

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

SHAWN JULIAN HENDRICKS,  
*Appellant.*

No. 2 CA-CR 2021-0110  
Filed November 18, 2022

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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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.19(e).

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Appeal from the Superior Court in Pima County  
No. CR20210753001  
The Honorable Renee T. Bennett, Judge

**AFFIRMED AS CORRECTED**

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COUNSEL

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*Counsel for Appellee*

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**MEMORANDUM DECISION**

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Cattani concurred.

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V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Shawn Hendricks was convicted of unlawful imprisonment, criminal damage, and assault. The trial court sentenced him to concurrent 2.5-year terms of imprisonment, with 212 days' presentence incarceration credit, for unlawful imprisonment and criminal damage, and it suspended the imposition of sentence and placed Hendricks on a three-year term of probation for assault. Hendricks argues the court erred by ordering probation for his assault conviction because he had already served more than the maximum sentence of imprisonment for that offense. For the following reasons, we affirm the court's sentencing ruling, although we correct a clerical error (acknowledged by the state) in the sentencing minute entry to reflect the correct number of days of presentence incarceration credit to which Hendricks is entitled.

**Factual and Procedural Background**

¶2 In February 2021, Hendricks was in an on-and-off romantic relationship with M.J. One day at her apartment, M.J. told Hendricks that she wanted to break up, and the two began arguing. M.J. retreated to her bedroom, but Hendricks forced his way in and shoved M.J. down on the bed. M.J. thought Hendricks was going to hit her, making her flinch, but instead he kissed her "really hard." Hendricks got up and started "ranting," but then he jumped back on top of M.J. and put his hands around her neck, making it difficult for M.J. to breathe and leaving marks on her neck.

¶3 When M.J.'s phone rang, Hendricks let her up. She grabbed her phone and keys, left the apartment, and drove away. M.J. waited to return until she saw Hendricks leave. Inside the apartment, M.J. found several personal items broken or destroyed. She also discovered damage to a door and a wall, and she called 9-1-1 to report the incident.

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¶4 A grand jury indicted Hendricks for aggravated assault, kidnapping, and criminal damage. At the time of the trial, Hendricks and M.J. had resumed their relationship, and M.J.'s testimony was inconsistent with her initial police report. The jury convicted Hendricks of criminal damage (a class six felony) and the lesser-included offenses of assault (a class one misdemeanor) and unlawful imprisonment (a class six felony). The trial court found Hendricks had four prior felony convictions and sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**Discussion**

¶5 Hendricks maintains the trial court erred in ordering probation for his assault conviction because he had already “served the maximum sentence for a class one misdemeanor.” Because Hendricks did not raise this issue below, our review is limited to fundamental, prejudicial error. See *State v. Escalante*, 245 Ariz. 135, ¶¶ 12, 21 (2018). However, the imposition of an illegal term of probation constitutes such error. *State v. Bouchier*, 159 Ariz. 346, 347 (App. 1989).

¶6 Hendricks's assault conviction is a class one misdemeanor. See A.R.S. § 13-1203(A)(1), (B). The maximum term of imprisonment for a class one misdemeanor is six months. A.R.S. § 13-707(A)(1). A defendant is entitled to presentence incarceration credit for “[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense.” A.R.S. § 13-712(B). Hendricks served 212 days – more than six months – in custody before his sentencing. Hendricks therefore reasons that because he had served more than the maximum sentence for his assault conviction at the time of his sentencing, “he was ineligible for probation and should have been sentenced to time served.”

¶7 “[T]here is a difference between a sentence and an order imposing probation.” *State v. Muldoon*, 159 Ariz. 295, 298 (1988). “A sentence is a judicial order requiring a defendant convicted in a criminal case to presently suffer a specified sanction such as incarceration, monetary fine, or both.” *Id.* By contrast, probation “is a judicial order allowing a criminal defendant a period of time in which to perform certain conditions and thereby avoid imposition of a sentence.” *Id.* Whether to impose a sentence or place a defendant on probation is within the sound discretion of the trial court. *State v. Moreno*, 17 Ariz. App. 548, 549 (1972).

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¶8 Here, it was within the trial court’s discretion to suspend the imposition of sentence and place Hendricks on probation rather than sentencing him to imprisonment—with credit for time served—for his assault conviction. See A.R.S. § 13-901(A) (“If a person who has been convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence and . . . place the person on intensive probation supervision . . . or supervised or unsupervised probation . . .”). Hendricks’s three-year term of probation is within the statutory limit. See A.R.S. § 13-902(A)(5). In addition, Hendricks has not argued, and we cannot say, the trial court acted capriciously or arbitrarily or failed to adequately investigate the facts and circumstances necessary for an intelligent exercise of its discretion. See *Moreno*, 17 Ariz. App. at 549.

¶9 Hendricks’s reliance on *State v. Everhart*, 169 Ariz. 404 (App. 1991), is unavailing. In that case, pursuant to a plea agreement, the defendant was convicted of attempted child molestation. *Id.* at 405. The trial court imposed a fifteen-year prison sentence and ordered the defendant to be placed on lifetime probation upon his release from prison. *Id.* On appeal, the defendant challenged the imposition of lifetime probation as unconstitutional. *Id.* at 406. This court explained that ordinarily “a trial court may order that a convicted defendant be placed on probation if authorized in lieu of imposing a prison term” and that “probation may not be ordered on the same offense in addition to a term of imprisonment.” *Id.* We therefore modified the defendant’s sentence to remove the order of probation. *Id.*

¶10 Here, by contrast, the trial court imposed only a term of probation for Hendricks’s assault conviction. Contrary to Hendricks’s suggestion, time served in prison before sentencing does not constitute a sentence of imprisonment and also cannot be credited against a term of probation. See § 13-712(A) (“A sentence of imprisonment commences when sentence is imposed if the defendant is in custody or surrenders into custody at that time.”), (B) (prisoner entitled to presentence incarceration credit “against the term of imprisonment”). Notably, the court gave Hendricks presentence incarceration credit on his other two convictions for which he was sentenced to imprisonment. Accordingly, the court did not err by placing Hendricks on a three-year term of probation for assault.

¶11 In its answering brief, the state points out that the sentencing minute entry shows “ZERO (212) DAYS” of presentence incarceration credit for Hendricks’s criminal damage conviction. The trial court orally announced that Hendricks was receiving 212 days’ credit. Because the language in the sentencing minute entry appears to be a clerical error, we

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correct it to reflect 212 days' presentence incarceration credit. *See State v. Hanson*, 138 Ariz. 296, 304 (App. 1983) (clerical mistake involves failure to accurately record statement or action); *State v. Caldera*, 141 Ariz. 634, 638 (1984) (with concurrent sentences, court required to fully credit defendants with total time spent awaiting trial in each count).

**Disposition**

¶12 For the foregoing reasons, we affirm Hendricks's convictions, sentences, and term of probation, as corrected.