *Bible*, 175 Ariz. at 588, 858 P.2d 1191. Reversal on this basis is not warranted.

CONCLUSION

¶24 For the foregoing reasons, we affirm defendant's convictions and sentences.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Presiding Judge

/S/

DONN KESSLER, Judge