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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KIMBERLY GAMBOA,

Defendant and Appellant.

A140718

(Contra Costa County  
Super. Ct. No. 51304260)

A jury convicted Kimberly Gamboa of felony and misdemeanor child abuse concerning her two youngest children. She challenges her conviction on grounds of *Batson/Wheeler* error and prosecutorial misconduct in closing argument. She further asserts the prosecution impermissibly based two different counts on a single course of conduct, and that she was convicted of both a greater and lesser included offense for the same acts. Gamboa also challenges drug and alcohol probation conditions and asserts the court improperly imposed various fees. We order the probation conditions modified, vacate the order imposing the challenged fees, and direct the probation order be amended to reflect the correct criminal conviction fee assessment. As modified, we affirm the judgment.

**BACKGROUND**

On January 24, 2012, personnel at 11-year-old John Doe's elementary school called Child Protective Services after John explained that bruises on his face and arm were from being beaten by Gamboa, his mother. Emeryville Police Officer Warren Williams met with John in the principal's office. The officer noticed swelling on John's

face, bruises on both of his arms and legs, marks on his back, and what looked like “belt whooping marks” on his buttocks. John told Officer Williams he got “a whoopin’ ” if he got in trouble or forgot to get something signed at school. The night before, his mother “whooped” him because his teacher had not signed his homework journal. As she “whooped” him, Gamboa told John she “doesn’t have a problem making [him] black and blue.” Gamboa usually beat John with a leather belt, but sometimes “she just slam or she’ll just, uh, hit me.”

Several nights before the injuries were observed at school, Gamboa “whooped” John with a belt for talking on the phone too late at night. The bruises on his arm and thigh were from that beating. John also told Officer Williams that three or four months earlier Gamboa had pushed him into a wall, cracking it and leaving a dent she later covered with a calendar. John had been “whooped” six or seven times since Halloween and twice since New Year’s. His father and younger sister, eight-year-old Jane Doe, usually tried to prevent the “whoopings.” Gamboa would also “whoop” Jane with a belt if she got in trouble.

Officer Williams also spoke with Jane. Jane told him that she and her father hid some of her grades from Gamboa so Jane would not “get whooped.” She explained, “Especially when I get bruises, ‘cause she whoops hard.” “Sometimes I try to—I try to block her and say stop . . . but she hit my head hard and then it’s hard for me to block because the belts (unintelligible) when my dad whoops me and then it’s easy for me to block and then (unintelligible) sting a little. [¶] . . . [¶] But when my mom hits me, when she—when she hits me, like, it hurts a whole lot so I just give up.” The previous night, while Gamboa was beating John, Jane heard him say “Stop, stop, Mommy, stop Mommy[.]” Then Gamboa told John, “Now, you know not to do it,” and “smacked” him in the face. Jane, a third-grader, said Gamboa once “smacked” her twice in the face because she had trouble reading a fifth grade book.

Pat Mori interviewed the children at the Children's Interview Center on January 25, 2012.<sup>1</sup> John said Gamboa had been spanking or "whooping" him since he was a baby, two or three times a week. Sometimes when she was angry she would also slap him with her hand. On Monday evening she made him lie down on her bed and "whooped him" with a belt on his arm, buttocks, thighs and legs because he did not get his homework "contract" or journal signed. Gamboa also curled the belt up and slammed it into John's face. When he got up, she "slapped me right here and it hit me on my ear. In my ear I heard a ringing noise." John's father, Daniel, generally tried to prevent Gamboa from beating John " 'cause he doesn't like it when I get whooped," but he was sick that night. The beatings were painful.

Once, the previous year, Gamboa slammed John's back into a wall, cracking it and pushing it in. Another time, a couple of weeks before the interview, she slammed John's head into a wall, slapped his face, hit him in the face with a belt and pushed him to the ground. A few days before the interview Gamboa "whooped" John for talking on the telephone late at night. Usually Gamboa would hit him with the belt 15 to 20 times. John said that Jane also got "whooped" with the belt when she was in trouble; he had seen Gamboa "whoop" her about 12 times.

John also told Mori about an earlier incident in which Gamboa "went after" Daniel with two kitchen knives and cut his hand as he tried to close the door against her. Daniel was holding Jane at the time. On a different occasion Gamboa threw a hanger at Daniel, but it hit Jane.

Jane told Mori about the "whoopings" Gamboa gave John for being on the telephone late at night and failing to get his homework journal signed. She said: "And so my mom—she told him to lay down on the bed and she whooped him. She whooped him and, uh—and I had to hear it. And so my brother—he didn't tell her to stop but he fell on the ground and she was still whooping his, uh, legs his thigh, and his arm. . . . Then on Monday night my mom—she whooped my brother because he didn't have his progress

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<sup>1</sup> The recorded interviews were played at trial.

report or his homework signed. And, uh, so she told him to lay down on her bed. And I—and I was on my dad’s bed. And so when she was, um, whooping him she had rolled up the—the belt and went like this in my brother’s face right here. And so then I walked in. Then I saw her going like this. And then I ran back and then I could just hear a smack.” Gamboa whooped John “a whole lot of times. Like probably every month he might—he gets whipped three times.”

Jane confirmed that Gamboa also “whooped” her, most recently two years ago, and once hit the children’s father with the belt and left red marks on his back. Once Gamboa hit the children with a hanger until it broke. Jane also talked about the time Gamboa went after Daniel with a knife and when she pushed John’s head into the wall. As to the former, Jane said her mother was mad and “she had a knife. Uh, she was going at my dad. My dad closed the door and locked it. She stabbed the door with the knife. And then his hand was in one of the ways and it went doo-but the knife never went through his hand. [¶]. . . [¶] It went right there. And then he has a cut like that.” She explained her mother “was on the ground. And so my dad—he was holding her down w—and he was like, calm down, calm down. And she was like, no, no I’m gonna stab you. And then it was—and then I was—I was scared a whole lot.”

Jane said her mother “smacks us around . . . real hard” and pulled both the children’s ears “real bad.” Once when Gamboa pulled Jane’s ear she put her finger deep inside it “[a]nd so I –sometimes when people are talking, uh, out of here I can just hear a—a loud beep. . . .”

John was 13 years old and in eighth grade at the time of trial. He testified about the “whoopings” he received for being on the telephone too late at night and failing to have his homework journal signed. Once when John was in sixth grade he saw Gamboa hit Jane with the belt. He also described the incident when Gamboa slammed his back into a wall so that he struck it with his back, leaving it damaged. He testified that he exaggerated some of the incidents of abuse during his interview because he was angry with Gamboa, “but I didn’t realize that I was going to be taken away for so long so.”

Specifically, he said he had exaggerated about his mother pushing his head into a wall, hitting him in the face with a belt and spanking him with a belt when he was a baby.

Jane was nine years old at trial. She testified that being “whooped” means getting spanked with a belt. She had only been whooped “like twice,” when she was “being disrespectful to my parents and I was trying to talk back.” She recounted the “whoopings” Gamboa gave John for failing to have his homework journal signed and talking on the telephone late at night. She also described the time Gamboa pushed John into a wall, leaving a hole in it, because “he was disrespecting my mom and he was being really rude so he thought that she wasn’t going to do anything. . . .” John told her his head hit the wall.

Jane testified that she lied to Ms. Mori about being deaf in one ear because she was mad at Gamboa for yelling at her. She also described the time that Gamboa hit Daniel with a belt, and recounted a milder version of the knife incident than she described during her interview. She testified that Gamboa grabbed a knife during a fight with Daniel “and then my dad saw her coming so he closed the door. And then—and then he let go of me and so I have ran out and ran under the table and my brother was watching from down the hall and then my dad opened the door and he grabbed the knife and then his hand got stabbed by the knife but it didn’t go through. It was like a scratch.”

Myalisha Dessman is Gamboa’s 23-year-old daughter and John and Jane’s half-sister. Other than living with her father in San Francisco when she was 16, Dessman lived in Gamboa’s home until she was 18 years old. Once when she was 15 or 16 she heard John getting hit “a few times” with a belt and crying. There were a couple of other times when she heard John get hit with the belt, but on those occasions “it kind of matched up for his discipline so it didn’t move me in any way.” She also had seen Jane get “a pop in the mouth” when she was three or four years old, and testified that Gamboa would smack Jane so hard in the face that she would cry.

Dessman admitted that Gamboa hit her from about first grade until she left home, and that she sometimes had to wear long sleeves and pants to cover up the marks and

bruises. Gamboa would smack her, John and Jane in the face, primarily in the mouth, and disciplined them by using whatever was within reach to hit them.

Sheriff's deputy Kim Cogo testified that on October 25, 2009 she responded to a reported incident in San Pablo. Daniel was in the front yard with John and Jane, holding a bloody tissue over his right hand. All three of them were upset. Gamboa was lying on the floor inside the home "saying she had been thrown to the floor and was hurt," although she had no visible injuries. John told her his parents were fighting and his mother "got really angry and went and grabbed a knife." His father tried to take the knife away "and he grabbed mommy and pulled her down to the floor and was able to get the knife away." John said his mother was lying on the ground laughing. His father took the children outside and called the police.

Dr. James Crawford-Jakubiak, the medical director at The Center for Child Protection at Children's Hospital, testified as an expert in child abuse and child injuries. He opined that some of the marks depicted in photographs of John's injuries were consistent with being beaten with a belt. Dr. Crawford-Jakubiak explained that getting hit "north of the neck is potentially a very dangerous place to have an impact injury. There are a lot of different types of structures—very sensitive structures that can sustain anything from mild to catastrophic damage depending on how the impact happened." For example, a slap to the head can cause severe damage to the eyes, nose, ear, teeth, face, jaw or tongue. The ringing sound John described indicated structural traumatic injury to the structures of the ear; repetitive episodes of ringing in the ear due to blows to the head are likely to cause noticeable hearing loss. Poking a child's ear could also damage the ear's internal structures, which was consistent with Jane's description of experiencing hearing loss and a beeping sound after Gamboa pulled her ear and poked a finger into it. Hitting someone with a belt-wrapped fist or slamming someone's head or back into a wall can cause death. Dr. Crawford-Jakubiak had seen "quite a few" cases in which abused children initially make a clear statement about what happened and later minimize or deny that their parents abused them.

Jaguanana Lathan, the children’s school principal, testified for the defense that she never noticed any physical signs of injury on Jane’s body. Gamboa was an active parent who came to “PTO meetings” and participated as needed. Jane’s third grade teacher testified that she never noticed Jane with any injuries. Cathy Bryant, a friend of the Gamboas, testified that she never saw Gamboa raise a hand to her children. Bryant was unaware of the charges against Gamboa until she testified. Two of John’s school friends testified that John was in a fight with a bigger kid in January 2012, shortly before he was taken out of school because of the child abuse. The other boy punched John in the face, back and stomach, and threw him to the ground.

The jury found Gamboa guilty of one count of inflicting corporal injury on a child (Pen. Code, § 273d, subd.(a)) (count 1),<sup>2</sup> one count of felony child abuse (§273a, subd. (a)) (count 8), two counts of misdemeanor child endangerment (§273a, subd.(b)) (counts 9 and 10), and the lesser included offense of misdemeanor child abuse on a second felony child abuse count (§273a, subd. (b)) (count 2). Gamboa was acquitted of five other counts under section 273d, subdivision (a) and section 273a, subdivisions (a) and (b) (counts 3, 4, 5, 6, 7).

The court suspended imposition of sentence and placed Gamboa on four years’ probation with conditions that included 365 days in jail, an order requiring her to stay away from John and Jane, and various conditions related to the use of drugs and alcohol. This timely appeal followed.

## **DISCUSSION**

### **I. Batson/Wheeler Error**

Gamboa contends the court violated her state and federal constitutional rights to a fair trial when it denied her *Batson/Wheeler*<sup>3</sup> motion as to prospective alternate juror Nadia J. The contention is irrelevant to any meaningful issue, as Nadia J. was a potential alternate juror and no alternate jurors were substituted into the jury. (*People v. Roldan* (2005) 35 Cal.4th 646, 703, disapproved on a different point in *People v. Doolin* (2009)

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<sup>2</sup> Subsequent references to statutes are to the Penal Code.

<sup>3</sup> *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

45 Cal.4th 390, 421 fn. 22.) Just as the Supreme Court stated in *People v. Roldan*, “[Because] no alternate jurors were ever substituted in, . . . it is unnecessary to consider whether any *Wheeler* violation occurred in their selection. Moreover, any *Batson* violation could not possibly have prejudiced the defendant.” (35 Cal.4th at p. 703; see *People v. Turner* (1994) 8 Cal.4th 137, 172, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5 [stating in dictum, “no alternate jurors were ever substituted in, and hence it is unnecessary to consider whether any *Wheeler* violation occurred in their selection”]; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1035–1036 [erroneous denial of prosecution’s peremptory challenge was harmless where no alternate jurors were used].) The same situation confronts us here. Following our Supreme Court, we decline Gamboa’s invitation to analyze an alleged *Batson/Wheeler* violation that could not possibly have affected the outcome of her trial.

## **II. Prosecutorial Misconduct**

Gamboa contends the prosecutor committed misconduct in closing argument by making comments she contends appealed improperly to the jurors’ sympathy and passion, stated facts not in evidence, vouched for the veracity of her children’s testimony, and unlawfully burdened her exercise of her trial rights to be present and confront the witnesses against her. Her contentions are meritless.

### *A. Background*

Gamboa takes issue with the following comments. In closing argument, the prosecutor addressed the discrepancies between the children’s interviews and their testimony at trial: “And in fact [John] gives this description despite what both [Jane] and [John] said when they testified which was a lot of minimizing and really who can blame them with what they’ve gone through and with their mom sitting right there. I don’t blame them.” Gamboa did not object.

The prosecutor revisited the same theme in her rebuttal: “Defense counsel also mentioned [Jane] in terms of what she said about the ear and it was really interesting watching her testify. And as soon as I brought up that Child Interview Center she knew what she had to chime in to say, right? She said, oh, well, about the Child Interview

Center I lied about my ear. Oh, okay, you lied about your ear. Gosh, all right. Can I ask how did that happen? It's a lie. But you know what, she went right back to how it happened, the same details she gave at the Child Interview Center, the same details that she gave to Officer Williams in terms of her mom grabbing her ear, sticking her finger in the ear, she went right back to that. Well, it happened at Macy's when I was looking at a bike. That's what she said because it did happen. *[But], you know what's sad, almost as sad as what these kids underwent on a regular basis is the fact that despite that they had to come sit up here with their mom sitting there—.*<sup>4</sup> (Italics added.) Defense counsel objected to this as "improper argument," but the court overruled the objection.

The prosecutor continued: *"With their mother sitting right there watching them and they tried to protect her. They tried to make it better. [John] sat up here and said, well, I said that those days because I didn't know how long she would be away. They said the truth. Even Mya who's 23 years old left home at 18, has been away for 5 years. She couldn't sit up here and tell you exactly what happened. She tried to also protect the mom and it wasn't until I came back and asked her direct questions, isn't it true that your mom hit you on a weekly basis from first grade when you moved out? She said yes. Isn't it true that you wore long sleeved shirts and pants to cover up marks on yourself? Yes. Isn't it true that you get hit in the face? Yes. Isn't it true that you watched your little sister's hair get pulled and get slapped in the face when she was 4? Yes. Isn't it true that you don't think the discipline that was going on in that house, discipline was unreasonable, that the punishment did [sic] the crime? Yes. And she said how hard that was to sit here and talk about this. She said she didn't want to be here. She said that she felt more comfortable sitting in the room with her dad, myself, and the inspector talking about what had occurred with an audio recording and who could blame her? Who could blame [John]? Who could blame [Jane]? No one could in terms of *how brave it is to walk up [here] and talk to a bunch of strangers about what your mom did to you.*"*

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<sup>4</sup> This and the following italicized portion of the prosecutor's argument are the comments defendant specifically identifies as misconduct. The nonitalicized remainder is provided here only for context.

At this point defense counsel objected that the prosecutor was vouching. The court responded by instructing the jury: “Ladies and gentlemen, you heard the witnesses. You are the ones who judge their credibility. It is not up to the attorneys to tell you who is credible and who is not credible. You are the ones who determine whether or not they are credible.”

### *B. Analysis*

#### 1. Legal Principles

“ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” ’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

“It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during a summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. [Citations.] The prosecutor is entitled to draw conclusions from the evidence presented and to state them to the jury. The right is very broad and includes the opportunity to fully state [her] views as to what the evidence shows and as to the conclusions to be drawn therefrom. [Citations.] [¶] Moreover, even in a case where prosecutorial misconduct is shown, reversal will not result ‘ . . . unless the misconduct can be said to have contributed materially to the verdict in a closely balanced case or is of such a nature that it could not have been cured by a proper and timely admonition.’ [Citation.]” (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396–397.)

## 2. Application

As a preliminary matter, Gamboa did not object to the prosecutor’s first remark about the children minimizing her conduct, so she forfeited the right to raise it as asserted error in this appeal. (*People v. Medina* (1995) 11 Cal.4th 694, 756–757; *People v. Fierro* (1991) 1 Cal.4th 173, 211.) Even were we to assume the comment was improper, there is no reason to suppose an objection and admonition by the trial court would not have cured it. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1215 [prosecutorial misconduct claim is reviewable absent objection “ ‘only if an admonition would not have cured the harm caused by the misconduct’ ”].)

Gamboa did object to the italicized comments made during the prosecutor’s rebuttal argument as improper argument or vouching, but at no time did she assert that those comments denigrated her rights to be present and confront the witnesses against her. Accordingly, this claim is also forfeited. “ ‘As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.’” (*People v. Valencia* (2008) 43 Cal.4th 268, 281, italics added.) In any event, the record gives no indication that the prosecutor’s argument tainted Gamboa’s right to defend herself or otherwise affected her participation in the proceedings.

To the extent preserved for appeal, Gamboa’s assertions of prosecutorial misconduct are unpersuasive. The children’s testimony at trial differed in some respects from their statements at the Child Interview Center. The prosecutor’s comments that the children “had to come sit up here with their mom sitting there” and were brave to testify against her explained those discrepancies by inviting the reasonable inference that the children were reluctant to tell the complete, unvarnished truth about their mother’s abuse in her presence.<sup>5</sup> “[S]o long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the ‘facts of [the] record and the

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<sup>5</sup> The trial court also noted in a discussion with counsel that the children clearly attempted to minimize their mother’s behavior when they testified at trial.

inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,’ her comments cannot be characterized as improper vouching.” (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.) “[T]here is no impropriety in attempting to persuade jurors to draw inferences based on the evidence.” (*People v. Frye, supra*, 18 Cal.4th at p. 972.) A prosecutor is also free in argument to draw on matters “not in evidence, but which are common knowledge or are illustrations drawn from common experience.” (*People v. Wharton* (1991) 53 Cal.3d 522, 567; *People v. Sassounian, supra*, 182 Cal.App.3d at p. 396.) The prosecutor’s argument here did not transgress these boundaries.

Nor, assuming the point to have been preserved despite counsel’s failure to articulate it (see *People v. Valencia, supra*, 43 Cal.4th at p. 281; *People v. Redd* (2010) 48 Cal.4th 691, 742–743), was the prosecutor’s commentary about how hard it must have been for the children to testify in their mother’s presence an improper appeal to the jurors’ sympathies and passions. “ ‘It is, of course, improper to make arguments to the jury that give it the impression that “emotion may reign over reason,” and to present “irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response.” [Citation.]’ ” (*People v. Redd, supra*, 48 Cal.4th at p. 743.) But here the prosecutor’s statements proposed a common-sense explanation for the variance between the children’s interviews and their testimony. Her argument did not invite the jury to render a verdict based on an irrational or emotional response. It is not reasonably probable the jury was influenced or misled by these relatively self-evident remarks.

### **III. Multiple Convictions**

Gamboa contends she was improperly convicted of two “course of conduct” felony child abuse charges (§ 273a, subd. (a), count eight) and misdemeanor child endangerment (§ 273a, subd.(b), count nine) for different acts that were part of the same

course of conduct.<sup>6</sup> She also argues her conviction on count nine must be dismissed because it is a lesser included offense of the crime charged in count eight. We disagree.

#### *A. Background*

The prosecutor explained the separate factual bases for counts eight and nine during closing argument. The felony, she explained, was based on the two times Gamboa slammed John into a wall. “Count 8 this is also in regards to [John] and this is another one of those counts that has that time frame that’s over a period of—an extended period of time. So January 2010 through January 23rd of 2012. And that’s because in the terms of the description that he gives with these particular events, there’s not an exact date or time like we know of or the 23rd or the 21st. And these incidents and [*sic*] referred to them as the wall incidents, okay, we know that he talked about the fact that there were two incidents involving the wall. And on the one incident that he says happened two, three months earlier he was punched that night, also slapped in the face. So he had the same worries that we would for the 23rd but in that instance his head is actually also slammed into the wall. . . . [¶] We also have a second time involving the wall that you heard described by [John] and you also heard testimony from—in regards to [Jane]. And

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<sup>6</sup> Count 8 charged that “On or about January 2010 through January 23, 2012, at Richmond, in Contra Costa County, the Defendant, KIMBERLY GAMBOA, under circumstances and conditions likely to produce great bodily harm and death, did willfully and unlawfully injure JOHN DOE, a child, did willfully and unlawfully cause and permit the child to suffer and to be inflicted with unjustifiable physical pain and mental suffering, and, having the care and custody of the child, did willfully and unlawfully injure and cause and permit the person and health of the child to be injured, and did willfully and unlawfully cause and permit the child to be placed in a situation that endangered the person and health of the child.”

Count 9 charged: “On or about January 2010 through January 23, 2012, at Richmond, in Contra Costa County, the Defendant, KIMBERLY GAMBOA, under circumstances and conditions other than those likely to produce great bodily harm and death, did willfully and unlawfully cause and permit [JOHN] DOE, a child, to suffer and to be inflicted with unjustifiable physical pain and mental suffering, and, having the care and custody of the child, did willfully and unlawfully injure and cause and permit the person and health of the child to be injured, and did willfully and unlawfully cause and permit the child to be placed in a situation that endangered the person and health of the child.”

this is the occasion where [John] is actually thrown into the wall and his back breaks the wall. He testified to that occurring as well and that there was damage in the wall. And [Jane] said, yep, it was in my room, my mom put a calendar over it.”

Later, addressing counts 9 and 10, the prosecutor stated: “This is another one of those periods that Judge Mockler was describing to you that [*sic*] in terms of a wide range of time. So we have January 2010 through January 2012 and you have one charge for [John] and one charge for [Jane]. And this encompasses a lot of conduct. We heard about a lot of things going on over at that house over a period of time. Some of it was directed towards [John], some of what [*sic*] was directed towards [Jane], some of it was directed towards their father, and they witnessed it. So in terms of they all obviously during this period suffered physical abuse in regards to their ear being pulled, being whooped with a belt, being slapped but also the emotional abuse of seeing their father whipped with the same belt that they’re whipped with in the back that’s leaving marks, seeing their mother throw a hanger at their father actually hitting [Jane] in the face, then being struck with hangers where they break. [John] described as being hit about three, four times a month and [Jane] witnessing that. [John] says he seen her hit about twelve times whooped with a belt. . . . But who was getting hit whether it was [Jane] or whether it was [John], these kids, they’re in this house and they’re in this together. And when one of them is going through this, the other one is going through it. They’re in the house, they’re seeing it, they’re hearing it, they’re seeing their sibling cry afterwards.”

#### *B. Discussion*

Gamboa argues her conviction of both counts eight and nine violates the proscription against dividing one criminal course of conduct into multiple charges. The authorities she relies on do not support her claim. *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309–1310 reasons that section 288.5 defines the continuous sexual abuse of a child as a course-of-conduct crime, so the offense falls within an exception to the general requirement that a unanimity instruction be given where the evidence tends to show more

violations than charges.<sup>7</sup> (See *People v. Anderson* (2012) 208 Cal.App.4th 851, 887–892 [not error to convict of both continuous sexual abuse of a child and additional lewd act counts for offenses that occurred outside the time period charged under 288.5].) In *People v. Lewis* (1978) 77 Cal.App.3d 455, 461, the defendant was improperly convicted of four counts of pimping the same woman over the course of five years because the applicable statute contemplates that knowingly deriving support or maintenance from the earnings of a prostitute “is an ongoing continuing offense that occurs over a period of time.” The crime was thus committed the first time the defendant derived support from one of the woman’s acts of prostitution, so it was error to convict him of multiple counts. (*Ibid*; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1139–1140.)

This case is different. Nothing in section 273a indicates a legislative intent that the People are limited to charging multiple, different acts of child abuse as a single course of conduct. Gamboa suggests no reason in law or logic that the People cannot charge, and Gamboa cannot be convicted of, a series of acts of child abuse so severe that they are likely to produce great bodily harm or death (§ 273a, subd. (a)) and separately charge and convict of a course of distinct acts of less severe abuse, whether or not those less severe acts of abuse were committed during the same general time period.

Gamboa’s related claim that she was wrongly convicted of both a greater offense (count eight) and lesser included offense (count nine) “for the same course of conduct” also lacks merit. Although the courses of conduct respectively described in the two counts occurred over the same periods of time, they comprised separate and distinct acts. It is therefore not the case that, as she maintains, she could not have committed one

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<sup>7</sup> As a general rule, “[w]hen the evidence tends to show a larger number of distinct violations of the charged crime than have been charged and the prosecution has not elected a specific criminal act or event upon which it will rely for each allegation, the court must instruct the jury on the need for unanimous agreement on the distinct criminal act or event supporting each charge.” (*People v. Avina, supra*, 14 Cal.App.4th at p. 1309.) But “[n]either instruction nor election are required . . . if the case falls within the continuous course of conduct exception,” either because the acts are so closely connected as to be part of the same transaction or if the statute contemplates a continuous course of conduct of a series of acts over a period of time. (*Ibid*.)

without committing the other. (See, e.g.,; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 748 [defendant properly convicted of committing a lewd act on a child and forcible lewd act on a child because different acts supported the challenged counts].)

#### **IV. Probation Conditions**

The court sentenced Gamboa to four years' probation subject to various conditions, including that: She is to provide written verification within 72 hours to her probation officer of any prescribed medications. [¶] She is to abstain from the use of alcohol or [*sic*] beverages and marijuana and not go to any establishment where alcohol is the chief item of sale.” Gamboa objected that these conditions were not warranted by the evidence. The court responded that the conditions “are standard terms of formal felony probation. So your objection is noted but I’m going to order them.” It then added a condition requiring Gamboa to submit to drug and alcohol detection tests as required by her probation officer.

Gamboa argues the alcohol and drug conditions are unwarranted because there was no evidence she abuses either substance or that their use was related to her offenses. The People concede, correctly, that the alcohol condition and drug conditions, to the extent the latter prohibits the use or possession of *legal* drugs for which Gamboa has a prescription or medical authorization, are unrelated to criminal conduct or future criminality, and must therefore be modified.<sup>8</sup> (See, e.g., *People v. Burton* (1981) 117 Cal.App.3d 382, 390.) The alcohol condition must be stricken and as modified, the drug condition withstands review. “The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. [Citation.] 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

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<sup>8</sup> The requirement that defendant report any new prescriptions to her probation officer strongly indicates that the court intended to prohibit only the illegal drug use and possession. We see no problem, however, in requiring the court and probation department to remove any room for doubt.

forbids conduct which is not reasonably related to future criminality . . . .’ ” (*People v. Lent* (1975) 15 Cal.3d 481, 486.) This test is conjunctive, so a probation condition may not be found invalid unless all three factors apply. The prohibition against using or possessing illegal drugs necessarily relates to criminal conduct, and therefore passes muster under *Lent*.

Gamboa relies on *People v. Keller* (1978) 76 Cal.App.3d 827 to argue the court cannot impose a drug condition unless there is a factual nexus between drug abuse and the crime or Gamboa’s personal history. But *Keller* is of limited precedential or persuasive value in light of that court’s own subsequent decision *People v. Balestra* (1999) 76 Cal.App.4th 57, which disapproved *Keller* to the extent it limited the court’s discretion beyond the requirements stated in *Lent* and failed to accord proper deference to the trial court’s factual determination of reasonableness. (*People v. Balestra, supra*, 76 Cal.App.4th at pp. 66, 68–69.) “*Keller*[] is simply inconsistent with a proper deference to a trial court’s broad discretion in imposing terms of probation, particularly where those terms are intended to aid the probation officer in ensuring the probationer is complying with the fundamental probation condition, to obey all laws.” (*Id.* at p. 68.) In any event, *Lent* prohibits us from disapproving a probation condition that relates to conduct that is “in itself criminal.” (*People v. Lent, supra*, 15 Cal.3d at p. 486.)

Gamboa also maintains the court simply failed to exercise its discretion at all in imposing the probation conditions, because it described them as “standard terms of formal felony probation.” We disagree. The court considered a great deal of information, including the probation report, both parties’ sentencing memoranda, a letter from Gamboa’s therapist and testimony from her former social worker, in reaching its decision to grant felony probation “with a lot of standard terms and conditions” rather than impose the prison sentence vigorously urged by both the prosecutor and the probation department. The record affirms that the court carried out its sentencing responsibilities and that its sentencing decisions were made in the exercise of its informed discretion.

## V. Fees and Costs

After the trial court imposed various fines and fees, including a \$176 probation report fee, Gamboa objected “to all the fines and fees. Ms. Gamboa has no present ability to pay. She is unemployed. She has no ability to pay them.” Without expressly ruling on the objection, the court continued: “I will assess attorneys fees in the amount of \$500. And I will refer all fines and fees for an assessment and recommendation to [the] Court Collections and Compliance Unit, and they will do a financial evaluation of Ms. Gamboa’s situation. [¶] She will need to comply with their request for an income and expense data. [¶] If the recommendation is that Ms. Gamboa cannot pay these fees, they will send that recommendation to Court and we will set it for a hearing, but at this point in time I am imposing the fines and fees.” Gamboa contends it was error to impose the attorneys’ and probation report fees without first determining that she had the ability to pay them. We agree.

“Section 987.8 establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant. [Citation.] Under subdivisions (b) and (c) of the statute, an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has ‘the present ability . . . to pay all or a portion’ of the defense costs. [Citations.]” (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1420.) In assessing the defendant’s ability to pay, the court must consider the defendant’s available resources, including the defendant’s likely income and assets. If the court awards attorney fees or costs in error, we may remand for the purpose of determining the defendant’s the ability to pay. (*Id.* at p. 1421.)

The People implicitly concede that, as the record demonstrates, the court did not make the required assessment of Gamboa’s ability to pay. Instead, they argue Gamboa forfeited the claim by failing to object a second time after the court disregarded counsel’s objection, on the ground raised in this appeal, “to all the fines and fees.” She did not. “ “[A]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in

accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.” [Citation.]’ ” (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1051, fn.1.) The People alternatively suggest the issue is premature pending an assessment and recommendation from the Court Collections and Compliance Unit or a new fee order based on such a recommendation, but, again, we disagree. Gamboa has been ordered to pay the challenged amounts and is entitled to challenge that order on appeal. (§ 1237, subd. (b).) It would be absurd to hold she cannot do so because the court may itself revisit the issue after completing the assessment that was required in the first instance.

Finally, the trial court orally imposed a \$150 criminal conviction assessment fee, but the written probation order lists the fee as \$155. We agree with both parties that the probation order must be amended to conform to the court’s oral pronouncement. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471–472.)

#### **DISPOSITION**

The probation conditions are modified to vacate the condition related to alcohol use and clarify that the drug condition applies only to illegal use or possession. The orders directing the payment of attorney’ fees and a probation report fee are vacated and the probation order is modified to reflect a criminal conviction assessment fee of \$150. As modified the judgment is affirmed in all other respects.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Pollak, J.