DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. XAVIER ALEXANDER MILEA, Appellant.	)	1 CA-CR 10-0629 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0368

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

Kaiser James Wilson PLLC — Flagstaff
by Jeffrey A. James
Attorneys for Appellant

H A L L, Judge

¶1 Xavier Alexander Milea appeals his conviction and sentence on one count of conspiracy to sell dangerous drugs, a class two felony. On appeal, he argues insufficiency of the evidence, error in precluding evidence, and error in finding the existence of a historical prior felony conviction. For the reasons that follow, we find no reversible error, and affirm.

¶2 A grand jury indicted Milea on charges of conspiracy to sell dangerous drugs, illegal use of a wire or electronic communication, and illegally conducting an enterprise. The evidence, viewed in the light most favorable to supporting the conviction,[1] was as follows. In early 2008, a multi-agency narcotics task force obtained wiretaps on the phones of Jose Juan Ochoa, Reynaldo Magana, Consuelo Magana, and Terrance Roberts. When calls indicated drug-related activity was to take place, the supervisor of the "wire room" dispatched officers to conduct surveillance. During seven weeks of wiretapping, officers recorded nearly two hundred telephone calls that led them to conclude that Ochoa was the boss of a methamphetamine-trafficking organization in Kingman. Consuela Magana testified at trial as part of a plea agreement that she and her husband packaged and sold the drugs at Ochoa's direction

[1] *State v. Moody*, 208 Ariz. 424, 435, n.1, 94 P.3d 1119, 1130 n.1 (2004).

to others, including co-defendants Roberts, John Boone, Michael Mayo, and Sean Blackwell.

¶3 On March 20, 2008, between 6 p.m. and 7 p.m., investigators intercepted a phone conversation in code between Ochoa and Daniel Milea (Daniel), Milea's brother, which police interpreted as Ochoa telling Daniel to obtain a quantity of drugs stashed at a new location. In a follow-up call shortly afterward, Daniel is heard asking Ochoa if he wants Daniel's brother to go that day. In another phone call on March 21, 2008, at 10:17 a.m., Ochoa is heard telling Daniel that he is going to call Daniel's brother, and will call him right back.

¶4 Based on information from these phone calls, investigators set up surveillance on March 20, 2008, at about 10:30 a.m. at a construction site in Kingman where Daniel was working. At 10:40 a.m., they observed Milea park his Toyota Corolla next to Daniel's truck, and Daniel remove a package measuring a foot wide by a foot long from his pickup truck and give it to Milea, who placed it in his car.

¶5 They then followed Milea to a supermarket parking lot, where they observed Consuelo transfer the box from Milea's car to the truck driven by her husband, Reynaldo. Consuela Magana testified that the box contained crystal methamphetamine. She testified that on April 3, 2008, Milea delivered crystal

methamphetamine to her house at Ochoa's request.[2] She testified that Milea delivered methamphetamine to her more than five times.

¶6 Police executing a search warrant on the Magana's house on April 9, 2008, found eleven envelopes containing a total $18,360 in cash, and a ledger that Consuela said showed amounts of drugs purchased and payments made by the buyers. The jury convicted Milea of conspiracy to sell dangerous drugs, methamphetamine, but acquitted him of illegal use of a wire or electronic communication and illegally conducting an enterprise. The judge found the existence of a historical prior felony conviction, and sentenced Milea to a mitigated term of six years in prison. Milea filed a timely notice of appeal.

Sufficiency of the Evidence

¶7 Milea argues that the trial judge erred in denying his motion for judgment of acquittal after the close of the State's case, because the State had offered no proof that he had the knowledge required to convict him of conspiracy to sell dangerous drugs or illegally conducting an enterprise, and no proof that he had illegally used a wire or electronic

[2] Because the indictment charged Milea only with crimes occurring on or between February 19, 2008, and March 31, 2008, the judge instructed the jury that evidence that Milea delivered drugs on April 3, 2008, could not be used as the sole basis to convict him, but could be used "only to the extent that you find it relevant as to the relationship between the defendant [] Milea and [] Magana or any other person involved in this case."

communication. He further argues that the trial judge erred in denying his post-trial motion for judgment of acquittal and/or new trial because the State failed to prove that he had agreed to participate in the conspiracy or had the requisite intent to promote the sale of dangerous drugs, and an improper comment by co-defendant's counsel may have adversely influenced the verdict.

¶8 Because the jury acquitted Milea of the charges of illegally conducting an enterprise and illegally using a wire or electronic communication, the judge's failure to direct a verdict of acquittal on these charges is moot, and he is precluded from raising it on appeal. *See State v. Linden*, 136 Ariz. 129, 136, 664 P.2d 673, 680 (App. 1983) (holding that defendant is precluded from raising claim on appeal that trial court erred in denying him directed verdict on charges on which he was acquitted); *State v. LeMaster*, 137 Ariz. 159, 165, 669 P.2d 592, 598 (App. 1983) (holding that it was not necessary to address argument that judge erred in denying motion for judgment of acquittal on charge on which the jury acquitted defendant). We accordingly address only Milea's argument that the judge erred in denying his motions during and after trial for judgment of acquittal and/or a new trial on the charge of conspiracy to sell dangerous drugs, the charge on which he was convicted.

¶9 A directed verdict of acquittal under Rule 20 is required only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Landrigan,* 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted); *see* Ariz. R. Crim. P. 20(a). A new trial under Rule 24 may be granted if the verdict is contrary to "the weight of the evidence," but is required only if "the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996); Ariz. R. Crim. P. 24.1(c)(1). In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983); *Spears,* 184 Ariz. at 290, 908 P.2d at 1075. On a motion for new trial, unlike on a motion for judgment of acquittal, the trial court may weigh the evidence and consider the credibility of witnesses. *Compare State v. Tubbs*, 155 Ariz. 533, 535, 747 P.2d 1232, 1234 (App. 1987), *with State v. Just,* 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983).

¶10 We review a claim of lack of substantial evidence to sustain a conviction de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We will reverse a denial of a motion for new trial, however, "only when there is an affirmative showing that the trial court abused its discretion and acted arbitrarily." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984); *State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984).

¶11 Although the evidence was circumstantial, we find it was more than sufficient to support the guilty verdict on the conspiracy charge, and Milea has given us no basis to conclude that the court abused its discretion in denying his post-trial motion for a new trial. A person commits the offense of conspiracy to sell dangerous drugs if (1) with the intent to promote or aid the sale of dangerous drugs; (2) he agrees with one or more persons that at least one of them or another person will sell dangerous drugs; and (3) one of the parties commits an overt act in furtherance of the offense. *See* Ariz. Rev. Stat. (A.R.S.) §§ 13-1003(A), -3407(A)(7) (2010).[3] Methamphetamine is a dangerous drug. A.R.S. § 13-3401(6)(b)(xiii) (2010). Milea argues that the State failed to offer any evidence to prove that he had agreed with anyone that he or another person would sell

[3] Absent material revisions after the date of an offense, we cite to the current version of the statute.

dangerous drugs, or that he had any intent to promote the sale of dangerous drugs.

¶12 "The existence of an unlawful agreement can be inferred from the overt conduct of the parties." *State v. Avila*, 147 Ariz. 330, 336, 710 P.2d 440, 446 (1985). Intent can be proven by circumstantial evidence; it "rarely can be proven by any other means." *See State v. Thompson,* 204 Ariz. 471, 479, ¶ 31, 65 P.3d 420, 428 (2003) (citation omitted). We do not distinguish between direct and circumstantial evidence. *See id.* at 479, ¶ 32, n.8, 65 P.3d at 429 n.8; *State v. Stuard,* 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶13 In this case, police conducted surveillance of Daniel and Milea on March 21, 2008, because they believed from wiretaps that Daniel would be transferring drugs to Milea at the direction of Ochoa. Shortly after the final in a series of calls alerting them to the potential transfer of drugs, in which Ochoa said he would call Milea immediately and call Daniel right back, police observed Milea drive to Daniel's construction site and park next to Daniel's truck. They observed Daniel transferring a box measuring one foot by one foot to Milea. They observed Milea place the box in his car and drive to a supermarket parking lot, where Consuela Magana removed the box from Milea's car.

¶14 Consuela Magana testified that the box contained crystal methamphetamine. She testified that Milea delivered another shipment of crystal methamphetamine to her on April 3, 2008, when police observed him drive up to her house and go inside. In all, Consuela Magana testified, on at least five occasions Milea delivered methamphetamine to her, which she in turn packaged and sold to dealers at the direction of Ochoa. On this record, the evidence was more than sufficient to show that Milea had agreed with Ochoa and/or Daniel to deliver methamphetamine to Magana with the intent to promote the sale of the drug.

¶15 We find no merit in Milea's argument that his acquittal on the charge of illegally conducting an enterprise, was inconsistent with his conviction for conspiracy, and the conviction thus represented a compromise verdict not possible had the judge not improperly sent the two charges on which he was ultimately acquitted to the jury. We find no merit in this argument. The evidence outlined above was sufficient to send the charge of illegally conducting an enterprise to the jury. *See* A.R.S. §§ 13-2312(B), -2301(D)(4)(b)(xi), -3407(A)(7) (2010) (requiring proof that a person knowingly associated with a drug trafficking enterprise and conducted the affairs of the enterprise by transporting drugs for sale). From this evidence, a reasonable jury could also have inferred that Ochoa had

actually phoned Milea and directed him to meet Daniel to pick up the drugs and transfer them to the Maganas, which was sufficient to send the illegal use of a wire communication to the jury. *See* A.R.S. §§ 13-3417(A), -3407(A)(7) (2010) (requiring proof that a person knowingly used any wire or electronic communication to facilitate the transport of drugs for sale). Moreover, Milea acknowledges, as he must, that Arizona permits inconsistent jury verdicts. *State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.3d 83, 84-85 (1969).

¶16 Milea's reliance on *State v. Franklin*, 130 Ariz. 291, 635 P.2d 1213 (1981) is misplaced. In *Franklin*, our supreme court held that any error in denying a judgment of acquittal on the greater charge on which a defendant is ultimately acquitted is harmless beyond a reasonable doubt if sufficient evidence clearly supports the lesser charge of which he was convicted. *See id.* at 294, 635 P.2d at 1216. In this case, the evidence clearly supports Milea's conviction on the conspiracy charge, and accordingly, any possible error in submitting the wire and enterprise charges to the jury was harmless beyond a reasonable doubt.

¶17 Nor has Milea made the necessary showing that the trial court abused its discretion and acted arbitrarily in denying his motion for new trial on the basis that the verdict was contrary to the weight of the evidence. In denying the

motion for new trial, the trial judge reasoned that the surveillance evidence, coupled with the testimony of Magana, was sufficient to support the verdict. He specifically noted that he had no reason to believe that the testimony of Magana was "inherently unreliable." Milea has given us no basis to find that the judge abused his discretion or acted arbitrarily in making these findings.

¶18 Finally, we find no merit in Milea's argument that a new trial is warranted because Blackwell's counsel "improperly commented on the appellant's right not to testify during closing argument." This argument refers to Blackwell's counsel's argument in closing in pertinent part:

> Let's talk about Sean, because I want to talk about him. He's the only one – the only one who got up on this stand, as scary as it was, and looked you straight in the eye and said I'm a user. And he told you his story. That's a brave thing to do. And he was subject to cross-examination by an extremely good prosecutor. And did he waiver? Did he break down? No. He was honest. He was asked, do you still use? Yes. He was asked, did you use today? Yes. That's use. That's a pathetic user.

Following Blackwell's closing argument, Milea objected to the argument and asked the judge to "supplement the regular jury instruction given regarding the defendant is not required to testify, with something specific with respect to any mention that was made in Mr. DeRienzo's closing argument of the fact

that no other defendant testified." Milea explained that he had not objected contemporaneously because he could not decide if it would call too much attention to the offending statement. Milea also told the judge that he did not believe there was any basis to request a mistrial, because it was not the prosecutor who had made the improper comment. The judge denied the request for a supplemental instruction, reasoning that it was not necessary to do more than give the standard instruction that a defendant is not required to testify. The judge subsequently denied Milea's motion for new trial based on this incident, reasoning that the improper comment was not made by the prosecutor, and Milea had made no contemporaneous objection to it, which might have allowed the judge to respond more effectively.

¶19 We find no abuse of discretion in the judge's denial of a new trial on this basis. As the judge noted, Milea did not lodge a contemporaneous objection. Nor did he ask for a mistrial; he expressly stated that he did not believe a mistrial was warranted. At the time, Milea asked only for a supplemental jury instruction on the right of a defendant not to testify, with a specific reference to the offending portion of co-defendant's argument. A trial court "does not err in refusing to give a jury instruction that is . . . adequately covered by the other instructions." *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997). In this case, after closing

arguments, the judge gave the jury the standard instruction that a defendant is not required to testify, that the jurors cannot use a defendant's exercise of the right not to testify as evidence of guilt, discuss his exercise of his right not to testify, or let it affect their deliberations. This instruction adequately covered any issue raised by Blackwell's closing argument, and ensured that Milea was not prejudiced thereby. *See State v. Newel*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). On appeal, we presume the jurors followed the judge's instructions. *See State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). We accordingly find no abuse of discretion in the judge's denial of the motion for new trial on this ground.

Exclusion of Letter From Daniel Milea

¶20 Milea argues that the trial judge abused his discretion in precluding him from offering as evidence Daniel's letter exonerating him, as a statement against interest of an unavailable witness. The background on this issue is as follows. Daniel's counsel informed the judge the twelfth day of trial that she had received a voicemail from her client notifying her that he would not be at trial that day or the following day. Milea's counsel informed the judge that the previous weekend Sonia Milea, Daniel's sister, had drafted a letter at the request of Daniel exonerating Milea, and he sought

to offer the letter as evidence at trial over the State's objection, as a statement against interest from an unavailable witness. Milea's counsel said Sonia had told him that Daniel had become concerned about the way the case was going after the judge denied the motions for acquittal, and he had decided he would no longer appear at trial. Daniel's counsel, however, told the judge that he had said in his voice mail to her that he was planning on being absent for only two days.[4] The letter Milea sought to introduce at trial was as follows:

> To the jury,
>
> I Daniel Milea would like to say that my brother Xavier Milea had no involvement with any of this.
>
> When I stated brother on my recording, I did not mean my actuall brother. Please, know that he is not guilty of this, all he did was sell them a car.
>
> Please dont convict an innocent person.
>
> Daniel Milea

The judge precluded the evidence, reasoning that that the letter was "clearly not a statement against Daniel Milea's interests," because "he doesn't implicate himself in any way." We review a trial court's ruling on the admissibility of evidence over

[4] Daniel ultimately did not attend the remaining two days of trial. After the jury found him guilty of the charged counts, the judge issued a warrant for his arrest.

hearsay objections for an abuse of discretion. *State v. Tucker,* 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

¶21 Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted," and is generally inadmissible unless an exception applies. *See* Ariz. R. Evid. 801, 802. The "statement against interest" exception to the rule precluding admission of hearsay for an unavailable declarant is defined in pertinent part as:

> A statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement[.]

Ariz. R. Evid. 804(b)(3).

¶22 A witness is considered "unavailable" in pertinent part if he "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement" or "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's . . . attendance or testimony[] by process or other reasonable means." Ariz. R. Evid. 804(a)(1) and (5). "A declarant need not expressly assert the privilege if his unavailability is 'patent' and assertion of the privilege is a

mere formality." *State v. LaGrand*, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987) (holding that codefendant who had stated throughout the pretrial hearings that he would not testify, and because he was a codefendant could not be compelled to testify, was unavailable).

¶23 We find no abuse of discretion in the judge's preclusion of Daniel's letter proclaiming Milea's innocence. Even assuming *arguendo* that Daniel was an unavailable witness because, even if he re-appeared at trial he could not be compelled to testify, *see id.*, we decline to find that the judge abused his discretion in concluding that Daniel's statements in the letter exonerating Milea were not against his penal interests. "To determine if a statement is truly against interest requires a fact-intensive inquiry of the surrounding circumstances and each declaration must be scrutinized to determine if it is self-inculpatory in light of the totality of circumstances." *State v. Nieto*, 186 Ariz. 449, 455, 924 P.2d 453, 459 (App. 1996) (citation omitted). Rule 804(b)(3) "does not require a direct confession of guilt . . . [r]ather, by referring to statements that 'tend' to subject the declarant to criminal liability, the [r]ule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant." *LaGrand*, 153 Ariz. at 27, 734 P.2d at 569 (citations and internal punctuation omitted). Milea

concedes that Daniel did not directly admit his guilt in the letter, but argues that the statement, "my brother Xavier Milea had no involvement with any of this," had some probative value on the issue of Daniel's involvement with "this," which in context, could only have meant the Ochoa drug trafficking organization. We disagree. Any probative value this statement might have as to Daniel's guilt is so minimal as to be nonexistent; the reference to "this" could reasonably also be interpreted as simply a reference to the offenses with which Milea had been charged and for which he was on trial. We find no abuse of discretion in the judge's finding that it did not constitute a statement against Daniel's penal interest.[5]

¶24 Moreover, the circumstances surrounding Daniel's letter do not "clearly indicate the trustworthiness of the exculpatory statement[,]" as necessary to admit it as a statement against penal interest. *See LaGrand*, 153 Ariz. at 26-29, 734 P.2d at 578-71; Ariz. R. Evid. 804(b)(3). "Many factors are involved in determining trustworthiness, including: the existence of supporting and contradictory evidence, the relationship between the declarant and the listener, the

[5] Nor, under the circumstances, was Daniel's implicit admission that it was his voice on the one wiretapped conversation in which he referred to his "brother" a statement that had more than minimal probative value in the case against Daniel, in light of the fact that the lead line investigator for the wire room had already testified that he recognized Daniel as the speaker.

relationship between the declarant and the defendant, the number of times the statement was made, the length of time between the event and the statement, the psychological and physical environment at the time of the statement, and whether the declarant would benefit from the statement." *State v. Tankersley*, 191 Ariz. 359, 370, ¶ 45, 956 P.2d 486, 497 (1998), *abrogated on other grounds by State v. Machado*, 226 Ariz. 281, 283, 284, ¶¶ 11, 16, 246 P.3d 632, 634, 635 (2011). The evidence at trial, specifically Magana's testimony and the surveillance evidence, completely contradicts his brother's out-of-court statement that Milea "had no involvement in any of this," and that he had not been referring to his actual "brother" in the wiretapped conversation. The timing of the statement, after the judge had denied the declarant's and defendant's motions for acquittal, the fact it was made only once and addressed specifically "to the jury," and the fact that it was made by defendant's brother, who had disappeared from his own trial, all suggest a lack of trustworthiness. *See Tankersley,* 191 Ariz. at 370, ¶ 45, 956 P.2d at 497. In short, we are not persuaded that the judge abused his discretion in finding that this statement did not meet the threshold for admissibility as a statement against interest.

Historical Prior Felony Conviction

¶25 Finally, Milea argues that the trial court improperly sentenced him as a repetitive offender based upon his conviction in 1996 for aggravated assault, reasoning that the legislature intended only dangerous offenses to qualify as historical prior felony convictions notwithstanding their age, and this offense did not qualify as a dangerous offense because no prison sentence was imposed.

¶26 Before trial, the trial court granted the State's motion to add an allegation of prior conviction to the indictment, specifically, Milea's 1996 conviction for aggravated assault committed on or about November 2, 1995. As an exhibit at the sentencing hearing, the State submitted documents from Mohave County Superior Court showing that a grand jury had indicted Milea for aggravated assault committed on November 2, 1995, "while using a deadly weapon or dangerous instrument, to wit: a pair of channel-lock pliers," and that the jury had convicted him of "Aggravated Assault while using a deadly weapon or dangerous instrument." The documents showed that before sentencing, the judge allowed the prosecutor to withdraw the allegation that the offense was a dangerous offense, and the judge suspended sentence and imposed a term of four years' probation. After hearing testimony from the judge who presided over the 1996 trial and sentencing, this trial judge found that

the State had proved the existence of Milea's prior conviction beyond a reasonable doubt.

¶27 Over Milea's objection on the same grounds he urges on appeal, the judge found that the prior conviction constituted a historical prior felony conviction because the conviction involved the use of a dangerous instrument. We review de novo the trial court's determination that a prior conviction constitutes a historical prior felony conviction. *State v. Rasul,* 216 Ariz. 491, 496, ¶ 20, 167 P.3d 1286, 1291 (App. 2007). In interpreting statutes, we make every effort to give effect to the intent of the Legislature. *Mejak v. Granville,* 212 Ariz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006). We consider the statutory language the best indicator of that intent, and we go no further to ascertain the intent if the language of the statute is clear and unambiguous. *Id.*

¶28 We find no error. Section 13-105(22) (2010) defines four classes of historical prior felony convictions. Subdivision (a) "lists six types of offenses that can be alleged as historical prior felony convictions no matter when they occurred." *State v. Christian*, 205 Ariz. 64, 66-67, ¶ 7, 66 P.3d 1241, 1243-44 (2003). One of the offenses listed in subsection a is "[a]ny prior felony conviction for which the offense of conviction . . . [i]nvolved the use or exhibition of

a deadly weapon or dangerous instrument." A.R.S. § 13-105(22)(a)(iii) (2010).[6] A person commits aggravated assault by committing an assault as defined in A.R.S. § 13-1203(A) (2010) using a "deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2) (2010). A jury convicted Milea in 1996 of aggravated assault using a deadly weapon or dangerous instrument. Because his prior conviction involved the use of a deadly weapon or dangerous instrument, it constituted a historical prior conviction under A.R.S. § 13-105(22)(a)(iii).

¶29 It is of no consequence that the State withdrew the allegation of dangerousness prior to sentencing, because the plain language of A.R.S. § 13-105(22)(a)(iii) applies to any offense committed using a deadly weapon or dangerous instrument, regardless of whether the offense is also found to be dangerous. Nor is it of any consequence that the judge failed to impose a prison term; the legislature provided in a different subsection of A.R.S. § 13-105(22)(a) that a prior felony offense for which a prison term is mandated constitutes an alternative basis for finding a prior felony conviction a historical prior felony conviction. *See* A.R.S. § 13-105(22)(a)(i). The judge

[6] At the time of the offenses charged in the indictment, A.R.S. § 13-105(22)(a)(iii) was numbered as A.R.S. § 13-604(W)(2)(a)(3). Because no material revisions were made after the date of an offense, we cite the statute's current version.

accordingly did not err in finding that the conviction was a historical prior conviction.

Conclusion

¶30 For the foregoing reasons, we affirm Milea's conviction and sentence.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICK IRVINE, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge