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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re S.A., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

S.A.,

Defendant and Appellant.

A140441, A140715

(City and County of San Francisco  
Super. Ct. No. JW126113)

S.A. appeals from jurisdictional and dispositional orders after the juvenile court sustained allegations of petty theft and resisting a peace officer and placed him in his mother’s custody subject to various probation conditions. He contends the court abused its discretion when it denied his request to continue the jurisdictional hearing. In addition, he asserts a probation condition that he not possess weapons, objects he intends to use as weapons, and toys that look like weapons is unconstitutionally vague. We modify the dispositional order to include a scienter requirement in the prohibition against S.A.’s possession of weapons and toys that look like weapons. In all other respects we affirm the juvenile court’s orders.

**BACKGROUND**

In May 2013, Arturo Franco was working at his family’s restaurant, Mamita’s Mexican Grill, at Fisherman’s Wharf. He was in the kitchen when one of the cooks

yelled, “Arturo, the money.” Franco ran to the front of the restaurant, where he saw an eight-year-old boy grab a black money bag containing \$200 from behind the cashier’s counter and pass it to S.A., who was standing at the front door. Franco recognized S.A. because he had seen him around the restaurant on other occasions and had warned him “not to be doing that kind of stuff, breaking – going into the parking lot . . . .” The two boys took off running, with Franco in pursuit. When S.A. turned and saw Franco chasing him he threw the money bag to the ground. None of the cash was missing when the bag was recovered.

About five days later Franco called the police to report that three youths, including the two who had tried to steal the restaurant’s money bag, were breaking into cars and smoking marijuana in the parking structure above Mamita’s. Officer Jacqueline Selinger responded. As she spoke with Franco, S.A. and two other boys emerged from the parking structure. Franco pointed and said “That’s them.” The boys fled and Officer Selinger gave chase. She grabbed S.A.’s jacket but he broke free, and lost one of his shoes in the process. S.A. was located and detained at a nearby housing project shortly thereafter, wearing only one shoe.

The People filed a juvenile wardship petition alleging two counts of petty theft (counts one and two) and one count of resisting a peace officer (count 3). Following a contested jurisdictional hearing the court sustained count one, based on finding true the lesser included offense of attempted theft, and count three. The court granted the People’s motion to dismiss count two. At the dispositional hearing the juvenile court reaffirmed S.A. as a ward of the court and continued him on probation in his mother’s home subject to various terms and conditions. This timely appeal followed.

## **DISCUSSION**

### **I. The Denial of a Continuance Was Within the Court’s Discretion**

S.A. contends the juvenile court abused its discretion when it declined to continue the jurisdictional hearing. Not so.

### *A. Background*

On the day of the jurisdictional hearing, S.A.'s attorney advised the court that she had just received information that Franco may have "had some type of contact or arrest with . . . U.S. Border Patrol down in San Ysidro back in 2008." The person contacted had the same name and birth date as Franco, although Franco was two inches taller and 10 pounds lighter. Arguing that "a prior arrest or conviction or whatever it is for fraudulent use of visas or illegal immigration could be relevant to his credibility," counsel requested a continuance to "look into it further . . . and see if it's anything." Franco denied that he was the person involved in the San Ysidro encounter.

The court denied the requested continuance. Noting that the case was almost eight months old "and it's in nobody's interest to drag these matters on," the court observed that "this is not a conviction, it's a contact. If that contact is for the same person, it's five years old. And I've heard defense counsel time after time in my long career . . . argue that five years old is old for a contact, not even a conviction. But if it is [Franco] and it's a contact and this were a jury trial, it would certainly confuse many issues, because in my court of law, I don't allow questioning about anyone's immigration status, whether they're documented or undocumented, whether it's a juvenile, whether it's an adult, whether it's a defendant or whether it's a victim. I think that confuses issues. Those are collateral issues. This is not an immigration court; this is a juvenile delinquency."

The court added that "my inclination would be not to allow you to ask about some alleged border contact. But since it's not a jury trial and since you assume to think that this is important, . . . I will allow you to ask this witness if in 2008 he was contacted by the Border Patrol if you think that's really important."

Franco testified on cross-examination that he had lived in San Francisco since he was three years old, had never been arrested by the Border Patrol or federal agencies, and was not in Mexico in or around June 2008.

### *B. Analysis*

Welfare and Institutions Code section 682, subdivision (b) provides that "A continuance shall be granted only upon a showing of good cause." (See also Cal. Rules

of Court, rule 5.550(b).) The determination of whether good cause exists is left to the sound discretion of the trial court. (*In re Maurice E.* (2005) 132 Cal.App.4th 474, 481; *In re Lawanda L.* (1986) 178 Cal.App.3d 423, 428.) That discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. (*In re Lawanda L., supra*, 178 Cal.App.3d at p. 428.)

The court's determination here that the investigation defense counsel wished to pursue was insufficiently material to justify a continuance was well within its discretion. The court explained its decision was based on multiple factors. It was not clear that Franco was the person involved in the 2008 border contact. If he was, the contact did not appear to be a conviction, and "five years is old for a contact, not even a conviction." In any event, the court reasonably considered Franco's immigration status to be a collateral matter that would only confuse the issues. It expressed reasonable reluctance to permit a continuance that would, in its view, not be in the best interest of the minor or of the community. The court nonetheless allowed defense counsel to cross-examine Franco about the border contact "if you think that's really important." In the end, after hearing Franco's testimony and considering his bias, his motive to lie, his memory problems and the inconsistencies in his testimony, the court found Franco to be a "very" credible witness.

From this record, it is manifest that the court did not abuse its discretion. Moreover, the court made it unmistakably clear that Franco's immigration status and history had no bearing on its credibility determination, so a continuance would have had no effect on the outcome.

## **II. S.A.'s Probation Conditions Must Be Modified**

### *A. The Probation Conditions*

At the dispositional hearing, the court orally imposed the following probation condition: S.A. is "not to possess any weapons, no toys that look like weapons, no

ammunition, no guns, no objects you intend to use as a weapon.”<sup>1</sup> S.A. contends the condition prohibiting him from possessing weapons is unconstitutionally vague on its face because it fails to include a knowledge requirement. He also asserts the conditions prohibiting him from possessing toys that look like weapons and objects intended to be used as weapons are too imprecise to provide fair warning of the proscribed conduct. We agree that the prohibitions against possessing weapons and toys that look like weapons must be modified to include a scienter requirement.

### *B. Analysis*

A probation condition is unconstitutionally vague if it is not “ ‘ ‘sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.’ ” [Citation.] A restriction failing this test does not give adequate notice—‘fair warning’—of the conduct proscribed. [Citations.]” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) “ ‘In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that “abstract legal commands must be applied in a specific context,” and that, although not admitting of “mathematical certainty,” the language used must have “ ‘reasonable specificity.’ ” ’ [Citation.]” (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1144, italics omitted.) S.A.’s challenge to his probation conditions as facially vague presents a pure question of law appropriate for de novo review. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888–889; *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

Here, S.A. argues the prohibition against possessing toys that look like weapons is unconstitutionally vague because people’s views are likely to differ as to whether a particular toy looks like a real weapon. We agree that this condition is unworkable because it requires him to speculate as to what other people might think, and thereby “ ‘ “forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” ’ ” (*In re Sheena K.*,

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<sup>1</sup>Although the oral pronouncement differs slightly from the minute order and the signed probation order, the parties agree that the court’s oral pronouncement controls. (See *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.)

*supra*, 40 Cal.4th at pp. 890, 891–892 [probation condition prohibiting association with “ ‘anyone disapproved of by probation’ ” unconstitutionally vague without knowledge requirement]; see also *People v. Gabriel, supra*, 189 Cal.App.4th at pp. 1073–1074 [probation condition precluding association with individuals “suspect[ed]” to be gang members, drug users, or on probation or parole failed to adequately inform defendant whom to avoid].) We shall therefore follow the practice of modifying probation conditions by clarifying that S.A. is prohibited from *knowingly* possessing any toys that look like weapons. (See, e.g., *In re Victor L.* (2010) 182 Cal.App.4th 902, 912–913.)

The probation condition prohibiting S.A. from possessing objects he intends to use as weapons presents no such deficiency, as its intent component necessarily includes a scienter requirement. As the People observe, S.A.’s own intent provides him with constitutionally sufficient notice. The prohibition against possessing weapons, however, does not contain a knowledge requirement. The appellate courts have held, albeit not uniformly, that probation conditions restricting a probationer’s presence, possession, or association must include express scienter requirements to prevent the conditions from being unconstitutionally vague. (*In re Victor L., supra*, 182 Cal.App.4th at p. 912 [knowingly in presence of weapons]; *People v. Freitas* (2009) 179 Cal.App.4th 747, 751–752 [knowing possession of gun or ammunition]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 634 [knowing display of gang indicia]; but see *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [implying scienter requirement].) We shall follow the majority practice and modify the probation order to prohibit S.A. from knowingly being in possession of weapons.

#### **DISPOSITION**

The prohibitions against possessing weapons or toys that look like weapons is modified to state that S.A. may not knowingly possess weapons or toys that look like weapons. In all other respects the judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.