

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO RICARDO VERDUZCO,
Appellant.

No. 2 CA-CR 2012-0506
Filed April 14, 2014

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

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20104338001

The Honorable Howard Hantman, Judge

AFFIRMED AS CORRECTED

COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Judge Brammer¹ concurred.

M I L L E R, Judge:

¶1 Appellant Francisco Verduzco appeals from his convictions and sentences for burglary, four counts of kidnapping, three counts of armed robbery, and six counts of aggravated assault. He maintains the trial court erred in determining his 1995 conviction was a historical prior conviction for sentencing purposes.

¶2 At sentencing, the trial court imposed enhanced, presumptive, concurrent sentences, the longest of which were 15.75 years.² The enhanced sentence was based on a historical prior felony found by the court after a prior convictions trial. That prior felony was a 1994 conviction for aggravated assault, committed on April 21, 1994, for which Verduzco originally was sentenced to seventeen years' imprisonment, based on its being a dangerous

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

²At sentencing, the court neglected to sentence Verduzco on six counts of aggravated assault. It instead imposed those sentences later in chambers via minute entry, without Verduzco present. Citing Rule 26.9, Ariz. R. Crim. P., and *State v. Powers*, 154 Ariz. 291, 295, 742 P.2d 792, 796 (1987), this court requested supplemental briefing on this issue. In his supplemental brief Verduzco maintained that the sentencing on those counts "need not be vacated" because, inter alia, he "has not suffered any prejudice from the trial court imposing sentences in chambers." Because Verduzco concedes we need not vacate the sentences, we do not address the issue.

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crime against children (DCAC). He later was resentenced to 7.5 years' imprisonment after the court determined the DCAC designation had not been applied properly. Verduzco was incarcerated on June 16, 1995, released on May 20, 2005, and committed the instant offense on December 10, 2010.

¶3 On appeal, as he did below, Verduzco argues that, because his original seventeen-year sentence was vacated and replaced with a 7.5-year sentence, the trial court abused its discretion in determining his conviction for that offense was a historical prior felony conviction. A "historical prior felony conviction" is, inter alia, "[a]ny class 2 or 3 felony . . . that was committed within the ten years immediately preceding the date of the present offense." A.R.S. § 13-105(22)(b). Time spent "incarcerated is excluded in calculating if the offense was committed within the preceding ten years." *Id.*

¶4 Verduzco argues that the time he spent wrongfully incarcerated—the time he served beyond the 7.5-year sentence ultimately imposed—should not be excluded from the ten-year calculation required by § 13-105(22)(b). He further maintains that only eighty-five percent of the 7.5-year sentence should be excluded because, had he served only his lawful sentence, he would have obtained early release. The trial court rejected this argument, concluding that even if the time beyond the 7.5-year sentence could be excluded, despite the clear language of § 13-105(22)(b), there was no authority to suggest the court should assume he would have obtained early release and exclude that time from the ten-year calculation.

¶5 We need not address this issue, however, because the record is clear that Verduzco's 1994 aggravated assault conviction, as well as other felonies of which he was convicted at the same time, involved a deadly weapon or dangerous instrument, and the trial court therefore properly found a historical prior conviction. On appeal, the state contends for the first time that the court's ruling was correct because of the dangerousness of Verduzco's prior convictions. Verduzco relies on *State v. Song*, 176 Ariz. 215, 217-18, 860 P.2d 482, 484-85 (1993), to argue that the state is precluded from

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raising this argument on appeal because it did not make it below. Assuming, without deciding, that *Song* could have governed untimely arguments by the state, its viability on this issue was vitiated by *State v. Smith*, 219 Ariz. 132, ¶¶ 16-20, 194 P.3d 399, 402-03 (2008), wherein the court clarified that a defendant who does not object timely to an error is not precluded from raising the issue on review, but rather receives review for fundamental error. More important, unlike the situation in the other cases Verduzco cites, the new argument presented here would not result in a reversal of the court's decision, but rather presents an alternate ground for affirming its decision. And we will affirm a trial court's ruling when it is legally correct for any reason. See *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶6 In our ruling affirming Verduzco's prior convictions, this court described the evidence to sustain them, including "evidence that [Verduzco] intentionally fired a semi-automatic handgun." *State v. Verduzco*, Nos. 2 CA-CR 95-0329, 2 CA-CR 98-0045-PR, ¶ 4 (consolidated) (memorandum decision filed Feb. 18, 1999). And, although the state asserted in its answering brief that the offenses had been dangerous and Verduzco addressed that argument in his reply, he does not contest that the offenses involved a weapon. At the time Verduzco committed his 1994 offense and the instant offense, the definition of a historical prior felony conviction encompassed one that involved "the use or exhibition of a deadly weapon or dangerous instrument," regardless of when the offense was committed. 1994 Ariz. Sess. Laws, ch. 200, § 4; 2008 Ariz. Sess. Laws, ch. 301, § 10. Verduzco's sentence on the 1994 conviction was vacated and reduced based on a conclusion that the DCAC designation was incorrect, but it and other convictions in the same proceeding were designated dangerous as involving a deadly weapon or dangerous instrument, specifically a firearm. Thus, because the 1994 conviction involved a deadly weapon, the trial court did not abuse its discretion in concluding Verduzco had a historical prior felony conviction and imposing an enhanced sentence on that basis. See *Perez*, 141 Ariz. at 464, 687 P.2d at 1219.

¶7 Verduzco argues in his reply brief that he will be prejudiced if we affirm the trial court's ruling on this basis because

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he was “not informed . . . of this potential basis” for designating his 1994 conviction a historical prior felony before he pleaded guilty. But the state included the 1994 conviction, as well as the other dangerous offenses of which Verduzco was convicted at the same time, in its allegation of prior convictions. And, although he argues he “rejected a favorable plea offer, after advice from counsel, believing that [the 1994 conviction] was too old to be an historical prior,” that claim is one of ineffective assistance of counsel and cannot be raised on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶8 Finally, the trial court’s minute entry lists Verduzco’s offenses as non-dangerous and non-repetitive, but the transcript of Verduzco’s sentencing reflects that the court deemed them dangerous and repetitive. Generally “[t]he oral pronouncement controls,” and we therefore order the minute entry amended to reflect the dangerous, repetitive nature of the offenses. *State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999). We otherwise affirm as corrected Verduzco’s convictions and sentences.