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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRITTANY SCHALL et al.,

Defendants and Appellants.

E060481

(Super.Ct.No. FBA1000541)

OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris,
Judge. Affirmed.

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and
Appellant Brittany Schall.

Law Office of Zachary J. McCready & Associates and Zachary J. McCready for
Defendant and Appellant Daniel Schall, Sr.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, and Laura

Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendants Daniel Schall and Brittany Schall² inflicted continuous physical abuse on two children, an infant and a toddler. A jury convicted defendants of two counts each of child abuse likely to cause great bodily injury or death. (§ 273a, subd. (a).) The jury found true the allegation that Daniel had personally inflicted great bodily injury upon a child under the age of five years old. (§ 12022.7, subd. (d).) The trial court sentenced Daniel to prison for eight years four months, and granted Brittany five years of probation.

On appeal, Daniel argues the court improperly admitted his former testimony from an earlier trial during rebuttal.³ In addition, Daniel contends the court erred by not giving a unanimity instruction. Brittany contends the court gave an incorrect criminal negligence instruction, and also claims the probation condition about contact with convicted felons is vague and overbroad.

The People respond that Daniel's prior testimony was admissible under Evidence Code sections 1220 and 1291. Second, no unanimity instruction was necessary because the convictions were based on continuous child abuse over a period of time, and the

¹ All statutory references are to the Penal Code unless stated otherwise.

² We use first names for ease of reference.

³ The first trial was a mistrial.

prosecutor made a clear and direct election as to which act established the great bodily injury enhancement. Third, the criminal negligence instruction correctly stated the law. Finally, the probation term is not overbroad because it includes a knowledge requirement. We affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. *G.H. and N.S.*

Daniel and Brittany were married and lived on the Army base in Fort Irwin, California. Brittany's son, G.H., was born in October 2008, and had a different father who was not Daniel. In June 2010, Brittany gave birth to a daughter, N.S.

While Daniel worked, Brittany managed the household. Defendants became friends with Heidi Robeson and Keith Robeson, who had six children, and Heidi often babysat for G.H. and N.S. G.H. was always hungry when he visited the Robeson family.

Once when the families were together, Heidi watched Daniel become very upset with G.H., grab his arm and order him to stand against a wall. Heidi confronted Daniel, who admitted he was struggling to control his temper. Heidi also noticed a large hole in the wall at defendants' home.

During the families' visit to a swimming pool in July 2010, Heidi's teenage daughter, Alisa, heard G.H. complaining to Daniel that he was hungry. In response, Daniel picked up G.H. and threw him into the pool, crying and screaming, while Daniel continued to dunk him. Daniel held the boy under the water while he struggled to reach

the surface and gasped for breath. Alisa knew G.H. could not swim. She grabbed the child and chastised Daniel, who responded, “Don’t tell me what to do. He is my child, not yours.” Another time, Heidi’s son Brice also saw Daniel dunking G.H.

On July 23, 2010, Heidi noticed G.H. had a large bruise around his ear and on the side of his head. Brittany claimed he had slipped in the bathtub. G.H. was scared of the water until Heidi bathed him together with her daughter of the same age. Heidi photographed bruises on G.H.’s legs and back but she did not contact the police.

On July 28, 2010, Heidi found blood while changing N.S.’s diaper. There was bruising in the shape of handprints on the baby’s torso. Keith testified he noticed an additional injury on G.H.’s torso in the shape of a boot print, similar to the military boots issued at Fort Irwin. Keith’s command unit instructed him to bring both children to the hospital. Heidi observed G.H. had different bruising from what she had seen the week before. Heidi photographed the fresh bruises with her cell phone.

B. Medical Evidence

The children were eventually transferred to Loma Linda University Children’s Hospital and treated by Dr. Amy Young. Both children were undersized for their ages. G.H.’s height was average but his weight was in the lowest fifth percentile for his age. During six days in the hospital, G.H. gained two pounds and six ounces, much greater than the normal gain of an ounce a day for a child his age. N.S., who was eight weeks old, was in the lowest 10th percentile of weight for her age. She had only gained about 19 grams a day since her birth. A newborn normally gains about 30 grams per day. Her

head circumference was in the fifth percentile.

Dr. Young noted that G.H. had over 40 different injuries to his body. G.H. had a torn frenulum—the flap of skin connecting the lip to the gum inside the mouth—which would cause a large amount of bleeding. A torn frenulum could be caused, either accidentally or from abuse, by a blunt impact to the mouth, something forcibly shoved into the mouth, or a slap across the face. G.H. also had bruising to his right ear and the right side of his head, which was not caused by a toddler injuring himself accidentally. When a toddler falls down, he usually falls on the chin, nose, forehead, shins, or other anatomical protuberances. G.H.'s injuries were multiplanar, meaning the injury could be caused by a hand striking the face or by an object that can mold to the face. G.H. also had abrasions beneath his nose and on his chin, and an additional bruise on his upper lip, consistent with being hit in the face. Dr. Young would have expected a reasonable caregiver to have sought medical attention for the visible injuries.

G.H. had more injuries to his genitals, bruising above his penis, on the tip of his penis, and on his inner groin area, and abrasions to his scrotum. This was unusual because G.H.'s diaper would have protected these areas of the body. The injuries could have been caused by rough diaper changing, or by being pinched, scratched or punched. Finally, G.H. had bruising to his right forearm, right thigh, upper thigh, outer portion of his knee, hand, back, and abdomen. His blood panel revealed a high level of liver enzymes, indicating liver damage and abdominal trauma as a result of blunt impact.

N.S.'s body bore about 20 bruises located on her left neck, upper left arm, left

abdomen, back, chest, right arm, left scalp, behind her left ear, and right leg. There were also some abrasions beneath her left ear. The head and ear injuries could have been caused by being hit on the side of the head. N.S.'s blood panel also revealed a high level of liver enzymes, indicating liver damage.

N.S.'s wrists appeared to be slightly fractured, caused by yanking on the baby's arms. The fracture to the distal radius, a wrist bone, was a significant injury.

Both children's bruises were readily visible and were not typically caused except by physical abuse. Dr. Young's opinion was that the children were victims of physical abuse.

C. The Investigation

A deputy sheriff, Robin Real, assigned to the Crimes Against Children Unit, interviewed Daniel on August 12, 2010, and asked him to explain photographs of the children's injuries. Daniel admitted that he had disciplined G.H. "too hard" and had "slapped [G.H.] upside the head," causing the large bruise to the child's head and ear. Daniel said G.H. was afraid of him, and Daniel admitted hitting G.H. in the abdomen and the groin in frustration. Daniel also admitted N.S.'s wrist injuries may have occurred when Daniel grabbed the baby's hands and tried to stand her up, although she was less than two months old.

D. Defense and Rebuttal Evidence

A fellow soldier testified that his son played with G.H. and that, when he babysat G.H. and N.S. a few times, he never saw any injuries on the children. The witness said

Daniel never acted improperly with G.H., and G.H. had been playing in a bounce house before being taken to the hospital. On cross-examination, the witness admitted he had not mentioned the bounce house in previous testimony.

The prosecution presented rebuttal evidence that, in the earlier trial, Daniel testified that G.H. had fallen out of the bathtub and hit the side of his head and ear on the toilet, leaving a mark on his ear. In his statement to police, Daniel had said it was him, and not Brittany, who fractured N.S.'s wrists.

III

DANIEL'S FORMER TESTIMONY

Daniel urges the trial court erred when it allowed the prosecutor to introduce his former testimony as rebuttal evidence. After both defendants rested their respective cases, the prosecutor argued the testimony was admissible citing *People v. Malone* (2003) 112 Cal.App.4th 1241. Defense counsel objected on the grounds that no rebuttal was needed when only a minimal defense was offered. The prosecutor argued the evidence would rebut the testimony of the defense witness that the children had not been injured. The trial court admitted the former testimony.

Daniel's former testimony was admissible within the trial court's discretion under Evidence Code sections 1220⁴ and 1291.⁵ (*People v. Malone, supra*, 112 Cal.App.4th at

⁴ Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which

[footnote continued on next page]

pp. 1244-1245; *People v. Harris* (2005) 37 Cal.4th 310, 335-336.) Evidence that corroborates evidence submitted during the case in chief may be admitted in rebuttal on a disputed point. (*People v. Cooper* (1967) 249 Cal.App.2d 479, 482; *People v. Harrison* (1963) 59 Cal.2d 622, 629.)

Daniel relies upon *People v. Carter* (1957) 48 Cal.2d 737, which explains the proper order for presentation of evidence: “Section 1093, subdivision 4, of the Penal Code provides that after the defendant has offered his evidence, the prosecution may then offer ‘rebutting testimony only, unless the court, for good reason, in furtherance of justice . . .’ permits it to offer evidence upon its original case. . . . The purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent’s case is suddenly confronted at the end of trial with an additional piece of crucial evidence. Thus proper rebuttal

[footnote continued from previous page]

he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.”

⁵ Evidence Code section 1291, subdivision (a), provides: “(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.”

evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.]" (*Id.* at pp. 753-754.)

In *Carter*, the Supreme Court held that it was error to permit the prosecutor to withhold evidence of a red cap left at the scene of the crime because the evidence was material to the prosecution's case to establish the commission of the crime and the defendant's denial of guilt put his presence at the scene in issue from the beginning. (*People v. Carter, supra*, 48 Cal.2d at p. 754.)

Here, unlike the prosecutor's decision to withhold the red cap in *Carter*, the subject evidence did not serve to establish Daniel's commission of the crime. Instead, Daniel's former testimony about G.H. falling in the bathtub and his admission about breaking N.S.'s wrists were properly admitted during the rebuttal phase because they rebutted the defense witness's testimony that he never saw any injury to the children and corroborated evidence from the prosecution's case-in-chief. Admission of the evidence was not an abuse of discretion. (*People v. Harris, supra*, 37 Cal.4th at p. 336.)

The evidence also did not violate defendant's right against self-incrimination: "Contrary to defendant's suggestion to the trial court, the 'use of a defendant's prior trial testimony . . . does not violate his privilege against self-incrimination.' [Citation.] 'A defendant who chooses to testify waives his privilege against compulsory self-

incrimination *with respect to the testimony he gives . . .*’ [Citation.]” (*People v. Malone, supra*, 112 Cal.App.4th at p. 1244.)

Furthermore, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Ample evidence established Daniel committed the crimes as charged. Daniel’s former testimony—claiming the large bruising to G.H.’s ear was caused when he slipped in the bath—corroborated other evidence of G.H.’s injuries and was consistent with Brittany’s explanation to Heidi about G.H. falling in the bathtub. Similarly, when he was interviewed, Daniel had already admitted he hurt N.S. Therefore, the additional evidence in rebuttal was not prejudicial to Daniel and the defense declined to offer surrebuttal evidence. (*People v. Riley* (2010) 185 Cal.App.4th 754, 766.)

In view of the overwhelming evidence of Daniel’s guilt, he would not have achieved a more favorable result had the testimony been presented in the prosecution’s case-in-chief, or not at all. Direct and circumstantial evidence demonstrated Daniel physically abused both children repeatedly. The testimony of the Robeson family members, the medical evidence, and Daniel’s own admissions permit no other outcome. Any error was harmless.

IV

UNANIMITY INSTRUCTION

The prosecution alleged a theory of continuous course of conduct for counts 1 and 2. It relied on the specific act of Daniel fracturing N.S.’s wrists to support the great bodily injury enhancement. Daniel argues the trial court erred when it failed to give the

jury a unanimity instruction that the enhancement was based on the same act underlying the conviction. Additionally, Daniel argues the trial court improperly modified the jury instruction for the great bodily injury allegation. We reject these claims because no unanimity instruction was required. The prosecutor clearly elected the act of fracturing N.S.'s wrists as the basis for the great bodily injury enhancement, part of the same continuous course of conduct which was the basis of Daniel's conviction.

Daniel was charged with one count of section 273a, subdivision (a), child abuse, for each child and the allegation that Daniel personally inflicted great bodily injury on N.S. The prosecutor requested the court not give a unanimity instruction because the children's injuries were caused by a continuous course of conduct. Defense counsel agreed but, concerning the enhancement, requested CALCRIM No. 3501—a modified unanimity instruction—which the trial court refused. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 555-556, quoting *People v. Jones* (1990) 51 Cal.3d 294, 321-322.)

Instead the trial court instructed the jury based on CALCRIM No. 3162, the instruction concerning the great bodily injury enhancement: “[T]he People must prove that: [¶] 1. The defendant personally inflicted great bodily injury on [N.S.] during the commission of the crime; [¶] AND [¶] 2. At that time, [N.S.] was under the age of 5 years. [¶] The defendant must have applied substantial force to [N.S.]. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.” The instructions for counts 1 through 4, child abuse, defined great bodily

harm: “Great bodily harm means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.” (CALCRIM No. 821.)

Generally, the trial court must instruct the jury that it must unanimously agree that the defendant committed the same specific act. However, the rule does not apply where: (1) the prohibited acts are so closely connected that they form part of one and the same transaction, and thus one offense; and (2) where the statute contemplates a continuous course of conduct of a series of acts over a period of time. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) Continuous child abuse fits within the exception. (*People v. Ewing* (1977) 72 Cal.App.3d 714, 716-717; *People v. Napoles* (2002) 104 Cal.App.4th 108, 116.)

Furthermore, an act which occurred during a continuous course of conduct can constitute a great bodily injury enhancement, and still not require the trial court to charge the jury with a unanimity instruction: “When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) If the prosecution clearly elects one act among many as the basis for the offense, a unanimity instruction is not required. (*Id.* at pp. 1536, 1539; *People v. Diaz* (1987) 195 Cal.App.3d 1375, 1381; *People v. Mayer* (2003) 108 Cal.App.4th 403, 418; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455.)

Here, the prosecutor charged Daniel with regularly abusing the children, and pursued a criminal negligence theory against Brittany for condoning her husband's conduct. A continuous course of conduct was the theory of liability for all four counts. The fracturing of N.S.'s wrists by Daniel constituted the specific act, during the continuous course of conduct, supporting the great bodily injury enhancement. The prosecutor's election eliminated the need for a unanimity instruction. (*People v. Diaz, supra*, 195 Cal.App.3d at p. 1381.)

Furthermore, any error was harmless under the state or federal standard. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186.) The failure to give a unanimity instruction is harmless if it is not reasonably possible the jury disagreed concerning different specific acts. (*People v. Napoles, supra*, 104 Cal.App.4th at p. 119.) Here the prosecutor expressly stated he was relying on the broken wrists and did not argue any other child abuse constituted the enhancement. The evidence established beyond a reasonable doubt that Daniel inflicted great bodily injury on N.S. Dr. Young believed the wrist fractures were between seven and 21 days old. Daniel admitted he would stand the baby up by her hands, causing the fractures. The jurors unanimously agreed that the fracturing of N.S.'s wrists supported the enhancement. Any error was harmless.

V

CRIMINAL NEGLIGENCE INSTRUCTION

Brittany asserts that CALCRIM No. 821, the instruction concerning criminal negligence, is legally flawed and lowers the prosecution's burden of proof because it

permits the jury to find a defendant acted with “indifference to the consequences” of an act, without finding the act amounted to a “disregard for human life.” We disagree because the instruction encompasses the risk of death or great bodily injury, satisfying the legal definition of criminal negligence.

We conduct an independent review of whether a jury instruction correctly stated the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Instructions are viewed in context. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) The courts assume that jurors are intelligent people capable of understanding and correlating all the jury instructions that are given. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

The trial court gave the jury the following instruction without objection from the parties:

“To prove that the defendant is guilty of this crime, the People must prove that:

[¶] 1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child’s person or health was endangered; [¶] AND [¶] 2. The defendant caused or permitted the child to be endangered under circumstances or conditions likely to produce great bodily harm or death; [¶] AND [¶] 3. The defendant was criminally negligent when she caused or permitted the child to be endangered. [¶] . . . [¶] Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: [¶] 1. He or she acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation; [¶] 2. The person’s

acts amount to disregard for human life or indifference to the consequences of his or her acts; [¶] AND [¶] 3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others.” (CALCRIM No. 821.)

The California Supreme Court in *People v. Penny* (1955) 44 Cal.2d 861 articulated the meaning of criminal negligence: “The words lack of ‘due caution and circumspection’ have been heretofore held to be the equivalent of ‘criminal negligence’ . . . ‘the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in, other words, a disregard for human life or an indifference to consequences.’” (*Id.* at p. 879.)

In *People v. Peabody* (1975) 46 Cal.App.3d 43, a child abuse case, the appellate court reiterated: “The conduct must be aggravated or reckless; that is, it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life. The conduct must show an indifference to the consequences, and this has been said to require knowledge, actual or imputed, that the act tends to endanger another’s life.” (*Id.* at p. 47.)

In *People v. Valdez* (2002) 27 Cal.4th 778, the Supreme Court considered “the appropriate mens rea for section 273a, subdivision (a) felony child endangerment . . . [¶] . . . [that derives from the fourth prong:] ‘willfully causes or permits that child to be placed in a situation where his or her person or health is endangered.’” (*Id.* at p. 787.)

The *Valdez* court concluded there was no reason why section 273a, subdivision (a), could not require a general intent mens rea for direct infliction of child abuse and criminal negligence for indirect abuse. The “use of a general intent standard is appropriate when the statute criminalizes commission of a battery, or direct infliction of unjustifiable pain or suffering. By contrast, criminal negligence is the appropriate standard when the act is intrinsically lawful, such as leaving an infant with a babysitter, but warrants criminal liability because the surrounding circumstances present a high risk of serious injury. Criminal negligence is not a ‘lesser state of mind’; it is a standard for determining when an act may be punished under the penal law because it is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances. When that departure endangers the person or health of a child and is ‘under circumstances or conditions likely to produce great bodily harm or death,’ it constitutes a felony violation of the child endangerment statute. (§ 273a, subd. (a).)” (*Id.* at pp. 789-790.)

Here, the instruction stated defendant acted in a reckless way that is gross departure from the way an ordinarily careful person would act in the same situation; the acts amount to *disregard for human life or indifference to the consequences*; and a reasonable person would have known that acting in that way would naturally and probably result in harm to others. (CALCRIM No. 821.) Defendant argues the instruction is incorrect because of the word “or” between “disregard for human life” and “indifference to the consequences.” But the instruction, considered as a whole, makes

clear that the phrase “indifference to the consequences” refers to the potential consequences of death or great bodily harm. Consistent with *Penny, Peabody* and *Valdez*, “an indifference to the consequences” is not an alternative element to “disregard for human life.” Instead, the phrase described what constitutes conduct that is without a proper regard for life. The instruction concerning criminal negligence correctly stated the law.

Even assuming the instruction was wrong, no error affected the result. The challenged phrase necessarily referred to the consequences of potential death or great bodily harm. Furthermore, the evidence established that Brittany acted recklessly, without regard for her children’s safety or lives. She knew about the abuse; the bruises on both children were readily apparent; and Dr. Young believed a reasonable caregiver would seek medical aid based on the injuries. The children were also severely malnourished. Brittany’s conduct showed a patent disregard for her children’s well-being. Any error was harmless under the *Watson* or *Chapman* standard of review. (*People v. Wolfe, supra*, 114 Cal.App.4th at pp. 185-186.)

VI

PROBATION TERM

Term No. 15 of Brittany’s probation required her to “Not associate with persons known to defendant to be convicted felons or anyone actively engaged in criminal activity upon the release of custody.” Daniel was listed as a specific exception to this term. Brittany contends the probation term is unconstitutionally vague and overbroad.

The knowledge requirement, however, affords her with fair notice of what is and is not permitted. The term also serves the purposes of rehabilitation and societal protection.

A probation condition challenged as unconstitutional is reviewed de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881, 885, 887, 889.) To withstand a challenge on the ground of unconstitutional vagueness, a probation condition must be sufficiently precise for the probationer to know what is required of her, and to enable the court that imposed the condition to determine whether the condition has been violated: “A condition is sufficiently precise if its terms have a ‘plain commonsense meaning, which is well settled’” (*In re R.P.* (2009) 176 Cal.App.4th 562, 566; *Sheena K.*, at p. 890.) Due process requires adequate notice. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.) Probation conditions are interpreted according to a reasonable and objective standard, using common sense and context. (*People v. Bravo* (1987) 43 Cal.3d 600, 606-607; *Acuna*, at p. 1117; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.)

Furthermore, “[i]f a probation condition serves to rehabilitate and protect public safety, the condition may ‘impinge upon a constitutional right otherwise enjoyed by the probationer, who is “not entitled to the same degree of constitutional protection as other citizens.”’” (*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1355.) A probation condition is unconstitutionally overbroad if it is not “tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.” (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910; *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

In *Sheena K.*, a probation condition requiring that the juvenile defendant not associate with anyone “disapproved of by probation” was held unconstitutionally vague and overbroad “in the absence of an express requirement of knowledge, . . .” (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 890-891.) The vagueness of the probation condition allowed the probation officer the power to preclude the defendant’s association with almost anyone, including grocery clerks, mail carriers, and health care providers. The infringement of the defendant’s constitutional rights was cured by modification requiring the defendant have knowledge of who was disapproved of by the probation officer. (*Id.* at p. 892.)

In other cases, the courts have held that a knowledge requirement cures a probation condition about association. (*People v. Garcia* (1993) 19 Cal.App.4th 97, 103; *People v. Lopez* (1998) 66 Cal.App.4th 615, 638; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) Here, the probation condition includes a knowledge element, barring Brittany from associating with someone she knows to be a convicted felon or engaged in criminal activity. The knowledge element gives her “fair warning” of how she can remain in compliance with the terms of her probation. The term, as it is currently worded, is not unconstitutionally vague or overbroad.

A constitutional probation condition cannot be invalidated by an appellate court unless the condition has no relationship to the crime, relates to noncriminal conduct, and requires or forbids conduct not reasonably related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486, quoting *People v. Dominguez* (1967) 256 Cal.App.2d 623,

627.) The courts have broad discretion to impose conditions fostering rehabilitation and protecting public safety. (§ 1203.1; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A defendant is free to decline probation if it is too harsh. (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459, quoting *People v. Miller* (1967) 256 Cal.App.2d 348, 356.)

Brittany did not object below. Her claim that the condition does not relate to her crime is forfeited. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 881, 885, 889.) Notwithstanding forfeiture, the term reasonably relates to her child abuse conviction because it prohibits her from associating with convicted felons or those engaged in criminal activity, protecting her children from future association with felons. The condition relates to Brittany's crimes and prevents her from participating in criminal negligence. The condition was not an abuse of discretion based on these circumstances.

VII

DISPOSTION

We reject defendants' claims of evidentiary and instructional error and Brittany's challenge to the probation condition. We affirm the judgment.

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CODRINGTON

J.

We concur:

RAMIREZ

P. J.

HOLLENHORST

J.