**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: 07/28/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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

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| STATE OF ARIZONA, | 1 CA-CR 10-0506 |
| Appellee, | DEPARTMENT B |
| v. | **MEMORANDUM DECISION** |
| JOSHUA LEE SPITERI, | (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |
| Appellant. | |

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR820090387

The Honorable Tina R. Ainley, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

Law Office of Nicole Farnum — Phoenix
By Nicole T. Farnum
Attorney for Appellant

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**S W A N N**, Judge

**¶1** Joshua Lee Spiteri ("Appellant") appeals his convictions and sentences for possession of dangerous drugs and

possession of drug paraphernalia, claiming he was improperly impeached with his foreign convictions, his sentences were improperly enhanced, and that the trial court violated his right to confrontation. For the reasons that follow, we affirm.

*FACTS AND PROCEDURAL HISTORY*[1]

**¶2** In August 2009, Cottonwood Police Sergeant Darren Harper learned that Appellant might be in possession of illegal drugs and that his vehicle was uninsured. Harper and other officers believed the lack of insurance gave them a reason to stop Appellant's vehicle, after which they could have a drug-detection dog conduct a free-air sniff of the vehicle to establish probable cause to search it. When Appellant's vehicle was later stopped, the drug-detection dog alerted on the vehicle and officers searched it. The search revealed methamphetamine and paraphernalia used for the consumption of methamphetamine. Appellant was arrested.

**¶3** Appellant was indicted on, *inter alia,* drug-related charges. The state amended the indictment to allege Appellant was convicted in California in 2007 for theft and second-degree burglary, and notified Appellant that it intended to use those convictions to impeach him during trial. *See* Ariz. R. Evid.

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

609. The parties stipulated to use sanitized versions of those convictions that omitted the nature of the offenses. The state later amended its Rule 609 notice to allege Appellant's 2006 conviction in California for possession of a controlled substance (methamphetamine), which the state intended to sanitize unless Appellant "open[ed] the door" regarding the nature of the conviction. Appellant filed no response to the amended motion and raised no objection at oral argument; the trial court granted the motion.

**¶4** During a mid-trial hearing on a motion to dismiss, Appellant testified that he had three prior felony convictions. At trial, Appellant more specifically testified that he had three prior felony convictions in California.

**¶5** A jury found Appellant guilty of possession of dangerous drugs (methamphetamine) and possession of drug paraphernalia (methamphetamine).[2] Appellant was sentenced to concurrent terms of five years' imprisonment for possession of dangerous drugs and 1.5 years' imprisonment for possession of drug paraphernalia.

**¶6** Appellant timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A), 13-4031 and -4033.

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[2] Appellant does not contest the sufficiency of the evidence to support either conviction.

## *DISCUSSION*

¶7 Appellant asserts that the trial court erred by allowing his foreign convictions to be used for impeachment purposes, improperly enhancing his sentences, and violating his right to confrontation.

### *I. CALIFORNIA CONVICTIONS*

¶8 Appellant contends it was improper to impeach him with (1) the burglary and theft convictions because they were not felonies under Arizona law; (2) the possession of methamphetamine conviction because it was the same offense as one of the charged offenses; and (3) the possession of methamphetamine conviction because the offense was not punishable by more than one year of imprisonment.

¶9 Appellant raised none of these issues below. A failure to raise an issue at trial waives all but fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). Therefore, in each instance we review only for fundamental error. "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even once fundamental error has

been established, a defendant must still demonstrate the error was prejudicial. *Id.* at ¶ 26.

A. The Prior Convictions Were Properly Considered Even Though They Might Not Have Been Felonies in Arizona.

**¶10** Appellant contends that impeachment with a foreign conviction pursuant to Rule 609 is permissible only if the conviction was for an offense that would be a felony in Arizona. He asserts error because the commercial burglary and theft convictions would not be felonies in Arizona.[3] We find no error, fundamental or otherwise.

**¶11** Rule 609 provides in relevant part that a witness may be impeached with a foreign conviction if the crime was punishable by "imprisonment in excess of one year *under the law under which the witness was convicted*[.]" (Emphasis added.) *See also State v. Hatch*, 225 Ariz. 409, 411, ¶ 8, 239 P.3d 432, 434 (App. 2010).

**¶12** There is no requirement that the foreign conviction be for an offense that would be a felony under Arizona law. The single case Appellant relies upon, *State v. Clough*, is inapposite. *Clough* dealt with sentence enhancement pursuant to the former A.R.S. § 13-604(I)(1989), which provided that a foreign conviction may be considered as a prior felony conviction for purposes of sentence enhancement if the foreign

[3] Appellant does not contest the California offenses were felonies.

offense was a felony under Arizona law. 171 Ariz. 217, 218, 829 P.2d 1263, 1264 (App. 1992). Nothing in *Clough* suggests that a witness may be impeached with a foreign conviction pursuant to Rule 609 *only* if the foreign offense would be a felony in Arizona, and nothing in *Clough* suggests that such a policy should be adopted.

B. Prior Conviction for Same Offense

**¶13** Appellant asserts that he was unfairly prejudiced when the state revealed to the jury that he had a prior conviction for possession of methamphetamine -- the same offense for which he was currently being tried. Appellant further contends that the subsequent jury instruction was insufficient to cure any error. Again, because Appellant raised no objection below, we review only for fundamental error.[4]

**¶14** Here, the court and counsel agreed before trial that the state could impeach Appellant with his California convictions, but that they would be sanitized. On cross-examination, the state asked Appellant if he had been convicted in California "of a felony that was committed on August 26,

[4] Appellant titles this issue "Impeachment of a defendant with a conviction for the same offense that he is currently on trial for is unduly prejudicial." Appellant does not, however, actually argue that a defendant can never be impeached with a prior conviction for the same offense, but only that the nature of the prior offense should not have been revealed. Therefore, we do not address whether a defendant can never be impeached with a prior conviction for the same offense for which the defendant is being tried.

2006" in a specific cause number and on a specific date. Appellant answered, "I don't know cause numbers. If you could say what the charge was, I could affirm that, yes." When the prosecutor informed Appellant that the charge was for possession of methamphetamine, Appellant did not object; instead he responded, "yes." The prosecutor then asked Appellant about two other California convictions and referenced only the dates of the offenses and convictions, cause numbers and the courts of conviction. Based on that information, Appellant confirmed he had been convicted of those felonies. At the conclusion of trial, the court limited the jury's consideration of the California convictions, instructing the jurors:

> You have heard evidence that defendant has previously been convicted of criminal offense(s). You may consider this evidence as it relates to one element of the crime charged or as it may affect a defendant's believability as a witness. You must not consider prior conviction(s) as evidence of guilt of the crime for which the defendant is now on trial. In other words, you must not consider the defendant as "guilty" simply because he has been previously convicted of criminal offenses(s).

**¶15** Evidence of a prior conviction for an offense that is similar to the charged offense should be admitted "sparingly" when offered for purposes of impeachment. *State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995). Despite Appellant's ill-advised request for the prosecutor to identify the offense

in open court, the prosecutor could have responded without also informing the jury that Appellant was convicted of possession of methamphetamine, such as by showing Appellant a document which identified the offense. Even so, we find Appellant was not prejudiced such that he was denied a fair trial because the jurors were expressly told that they could not consider the prior convictions as evidence of guilt, and that they could not find Appellant guilty simply because of them. *See State v. Bible,* 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993) ("To be fundamental, the error 'must be clear, egregious, and curable only via a new trial.'"). "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

**¶16** But Appellant further contends that the specific language of the jury instruction -- allowing jurors to consider evidence of Appellant's prior convictions as they relate "*to one element of the crime charged* or as it may affect a defendant's believability as a witness" -- misled jurors to believe his prior methamphetamine conviction could be used as evidence of guilt on his current charges.[5] (Emphasis added). We agree with

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[5] The record does not reveal why the instruction included the language regarding how the jury could consider the evidence "as it relates to one element of the crime charged[.]" Neither party requested this specific instruction. Appellant, however, did request Standard Criminal Instruction 26A regarding evidence of other acts. Standard Criminal Instruction 26A follows the

Appellant that the italicized language should not have been included in the instructions in this type of case.[6] But because Appellant failed to raise this issue below, we review only for fundamental error and find none. Appellant's timely objection below would have given the trial court the opportunity to edit the instruction and eliminate any prospect for confusion. *See State v. Davis,* 226 Ariz. 97, 100, ¶ 12, 244 P.3d 101, 104 (App. 2010) ("The purpose behind the more restrictive fundamental error standard of review is to encourage defendants to present their objections in a timely fashion at trial, when the alleged error may still be corrected, and to discourage defendants from reserving a curable trial error as a 'hole card' to be played in the event they are dissatisfied with the results of their proceedings."). While the language at issue was improper in this case, we find no prejudice because the remaining unambiguous language of the instruction made it clear that the jury could not consider any of Appellant's prior convictions as evidence of guilt.

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language of Ariz. R. Evid. 404(b) and provides that evidence of other acts may be considered to establish motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident. Rev. Ariz. Jury Instr. ("RAJI") Stand. Crim. 26A. Appellant did not object below to the court's failure to use the language found in RAJI (Criminal) 26A.

[6] Certain types of cases that involve a predicate offense as an element might properly involve such an instruction.

C. <u>Prior Conviction not Punishable by More Than One Year of Imprisonment</u>

**¶17** As noted above, Rule 609 provides in relevant part that a witness may be impeached with a prior conviction for a crime punishable by imprisonment in excess of one year. As the final impeachment issue, Appellant contends he could not be impeached with his prior California conviction for possession of methamphetamine because it was not punishable by more than one year of imprisonment. Appellant asserts that because his California conviction for possession of methamphetamine was a "Proposition 36" case, probation was mandatory and he could not be sentenced to imprisonment for a term in excess of one year even if probation were revoked. Once again, because Appellant raised no objection below, we review only for fundamental error.

**¶18** Appellant was convicted of unauthorized possession of methamphetamine pursuant to California Health and Safety Code § 11377(a), which provides that a conviction pursuant to that subsection shall be punished by imprisonment for a period of not more than one year in either the county jail or state prison. But California Penal Code § 1210.1 provides, "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation." Section 1210.01 is commonly known as "Proposition 36." *Gardner v. Schwarzenegger*,

101 Cal. Rptr. 3d 229, 231-32 (Cal. Ct. App. 2009). A term of probation imposed pursuant to Proposition 36 can be revoked and the defendant incarcerated without regard to the provisions of that section. Cal. Penal Code § 1210.01(f)(1); *Gardner, 101 Cal. Rptr. 3d* at 236-37. Appellant argues, however, that even if probation is revoked, the maximum sentence permitted by section 11377(a) is one year.

**¶19** The state acknowledges Appellant's conviction for possession of methamphetamine was a Proposition 36 case. The state argues, however, that Appellant faced a maximum sentence of three years' imprisonment if his probation were revoked. The only authority cited by the state to support this claim is Appellant's California plea agreement. A handwritten provision of the agreement indicates Appellant faced a maximum penalty of three years' imprisonment. The agreement, however, does not identify any statutes which would indicate why Appellant was subject to a sentence of three years despite the language of section 11377(a), nor does the agreement otherwise indicate how a sentence of three years was possible.

**¶20** In the determination of whether an offense is punishable by more than one year of imprisonment for purposes of Rule 609, the question is whether imprisonment in excess of one year is possible. *State v. Hatch*, 225 Ariz. 409, 412, ¶ 13, 239 P.3d 432, 435 (App. 2010). "Rule 609(a) defines crimes by their

possible, rather than actual, punishments." *Id*. The parties do not adequately explain why a sentence in excess of one year was or was not possible. The state does not identify any California statutes which would permit the imposition of a three-year sentence upon the revocation of probation, nor does the state otherwise explain how a sentence of three years was possible; the state merely cites the plea agreement. In his reply brief, Appellant does not address the state's argument regarding the availability of a three-year sentence, nor does Appellant explain why the provisions of his plea agreement were incorrect. Neither party addresses the applicability of California Penal Code § 667 regarding the imposition of enhanced sentences for "habitual criminals" or whether Appellant's prior convictions made him subject to those or any other enhancement provisions. Finally, the record on appeal is not sufficient to permit us to make an independent determination of whether Appellant faced a sentence in excess of one year of imprisonment for possession of methamphetamine if probation were revoked.

**¶21** The defendant bears the burden of proof in a review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Appellant has failed to prove that despite the language of his plea agreement, he was not exposed to a sentence of more than one year of imprisonment if his probation were revoked. Therefore, Appellant has failed to establish he could

not be impeached with his conviction for possession of methamphetamine. Further, even if Appellant had established he was not exposed to a sentence in excess of one year of imprisonment, he has failed to establish that he suffered prejudice to such an extent that he was denied a fair trial. Appellant was impeached with two other prior felony convictions. To inform the jury Appellant had three rather than two prior convictions, the third of which was punishable by one day less than would ordinarily be necessary to impeach with that offense pursuant to Rule 609, did not tip the scales to such an extent that Appellant was denied a fair trial. *See State v. Jones*, 185 Ariz. 471, 485-86, 917 P.2d 200, 214-15 (1996) (impeachment pursuant to Rule 609 with misdemeanor offenses that did not involve dishonesty or false statements was harmless error in light of proper impeachment with two prior felony convictions).

*II. SENTENCE ENHANCEMENT*

**¶22** The range of sentence Appellant faced for each offense was enhanced pursuant to A.R.S. § 13-708(C). This section provides in relevant part that a person who commits a felony while on release for another felony conviction shall be sentenced to a term of not less than the presumptive sentence. A.R.S. § 13-708(C)(2009). If the defendant was on release for a foreign conviction, the foreign conviction must have been for an offense that would be a felony under Arizona law. *State v.*

*Weible*, 142 Ariz. 113, 118, 688 P.2d 1005, 1010 (1984) (interpreting the predecessor to A.R.S. § 13-708(C), A.R.S. § 13-604.01(B)).

**¶23** At the time he committed the instant offenses, Appellant was on probation for commercial burglary and theft in California. For unknown reasons, the trial court found A.R.S. § 13-708(C) was applicable even though the court also found the California offenses of commercial burglary and theft would not be felonies under Arizona law.[7] Appellant now argues that because the court had already found the two California offenses would not be felonies under Arizona law, it erred when it used those felonies to enhance his sentences pursuant to A.R.S. § 13-708(C). Because Appellant failed to object below, we review only for fundamental error.

**¶24** We need not address whether the California convictions for burglary and/or theft would have been felony offenses under Arizona law because Appellant has failed to establish he suffered any prejudice. The court found aggravated terms of imprisonment were appropriate for both counts because Appellant's criminal history was an aggravating factor that

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[7] The trial court did not explain why it found the offenses would not be felonies under Arizona law, other than to state that the elements of the California offenses did not match the elements of the Arizona offenses. The court made this determination in the context of whether the California offenses could be considered as historical prior felony convictions, not whether they could be used to enhance pursuant to A.R.S. § 13-708(C).

outweighed the mitigating factors. The court imposed an aggravated term of five years' imprisonment for possession of dangerous drugs -- six months more than the presumptive sentence for a class 4 felony for a category two (one historical prior felony conviction) repetitive offender. *See* A.R.S. § 13-703(B)(2) and (I)(2009). The court stated its intention to impose a concurrent, aggravated sentence for possession of drug paraphernalia as well, and in fact identified the sentence imposed as an aggravated sentence, but mistakenly imposed a *mitigated* term of 1.5 years' imprisonment -- three months less than the presumptive sentence for a class 6 felony for a category two repetitive offender. *Id.*[8] Despite this error by the court, there is nothing in the record to suggest the trial court considered the imposition of anything other than aggravated sentences for either count. Therefore, any error in the application of the enhancement provisions of A.R.S. § 13-

[8] Despite the trial court's stated intention to impose an aggravated sentence for possession of drug paraphernalia, neither party pointed out the court's error at sentencing. Further, because the State did not cross-appeal, we will not correct the sentence or otherwise address whether the court imposed an improperly lenient sentence. "[W]e will not correct sentencing errors that benefit a defendant, in the context of his own appeal, absent a proper appeal or cross-appeal by the state." *State v. Kinslow,* 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990). *See also State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990). We also note that Appellant has completed his sentence for possession of drug paraphernalia.

708(C) to make the presumptive sentences the minimum sentences available would be harmless.

*III. THE HISTORICAL PRIOR FELONY CONVICTION*

**¶25** Appellant next argues the trial court erred when it found that his California conviction for possession of methamphetamine was a historical prior felony conviction for sentencing purposes. Appellant's sole argument in this regard is that while he was initially convicted of a felony, the offense was later reduced to a misdemeanor.[9] Therefore, we address only whether the trial court erred when it found the evidence was insufficient to establish that the offense had been reduced to a misdemeanor.

**¶26** Appellant argued below that the conviction for possession of methamphetamine had been reduced to a misdemeanor and, therefore, could not be considered as a prior felony conviction. Appellant, however, conceded he had no court order to that effect. As support for his argument, Appellant was only able to provide the court with a computer printout from an unknown source and dated August 11, 2009, which contained the notation "CONV STATUS: MISDEMEANOR." In response, the state provided the trial court with documents which showed Appellant's term of probation had been terminated as unsuccessful. The

[9] Appellant has never argued that the California felony offense of possession of methamphetamine would not otherwise constitute a felony under Arizona law.

state also provided to the court a letter from the San Mateo County Probation Department dated May 21, 2010, four days before sentencing, that stated that not only had Appellant's conviction not been designated a misdemeanor, but that Appellant's probation was revoked for failure to report, that the California trial court had issued a warrant for Appellant's arrest as a result and that the warrant was still outstanding. Appellant did not object to the admission of this letter.

**¶27** The trial court found the computer printout submitted by Appellant was insufficient to establish that Appellant's California conviction for possession of methamphetamine had been reduced to a misdemeanor. The court noted the uncontested documentation used to establish the existence of the prior conviction for purposes of Rule 609 showed the offense was a felony; Appellant testified twice that the conviction was for a felony and the letter from the San Mateo County Probation Department stated the offense had never been reduced to a misdemeanor.

**¶28** We find no error. The weight to be given an item of documentary evidence is a question for the trier of fact. *State v. King*, 213 Ariz. 632, 636, ¶ 11, 146 P.3d 1274, 1278 (App. 2006). In this instance, the trier of fact was the trial court. Given the evidence that the conviction was a felony conviction for impeachment purposes, Appellant's testimony that the

conviction was for a felony, the letter from the probation department verifying that the offense had not been reduced to a misdemeanor and the absence of any court order or other directive reducing the offense to a misdemeanor, the trial court could reasonably find a cryptic computer printout from an unknown source prepared in an unknown context was not, by itself, sufficient to prove the offense had been reduced to a misdemeanor.

*IV. CONFRONTATION CLAUSE*

**¶29** As the final issue on appeal, Appellant argues the trial court violated his right to confront witnesses when it admitted information obtained from a confidential informant who did not testify at trial. Appellant did not raise any objection based on the Confrontation Clause below. Therefore, we review only for fundamental error.

**¶30** Before trial, the trial court ruled no evidence about the existence of an informant would be admitted. The court further ruled that no information obtained from the informant would be admitted in a manner that might violate the right to confrontation or otherwise constitute hearsay. The court held the state could, however, elicit evidence that the basis of the traffic stop was a lack of insurance and that police had held a briefing regarding how they would conduct such a stop.

**¶31** The testimony at issue came from a police sergeant. The sergeant was asked, "On or about August 8th of 2009, based upon your work as a sergeant with the Cottonwood Police Department, what did you come to suspect about the defendant?" The sergeant responded, "That he might be in possession of illegal drugs." Appellant raised no contemporaneous objection, but did eventually object to the reference to illegal drugs as hearsay without further explanation. The court overruled the objection, holding that the evidence went to the officer's state of mind. Appellant never argued he was denied the right to confront the informant.[10] Even so, Appellant argues on appeal that the question and answer violated his right to confront the informant regarding the information that Appellant "was associated with the possession of illegal drugs[.]"

**¶32** We find no error, fundamental or otherwise. The Confrontation Clause applies only to "testimonial statements of witnesses absent from trial" offered to prove the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). "Nontestimonial" statements may be exempted from the requirements of the Confrontation Clause altogether. *Id*. at 68. Here, no statement, testimonial or otherwise, from a witness

[10] "[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds." *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993).

absent from trial was introduced into evidence. Further, the question and answer did not hint at the existence of a statement made by another person. The question and answer informed the jury that the sergeant's suspicion that Appellant might be in possession of illegal drugs was based upon his "work as a sergeant with the Cottonwood Police Department[.]" Finally, the evidence that Appellant might be in possession of illegal drugs was not offered to prove the truth of the matter asserted, but to explain why police decided to stop Appellant's vehicle. The Confrontation Clause does not bar the use of even testimonial statements when those statements are offered for purposes other than to prove the truth of the matter asserted. *Crawford,* 541 U.S. at 59 n.9.

*CONCLUSION*

**¶33** Because we find no error, we affirm Appellant's convictions and sentences.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge