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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JULIO H., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
JULIO H.,  
Defendant and Appellant.

A132657

(Alameda County  
Super. Ct. No. SJ11016784)

Julio H. appeals from orders declaring him a ward of the juvenile court and placing him on probation in the home of his parents after his admission of a count of unlawful intercourse with a minor. He challenges the court's dispositional order as an abuse of discretion and denial of due process in that it was based on unsupported and inaccurate understanding of the facts. He further argues that the court abused its discretion in setting his offense as a felony and in imposing certain conditions of probation, and that the minute order from the June 6, 2011 hearing must be corrected to properly reflect the court's oral pronouncements. Appellant's fundamental claim is that the juvenile court improperly viewed him as a sexual predator rather than a normal teenage boy.

We will modify the conditions of probation in certain respects and affirm.

## STATEMENT OF THE CASE AND FACTS

On April 15, 2011, a petition was filed alleging that appellant, then 15 years eight months old and in ninth grade, came within the provisions of Welfare and Institutions Code section 602, subdivision (a), in that he committed a lewd and lascivious act upon a child under 14 years of age (Pen. Code, § 288, subd. (a)) and engaged in sexual intercourse with a minor more than three years younger than himself (Pen. Code, § 261.5, subd. (c)). On May 5, at the request of the prosecution, the second count of the petition was amended to allege unlawful intercourse with a minor (Pen. Code, § 261.5, subd. (a)). Appellant admitted the amended count and the first count was dismissed, “with facts and restitution open.”

According to police reports and the dispositional report, on January 25, 2011, 12-year-old Jane Doe told her mother that she had been sexually assaulted by an unknown person and thought she was pregnant. Jane was initially evasive with the police officer who spoke with her, then admitted there had been no assault and she had had consensual sexual intercourse with a friend. Jane told the officer that she met appellant on Facebook and that he was a high school student who frequented her school. At about 3:45 p.m. on January 10, she unexpectedly came upon appellant in front of her school. They chatted for a few minutes, then appellant invited her to his house to study. She agreed and they went to his house, where Jane discovered no one else was home. She and appellant studied in his bedroom, and when they were finished, they began kissing each other consensually on his bed. Jane stated that as the kissing “got heated,” appellant asked if she “ ‘wanted to do it.’ ” She understood “it” to mean sexual intercourse and said, “ ‘Sure.’ ” They disrobed themselves and appellant lay on top of her and attempted to insert his penis into her vagina. Jane said that because she had never had any kind of sexual activity, appellant was only able to insert his penis half way into her vagina. They were having so much difficulty with the sexual intercourse that after about a minute they both decided to stop. She got dressed and went home. Jane stated that she and appellant

are still friends. She lied to her mother about having been sexually assaulted because she feared her mother would be angry at her for having consensual sex and getting pregnant. Jane's mother later told the police officer that earlier in the year Jane had admitted having a " 'crush' " on appellant.

When interviewed on February 1, 2011, appellant said he knew Jane was a middle school student, knew she was in either sixth or seventh grade, and did not know how old she was. They had started "talking" on Facebook within the past month and he ran into her in front of her school as he was walking home from his. Jane came to his house twice at his invitation and his mother was home both times. On both occasions, Jane orally copulated him in his bedroom; on the second, they had sexual intercourse. In response to his question, she said she was a virgin. He asked if she wanted to " 'do it' " and she first said no, then when he asked again said she did. She lay on her back on the bed, he lay on top of her and inserted his penis into her vagina, and after about three or four minutes she asked him to stop and he did. She got dressed and left and he had not seen her since.

Appellant's mother described him as a quiet and friendly kid who had never been in trouble, did what he was supposed to do at home, and was a good student. She told the probation officer that she was at home at the time of the incident, but thought appellant and Jane were just studying. She said she would be more aware who appellant brings home in the future.

Appellant was polite during his interview with the probation officer, and described himself as a good kid. He said he liked school and had never been in trouble, that he needed to improve some of his grades and do things his mother tells him to do without complaining, that he had never used drugs or alcohol, and that he liked to hang out with friends and play basketball and soccer. He said that he and Jane had consensual sexual intercourse and that he had learned he was too young to have sexual intercourse and should get to know the person better if he decides to have sexual intercourse.

The probation officer stated that appellant appeared to be a “good kid,” a good student with no problems at home, who realized how serious his offense was, acknowledged his mistake, and was willing to cooperate with probation and “do anything that will help prevent him from making the same mistake.” The probation officer viewed the incident as a misdemeanor level offense, noting that the victim was not afraid of appellant, there was no violence, the conduct was consensual, and “the only inappropriate thing is their age.” The probation department recommended that the court declare appellant a ward, with care, custody, control and conduct under the supervision of the probation officer, to reside in his parents’ home. Among the recommended conditions of probation were that appellant be at home by 6:00 p.m. every day unless with a parent or legal guardian or with prior permission from the probation officer; not be on the campus or grounds of any school “unless enrolled, accompanied by a parent or legal guardian or responsible adult, or authorized by the prior permission of school authorities”; have no contact or association with Jane; and participate in a sex offender program.

At the disposition hearing on June 6, 2011, the prosecutor asked the court to set the level of offense as a felony, stating that she was disturbed by the tenor of the probation report and recommendation that the level be set at misdemeanor. The prosecutor noted that the victim had turned 12 five days before the event and described appellant as having gone to her middle school “to make contact with her, invited her to his house, quote unquote, to do homework, after being [*sic*] he brought her directly into his bedroom, sat on the bed with her, and after five minutes of being there with her, begins kissing with her and then begins to engage in a sexual contact with her all the way up to sexual intercourse.” Stating that the difference in age made it inappropriate for appellant and the victim to have any sexual contact, the prosecutor commented, “[t]he officer who writes the probation report says that it was consensual, except at her age, she can’t consent.” In response to the court’s question, the prosecutor confirmed that Jane Doe was a sixth grader.

Defense counsel emphasized the “unfortunate reality in this day and age” that “sex among people of [the victim’s age] is quite regular.” Acknowledging that appellant’s conduct was criminal, and that appellant needed education, rehabilitation and guidance to “develop his sexuality as he enters adulthood,” defense counsel stressed that the offense was a “nonforcible statutory rape,” and argued that the prosecutor’s portrayal of appellant as “some kind of predator” was not appropriate. Counsel urged that a misdemeanor level and a “4C” was appropriate. Appellant’s brief represents that “4C” is a term used by the Alameda County Juvenile Court to describe an order placing a minor on formal probation, as contrasted with a “3C” order for out-of-home placement.

The probation officer (not the one who authored the report) recommended that the level of the offense be set at felony with the understanding that it would be reduced to a misdemeanor upon successful completion of probation.

The court stated, “I do believe that [appellant] did act as a predator from the day he met her, the way he brought her to his house. She is—she was just barely 12 years old. She just had turned 12. In other words, he had contact, a ninth grader, with an 11-year-old sixth grader and has sex with her just upon her turning 12. The facts, probably despite what [defense counsel] indicated about how prevalent sex is among minors, this is a child who probably wasn’t physically developed enough to have consensual sex, to have appropriate sex, and that’s why the Minor could only get his penis halfway into her vagina. Physically, she was probably incapable of having completed sex.

“There’s a reason why Penal Code Section 26 makes children under the age of 14 unable to legally even commit a crime. They cannot possibly know. Of course there are extenuating circumstances, being able to give a legal and even logical and reasonable consent, not only at that age but with such a great difference in ages, and at that age having a difference of almost four years and three full grades is a huge difference.

“This is a predatory act, it’s an extremely serious act, and it’s clearly a felonious act. The court sets this as a felony.”

Turning to disposition, the court stated that the probation report was “quite lacking in information. For instance, the difference in the grades. It shows the age, but it doesn’t have a logical discussion about the difference in the ages. I find that the report in the reasoning that the victim was not afraid of the Minor, there was no violence, and it was consensual completely ignores the age difference and, also, ignores the age of the victim. ‘In concluding, however, the only inappropriate thing is their age,’ that completely misses the difference or the significance of the difference in their ages.

“As a result, I find the recommendation based upon that kind of reasoning is—I don’t believe is something that in any way can sway the Court. I looked at this as a 3C case.”

The court set the level of appellant’s offense as felony; adjudged him a ward of the court; made findings that his welfare required custody to be taken from his parents, continuance in his parents’ home was contrary to his welfare and reasonable efforts had been made to prevent or eliminate the need for removal and committed him to the care, custody and control of the probation officer to be placed in a suitable foster home, institution or facility. The court then referred appellant to the Family Preservation Unit (FPU) for screening, set a placement review hearing for June 20, and found it unnecessary to place appellant on GPS monitoring pending the FPU screening because his parents would monitor his behavior. It imposed orders including that appellant “be at his place of residence by the hours of 6:00 p.m. every day unless he’s with a parent or legal guardian or has prior permission of the Probation Officer”; that he not be “on the campus of any school unless he’s enrolled and accompanied by parent, guardian, or authorized by the prior permission of school authorities” and not “come within 100 yards of any lower school or middle school”; that he not “come within 100 yards or have any contact with the victim Jane Doe personally, by telephone, by mail, by electronic means, or by any third party”; and that he submit to “search of his person, any containers he may have or own, day or night at the request of a Probation Officer or peace officer.”

The court told appellant that it was assuming he was in all other areas of his life “a good and responsible student and son,” but that he needed to “understand and appreciate the seriousness of the nature of your activities given the age of the minor” and that the court found “you engaged in a predatory act with someone far younger than you, and it is a sexual predatory act.” The court noted that it could “certainly contemplate” reducing the offense to a misdemeanor if appellant did well, and that if appellant committed this act as an adult, “you’d be going to State Prison for a very, very long period of time.”

On June 29, the probation officer filed a status report relating that the family was willing to participate in all services recommended by the probation officer and eager to meet the terms of probation. His mother wanted to inform the court that she babysits two children, a nine-year-old and a one-year-old, and sought the court’s approval to continue. The probation officer asked the court to order a guidance clinic evaluation that would determine whether appellant was eligible for the Adolescent Sex Offender Treatment Program at Juvenile Hall.

At the July 5, 2011 hearing, the prosecutor requested orders that appellant not have contact with the two young children his mother babysits and not be alone with any child under 14 years of age without a responsible adult present. The court ordered that appellant not be present when children are in his mother’s home and not have contact with the children in the home, stating, “[i]t’s better he stay away from the home while the children are there.” It further ordered appellant “not to have any contact with any child that’s under the age of 14 and especially not in the household or anywhere else as far as that matter.” The court stated that appellant had been accepted into family preservation. The existing order was continued, with the additional probation conditions, and the court ordered a guidance clinic evaluation.

Appellant filed a timely notice of appeal on July 14, 2011.

## DISCUSSION

### I.

Appellant contends the juvenile court based its dispositional order on unsupported and inaccurate assumptions that appellant was a sexual predator, that Jane was too young to know about sexual intercourse and therefore could not agree to engage in it, and that Jane was too young to physically be able to have sex. According to appellant, the court thus violated the requirement that its disposition be based on individualized consideration of the case.

At the outset, it is necessary to clarify what the trial court actually ordered. According to appellant's characterization, the trial court removed him from his parents' custody and ordered out-of-home placement, then stayed the order, so that if appellant violates a condition of probation he immediately will be subjected to out-of-home placement without benefit of any further hearing. Appellant's arguments on appeal, therefore, challenge the imposition of an order for out-of-home placement. Respondent states that the court "stayed" its order for out-of-home placement, but then argues that the court's "disposition to supervised home probation" was not an abuse of discretion.

As described above, the probation report recommended that appellant be placed on probation in his parents' home. Appellant sought a "4C" placement, which he describes on appeal as being an order for formal probation. The court viewed the case as a "3C," which appellant describes as an out-of-home placement such as a group home or camp. The court made the findings necessary to remove custody from the parents and order out-of-home placement, then referred appellant to FPU for screening. Meanwhile, the court left appellant in his parents' home and found GPS monitoring unnecessary. Appellant was subsequently accepted into family preservation and remained placed in his parents' home.

Appellant provides no citation to the record for his assertion that the court stayed an order for out-of-home placement with the expectation that a probation violation would

automatically result in removal from his parents' home. The record contains no reference to a "stayed" or "suspended" placement order, nor did the court warn appellant of a particular consequence that would follow a violation of probation, such as occurred in *In re Ronnie P.* (1992) 10 Cal.App.4th 1079. *Ronnie P.* reversed a commitment order that was based on the court having previously imposed a " 'suspended' Youth Authority commitment under which [the minor] would go to the Youth Authority if he 'screw[ed] up' or got in 'any further trouble.' " (*Id.* at pp. 1086-1087.) Here, while the trial court initially ordered out-of-home placement, it simultaneously ordered an evaluation for FPU, which ultimately accepted appellant. Appellant was never, in fact, removed from his parents' physical custody, and no specific out-of-home placement was considered, much less ordered.

Moreover, even if the court intended to impose, but stay, an order for out-of-home placement, a future probation violation could not result in an *automatic* out-of-home placement: While a stay of commitment can be used by the juvenile court as a "warning tool aimed at rehabilitation," it "cannot be automatic or self-executing" and appropriate findings must be made before the stay is lifted. (*In re Chad S.* (1994) 30 Cal.App.4th 607, 614; *In re Jose T.* (2010) 191 Cal.App.4th 1142, 1147-1148.) " '[T]he court is required to examine the entire dispositional picture whenever the minor comes before the court for disposition. It cannot treat an earlier order as "self-executing" or "automatic." ' " (*In re Ronnie P.*, *supra*, 10 Cal.App.4th at p. 1088; accord, *In re Chad S.*, *supra*, 30 Cal.App.4th at p. 613; *In re Kazuo G.* [(1994)] 22 Cal.App.4th [1,] 10-11.)" (*In re Jorge Q.* (1997) 54 Cal.App.4th 223, 238.)

We conclude the disposition before us for review is to supervised home probation. We review a juvenile court's order for abuse of discretion. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.) Appellant does not argue that the trial court abused its discretion in ordering supervised home probation (although, as we will discuss, he challenges some of the conditions of probation), only that it abused its discretion in

ordering out-of-home placement *instead of* probation. It is clear that the order for supervised home probation was well within the court's discretion.

Appellant's fundamental contention is that the trial court failed to conduct an individualized assessment of his needs and instead improperly focused on an unsupported view of him as a sexual predator due to the age difference between appellant and Jane. According to appellant, he is a normal teenage boy who made friends with a girl on Facebook, invited her to his house to study, engaged in consensual sexual activity with her, and stopped when she asked him to. He maintains his behavior was "a mistake" but "not aberrant, unhealthy or predatory."

The record supports the trial court's contrary view. At the time of the offense, appellant was 15 years five months old, in ninth grade; Jane was only days past her 12th birthday, a sixth grader. Although a high school student, appellant frequented Jane's middle school; despite their three-plus year age and three-grade difference, he invited her to his home, took her to his bedroom and had sex with her. Even the probation report that viewed appellant's offense as a misdemeanor (because it was "consensual," the victim was not afraid and there was no violence) recognized the inappropriateness of the age difference. The trial court's view that the age difference, at this stage of life, was "huge" and of great significance did not exceed "the bounds of reason." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Appellant argues the court erred in viewing him as a sexual predator because he did not engage in predatory conduct as defined by the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et. seq.) or fit the Penal Code's definition of a "preferential child molester" (Pen. Code, § 13885.15, subd. (b)). The SVPA defines "predatory" as an act "directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (Welf. & Inst.

Code, § 6600, subd. (e).) “ ‘[P]referential child molester’ means a person whose primary sex drive is directed toward children.” (Pen. Code, § 13885.15, subd. (b).)

Appellant was not charged as or found to be a sexually violent predator or a preferential child molester. In describing him as a predator, and his conduct as predatory, we presume the juvenile court was not applying a statutory definition unrelated to the alleged offense, but rather using the terms in their colloquial sense to describe exploitative behavior.<sup>1</sup> In viewing appellant’s conduct as predatory, the court properly focused on Jane’s very young age and inherent vulnerability to a boy several years older, and appellant’s conduct in seeking out a girl so much younger than himself for sexual activity, taking her to a place where he could have sex with her, repeating his request for sex after her initial refusal, and then taking advantage of her apparent willingness to engage in sexual intercourse.<sup>2</sup>

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<sup>1</sup> Oxford English Dictionary defines “predator” as “[a] person who plunders or pillages; a ruthlessly exploitative or rapacious individual; a depredator.” (<http://oed.com/view/Entry/149783?redirectedFrom=predator#>.)

<sup>2</sup> Appellant requests us to take judicial notice of the guidance clinic evaluation, performed pursuant to the court’s July 5, 2011 order at the disposition hearing, which appellant contends supports his view that his behavior was “typical” of a teenage boy and not that of a sexual predator or molester. We decline to do so. The report, obviously, was not available to the juvenile court at disposition. “[A]n appellate court should not consider postjudgment evidence going to the merits of an appeal and introduced for the purposes of attacking the trial court’s judgment.” (*In re Josiah Z.* (2005) 36 Cal.4th 664, 676.) In any event, since appellant was not removed from his parents’ physical custody, any support the report might offer for appellant’s argument that he should not have been ordered into out-of-home placement is not relevant at this time. The report is now part of the juvenile court’s record and will be available for consideration at any future hearing in this case.

We further decline to take judicial notice of three documents appellant offers in support of his arguments that Jane was capable of having sex and consented to do so: Two surveys by the Centers for Disease Control and Prevention youth sexual activity, and an article on the falling age of puberty in the United States. The general propositions appellant seeks to advance with these materials—which were not presented to the trial court—are that very young people are capable of having sex and frequently willingly engage in sex. These general propositions are not significantly relevant to our review of

Appellant urges that the court implicitly acknowledged he was not “the typical sex offender raising concerns about public safety and of recidivism” because it did not order “sex offender terms of probation.” But the court did order appellant to participate in counseling as directed by the probation officer, including the Adolescent Sex Offender Program, and ordered an evaluation to determine appellant’s suitability for the Adolescent Sex Offender Treatment Program.

We cannot accept appellant’s contention that statutes prohibiting sexual acts against children were designed solely to prevent exploitation of “very young” children from “substantially older” molesters. The Legislature has specifically determined that one who engages in unlawful sexual intercourse with a minor more than three years younger than the perpetrator is more culpable than one who engages in such conduct with a minor less than three years older or younger than the perpetrator. (Pen. Code, §§ 261.5, subds. (b) and (c).) That more egregious cases exist does not exempt appellant from this legislative determination.

Appellant also contests the juvenile court’s stated assumption that Jane was unable to consent to sexual intercourse because of her young age. As indicated above, in finding Jane could not have consented, the court referred to Penal Code section 26’s presumption that children under age 14 are incapable of committing crimes “in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.” Appellant argues the court’s assumption cannot stand in the face of judicial recognition that the Legislature’s creation of the crime of unlawful sexual intercourse with a minor, and corresponding removal of sex with a minor from the definition of rape, reflected an implicit acknowledgement “that, in some cases at least, a minor may be capable of giving legal consent to sexual relations” (*People v. Tobias*

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the trial court’s decision. Consent was not an issue, as appellant admitted an offense for which consent is not a defense, and the court’s view of appellant’s conduct as predatory was based on the facts of the case.

(2001) 25 Cal.4th 327, 333-334), and that minors do willingly engage in sexual intercourse with each other (see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1361 [rejecting claim of minor's right to privacy in consensual sexual intercourse with another minor]). We need not resolve whether Jane was capable of agreeing to have sex with appellant. As appellant recognizes, her consent or lack thereof was irrelevant to the allegations he admitted; the offense of unlawful sexual intercourse with a minor does not require lack of consent by the victim. In any case, as we have said, the court did not remove appellant from his parents' physical custody. Appellant's challenge to the court's reliance upon Jane's legal or factual inability to consent as the basis for ordering out-of-home placement has no bearing on the actual disposition to supervised home probation.

## II.

Under Welfare and Institutions Code section 702, when a minor is found to have committed an offense, which in the case of an adult would be punishable as either a felony or a misdemeanor, the juvenile court must explicitly declare the offense to be a misdemeanor or a felony. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.) Appellant further contends the juvenile court abused its discretion in setting his offense as a felony.

As noted above, the probation report viewed the incident as a misdemeanor level offense because the victim was not afraid of appellant, there was no violence, the conduct was consensual and "the only inappropriate thing is their age." The prosecutor, disturbed by the probation department's apparent minimizing of the offense, emphasized Jane's young age and the difference between the minors' ages, and the trial court found these factors to be of great significance. Rejecting defense counsel's attempt to portray the incident as typical sexual activity among minors, the court viewed appellant as having engaged in predatory conduct and deemed the offense a felony. For the reasons we have discussed, considering Jane's age, the more than three years' difference between her age and appellant's, and appellant's conduct in taking her to his home and having sexual

intercourse with her, the court did not abuse its discretion in viewing appellant's conduct as sufficiently egregious to warrant classification as a felony.

### III.

Appellant challenges several of the conditions of probation imposed by the court: that he "not have any contact with any child that's under the age of 14 and especially not in the household or anywhere else as far as that matter"; that he not "be on the campus of any school unless he's enrolled and accompanied by parent, guardian, or authorized by the prior permission of school authorities" and not "come within 100 yards of any lower school or middle school"; and that he submit to "search of his person, any containers he may have or own, day or night at the request of a probation officer or peace officer."

"The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents' (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941 (*Antonio R.*)), thereby occupying a 'unique role . . . in caring for the minor's well-being.' (*In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1500 (*Laylah K.*)). In keeping with this role, [Welfare and Institutions Code] section 730, subdivision (b), provides that the court may impose 'any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.'

"The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."' (*Ginsberg v. New York* (1968) 390 U.S. 629, 638.) This is because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' (*Antonio R., supra*, 78 Cal.App.4th at p. 941.) Thus, ' " 'a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.' " '

(*In re Sheena K.* [(2007)] 40 Cal.4th 875, 889 (*Sheena K.*); see also *In re R.V.* (2009) 171 Cal.App.4th 239, 247; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242-1243 [rule derives from court's role as *parens patriae*.])” (*In re Victor L.* (2010) 182 Cal.App.4th 902, 909-910.)

Nevertheless, “the juvenile court’s discretion in formulating probation conditions is not unlimited.” (*In re D.G.* (2010) 187 Cal.App.4th 47, 52.) Under the void for vagueness doctrine, based on the due process concept of fair warning, an order “ ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.’ ” (*Sheena K., supra*, 40 Cal.4th at p. 890.) The doctrine invalidates a condition of probation “ ‘so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” (*Ibid.*) By failing to clearly define the prohibited conduct, a vague condition of probation allows law enforcement and the courts to apply the restriction on an “ ‘*ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ [Citation.]” (*Ibid.*)

“In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. (*Sheena K., supra*, 40 Cal.4th at p. 890; *In re Luis F.* (2009) 177 Cal.App.4th 176, 189.)” (*In re Victor L., supra*, 182 Cal.App.4th at pp. 910-911.)

“[J]uvenile probation conditions must be judged by the same three-part standard applied to adult probations under [*People v.*] *Lent* [(1975)] 15 Cal.3d 481: ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .” [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to

the crime of which the defendant was convicted or to future criminality. ([*People v. Lent*, *supra*, 15 Cal.3d 481,] 486, fn. omitted; see, e.g., *In re Luis F.*, [*supra*,] 177 Cal.App.4th 176, 188; *Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1180; *In re G.V.* (2008) 167 Cal.App.4th 1244, 1250; *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1034 [all holding the *Lent* factors are applicable in evaluating juvenile probation conditions].)” (*In re D.G.*, *supra*, 187 Cal.App.4th at p. 52-53.) Additionally, juvenile probation conditions “are permissible only if ‘ ‘tailored specifically to meet the needs of the juvenile.’ ” ’ ” [Citation.] (*In re D.G.*, *supra*, 187 Cal.App.4th at p. 53, quoting *In re Tyrell J.* (1994) 8 Cal.4th 68, 82.)

Appellant did not object below to the conditions he now challenges. Ordinarily, challenges to the reasonableness of a probation condition are forfeited if not raised in the trial court. (*People v. Kim* (2011) 193 Cal.App.4th 836, 841-842; *In re Justin S.* (2001) 93 Cal.App.4th 811, 814; see *In re Sheena K.*, *supra*, 40 Cal.4th at p. 883, fn. 4.) Constitutional challenges can be raised for the first time on appeal if they present “ ‘pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.’ ” ’ (*People v. Welch* [(1993)] 5 Cal.4th [228,] 235.)” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889, quoting *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 815, fn. 2.)

#### A.

Appellant urges his challenge to the prohibition against association with children under age 14 was not forfeited because his attorney did not have an opportunity to object. The condition was first raised at the July 5, 2011 hearing, in response to appellant’s mother’s request, described in the probation report, for the court to approve her continuing to babysit for her nine-year-old and one-year old nieces at her house. The prosecutor asked for an order that appellant not be present when his mother was caring for the children, and also for a probation condition restricting him from being alone with any child under age 14 unless a responsible adult is present. Defense counsel submitted.

The court then stated it would follow the recommendation and order the minor not to be present when the children were in the home. The court added that appellant was not to have any contact with any child under the age of 14, in the house or anywhere else. Defense counsel did not object.

Appellant likens this situation to that in *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537, in which the minor challenged an order for him to undergo AIDS testing to which he had not objected in the juvenile court. The *Khonsavanh S.* court held the claim had not been forfeited because involuntary AIDS testing is “strictly limited by statute” and nothing in the record suggested any statutory basis for such testing or that such testing had been recommended, requested or considered. (*Id.* at p. 537.) The juvenile court simply added the order at the end of the disposition hearing, so that defense counsel was “utterly surprised” and “had little opportunity to react.” (*Ibid.*) Here, by contrast, the question of appellant’s contact with children was raised generally by the fact of appellant’s offense and specifically by the probation report relating appellant’s mother’s request to continue babysitting her nieces. Counsel had reason to expect some condition regarding appellant’s contact with children even if not the specific condition imposed. The question of surprise is not critical, however, given appellant’s constitutional challenge to this condition. (*In re Sheena K., supra*, 40 Cal.4th at p. 889.)

Appellant contends that the condition prohibiting him from having contact with children under the age of 14 is constitutionally infirm because it infringes upon his constitutional rights to freedom of association and travel. He argues the condition is unconstitutionally vague and overbroad because it would apply even if he was unaware an individual with whom he was associating was less than 14 years old. We agree that a knowledge requirement is necessary. (*People v. Turner* (2007) 155 Cal.App.4th 1432 [probation condition prohibiting association with persons under age 18 unless accompanied by unrelated responsible adult required modification to include knowledge requirement, i.e., no association with persons the defendant knew or reasonably should

have known to be under age 18]; *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816 [prohibition against association with gang members vague and overbroad; condition must be restricted to “known gang members”]; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102-103 [prohibition against association with users and sellers of narcotics, felons and ex-felons unconstitutionally overbroad; modified to refer to persons defendant “knows to be users or sellers of narcotics, felons or ex-felons”].) The probation condition must be modified to prohibit appellant from associating with children he knows, or reasonably should know, to be under 14 years of age.

Appellant is also correct, and respondent concedes, that the condition as presently worded is overbroad because it applies everywhere—at school, at sporting events, at church, at a bus stop, in a relative’s home—and makes no exception for inadvertent contact. Respondent suggests modifying the condition to prohibit contact with children under age 14 “at home or at any school in which [appellant] is not enrolled, unless he is accompanied by his parent, guardian or a responsible adult, or unless his presence is authorized by the prior permission of school authorities, or unless the contact has been approved by his probation officer.” With the addition of the knowledge component we have discussed, we agree. As so limited, the restriction does not impermissibly infringe upon appellant’s constitutional rights to freedom of association and travel or amount to banishment from his community. As stated above, because of juveniles’ greater need for guidance and supervision, and more circumscribed constitutional rights, “even conditions infringing on constitutional rights may not be invalid if they are specifically tailored to fit the needs of the juvenile.” (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 693; *In re Antonio R.*, *supra*, 78 Cal.App.4th at p. 941.) The limitation on appellant’s contact with children under age 14 at home or at a school in which he is not enrolled addresses the conduct that brought him under the juvenile court’s supervision and is therefore tailored to meet his needs.

Appellant argues that the condition restricting his contact with anyone under age 14—rather than solely with Jane—is similar to conditions imposed upon sex offenders with a history of or propensity for committing sex offenses against minors (*People v. Mills* (1978) 81 Cal.App.3d 171, 174-175 [adult convicted of lewd and lascivious conduct on a seven-year-old child required as condition of probation not to associate with minors under age 18 or frequent places where such minors congregate unless in the presence of responsible adults]; *People v. Urke* (2011) 197 Cal.App.4th 766, 775 [properly worded probation condition prohibiting adult convicted of lewd and lascivious conduct on a minor from associating with minors would withstand constitutional scrutiny]), and is inappropriate here because he is not a pedophile or sexual predator and has no history supporting the need for the condition. Appellant’s argument on this point—that the condition is unreasonable “under the facts of the case”—was forfeited by his failure to raise it below. (*In re Justin S.*, *supra*, 93 Cal.App.4th at p. 814; *In re Sheena K.*, *supra*, 40 Cal.4th at p. 883, fn. 4.)

Anticipating this conclusion, appellant urges that his attorney’s failure to object to the condition constituted ineffective assistance of counsel. Under familiar principles, “[e]stablishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *In re Wilson* (1992) 3 Cal.4th 945, 950.) A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *In re Jones* (1996) 13 Cal.4th 552, 561.)” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) We need not determine whether failure to object to the condition as imposed by the trial court could be viewed as ineffective assistance of counsel. Modified as we have discussed to include

both a knowledge requirement and a limitation on scope, the condition reasonably relates to appellant's offense. The juvenile court was not required to limit the restriction to the one child with whom appellant had already engaged in sexual conduct.

**B.**

Appellant next challenges the conditions that he not come within 100 yards of any lower or middle school and that he not be on the campus of any school unless he was "enrolled and accompanied by parent, guardian, or authorized by the prior permission of school authorities." He argues the conditions are unconstitutionally overbroad and vague, and restrict his right to travel, because they are not limited to any particular time and apply to all schools except his own.<sup>3</sup>

Appellant relies upon *In re D.G.*, *supra*, 187 Cal.App.4th 47, which invalidated a probation condition prohibiting the minor from coming within 150 feet of any school campus other than the one he was attending. Neither the current offense—residential burglary—nor the minor's past offenses were committed near a school or involved other juveniles. Accordingly, the condition was found unreasonable because it was not related to the minor's offenses and did not prohibit otherwise criminal conduct, and because nothing in the record suggested it would serve a rehabilitative purpose by preventing future criminality. (*Id.* at pp. 50, 53.) Noting that a probation condition properly may proscribe otherwise criminal conduct, the court modified the condition in accordance

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<sup>3</sup> As appellant points out, the record reflects varying iterations of these probation conditions. As stated at the hearing on June 6, the court ordered that appellant not be "on the campus of any school unless he's enrolled and accompanied by parent, guardian, or authorized by the prior permission of school authorities" and not "come within 100 yards of any lower school or middle school." The minute order documenting the hearing, however, directed appellant not to "be on any campus or be within 100 yards of any campus other than the school in which currently enrolled." The "Conditions of Probation and Court Orders" that appellant and his parents signed stated, "Do not frequent any campus other than the school in which currently enrolled." We assess the validity of the condition as stated by the court. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.)

with state law prohibiting persons other than school students, parents and officials from visiting school grounds without notifying school authorities. (*Id.* at pp. 50, 55-56; Pen. Code, §§ 627.1, subd. (a), 627.2, 627.7.) The modified condition stated: “ ‘Do not enter on the campus or grounds of any school unless enrolled, accompanied by a parent or guardian or responsible adult, or authorized by the permission of school authorities.’ ” (*In re D.G.*, *supra*, 187 Cal.App.4th at p. 57.)<sup>4</sup>

Appellant’s failure to object below forfeits his claim that the trial court abused its discretion in imposing the school conditions and that the conditions violated his constitutional right to travel, neither of which claims can be resolved in the abstract, without reference to the particular facts of this case. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 883, fn. 4, 889.) Nor can appellant prevail through his claim of ineffective assistance of counsel. As we will explain, there is no reasonable probability appellant would have obtained a more favorable outcome if his attorney had objected because, with one exception we will correct by modification, both of the school conditions pass muster under *Lent*.

Unlike the situation in *In re D.G.*, appellant’s offenses *did* relate to school property and to other juveniles, as he contacted Jane outside her middle school, which she said he frequented. The trial court was deeply troubled by Jane’s youth and the age difference between her and appellant. The order that appellant not come within 100 yards of any middle or lower school was directly related to appellant’s offense and sufficiently specific to give notice of the areas appellant is required to avoid. (See *People v. Barajas* (2011) 198 Cal.App.4th 748, 760-762 [probation condition prohibiting

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<sup>4</sup> Appellant states that although the *In re D.G.* court invalidated the 150-yard condition as unreasonable under *People v. Lent*, *supra*, 15 Cal.3d 481, it also found the condition to be an unconstitutional restriction on his right to travel. This characterization is incorrect: The court expressly declined to reach the constitutional issue. (*In re D.G.*, *supra*, 187 Cal.App.4th at p. 56, fn. 5.)

defendant from being “adjacent” to school property modified to specify required distance].)

The condition restricting appellant’s presence on school property, with one exception, was consistent with state law—that is, it prohibited otherwise criminal conduct. The exception is that the condition, as worded by the court, prohibited appellant from being on the campus of any school “unless he’s *enrolled and accompanied* by parent, guardian, or authorized by the prior permission of school authorities,” whereas the condition the *In re D.G.* court fashioned to comport with state law used the disjunctive, “unless enrolled, accompanied by a parent or guardian or responsible adult, *or* authorized by the permission of school authorities.’ ” (*In re D.G.*, *supra*, 187 Cal.App.4th at p. 57.) We doubt the juvenile court intended to require that appellant be accompanied by a parent or legal guardian, or obtain prior permission from school authorities, before coming on the campus of the school in which he is currently enrolled, nor would such a requirement be reasonable. We will modify the condition to clarify that current enrollment is an alternative basis of authority for appellant’s presence on campus.

### C.

Appellant also argues the juvenile court abused its discretion in imposing a search condition because the condition was not reasonably related to his offense or future criminality. This claim does not raise a constitutional question that can be resolved without reference to the facts of the case and therefore was forfeited by the failure to object in the juvenile court. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 883, fn. 4, 889.) Again, appellant seeks review by urging his attorney’s failure to object to the condition constituted ineffective assistance of counsel.

Preliminarily, the parties disagree on the terms of the condition imposed by the court. Appellant quotes the court’s oral statement of the condition at the hearing requiring him to submit to a search of “his person, any containers he may have or own, day or night at the request of a Probation Officer or peace officer.” Respondent relies

upon the description of the condition in the minute order, which requires appellant to “[s]ubmit person and any vehicle, room or property under [his] control to search by Probation Officer or peace officer with or without a search warrant at any time of day or night.” Respondent concedes that the minute order should be amended to conform to the court’s oral pronouncement. Respondent indicates such conformity can be obtained simply by deleting the reference to “vehicle” from the condition stated in the minute order. Appellant argues, however, that the minute order also exceeds the terms of the court’s oral pronouncement in that it refers to search of his “room or property” and to “warrantless searches.”

“The clerk’s minutes and the reporter’s transcript are to be harmonized, if possible.” (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1018.) In requiring appellant to submit to search “at the request of” a probation or peace officer, it is apparent the court intended to be imposing a warrantless search condition. The remainder of the discrepancy between the court’s oral remarks and the language of the minute order, however, cannot be reconciled: Just as the court made no reference to “vehicle,” it made no mention of “room” in its oral statement of the condition. The court only ordered appellant to submit his “person” and “containers he may have or own” to search. As respondent recognizes, the minute order cannot add to the terms of the probation condition stated by the court. (See *People v. Gabriel, supra*, 189 Cal.App.4th at p. 1073.)

The question, then, is whether appellant was denied effective assistance of counsel by his attorney’s failure to object to the imposition of a probation condition requiring appellant to submit to warrantless search of his person and any containers he might have or own. The basis for such an objection would have been the asserted lack of relationship between the condition and appellant’s offense. Although a warrantless search condition is common in juvenile cases, “a minor cannot be made subject to an automatic search condition. . . . [E]very juvenile probation condition must be made to fit the circumstances and the minor.” (*In re Binh L.* (1992) 5 Cal.App.4th 194, 202-203.)

Appellant's offense involved no weapons, illicit substances or burglary tools that might be expected to be concealed on his person or in containers in his possession. Nor did the court impose other conditions of probation such that appellant's compliance might be monitored by a search of his person. As indicated above, respondent justifies the search condition primarily on the basis that a search of appellant's home is a reasonable safeguard against him committing further sexual offenses against children in his home. This justification would support a general search condition that included appellant's home as well as his person: Such a search condition, which would deter appellant from engaging in similar conduct in the future, would relate to appellant's offense and future criminality. But the court did not impose a general search condition, only the narrower condition requiring submission to searches of appellant's person and containers.

Nevertheless, respondent's argument points to the flaw in appellant's claim of ineffective assistance of counsel: If the juvenile court properly could have imposed a more onerous search condition, a tactical decision not to object would not have been unreasonable, and an objection would more likely have resulted in an outcome *less* favorable to appellant than a more favorable one. "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412), and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' (*Strickland v. Washington*[, *supra*,] 466 U.S. [at p. 689].) Defendant's burden is difficult to carry on direct appeal, as we have observed: "Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Here, where the trial court clearly wanted to impose a search condition and properly could have imposed a general one, but instead worded the condition narrowly, it is impossible to say there could have been no tactical reason for the

failure to object. Moreover, appellant would not be able to demonstrate prejudice. Had counsel objected to the condition as worded by the court, it is far more likely the court would have imposed a standard general search condition than that the court would have imposed no search condition at all.

### **DISPOSITION**

The probation condition concerning appellant's contact with children under the age of 14, currently reflected in the court's July 5, 2011 oral remarks and minute order, shall be modified to provide: "Do not have contact with any child you know or reasonably should know to be under the age of 14, at home or at any school in which you are not enrolled, unless you are accompanied by your parent, guardian or a responsible adult, or unless your presence is authorized by the prior permission of school authorities, or unless the contact has been approved by your probation officer."

The probation condition concerning appellant's presence on school campuses, currently reflected in the court's June 6, 2011 oral remarks and minute order, and the "Conditions of Probation and Court Orders," shall be modified to provide: "Do not be on the campus of any school unless you are enrolled or accompanied by a parent or guardian or authorized by the prior permission of school authorities."

The probation search condition, currently reflected in the June 6, 2011 minute order, shall be modified to conform to the court's oral remarks as follows: "Submit person and any containers you have or own, day or night, to search at the request of a Probation Officer or peace officer."

As so modified, the orders are affirmed.

Kline, P.J.

We concur:

Haerle, J.  
Lambden, J.