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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO ARMENTA,

Defendant and Appellant.

F061600

(Fresno Sup. Ct. No. F08903972)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Gustavo Armenta was arrested and charged with three counts of infliction of corporal injury on his wife, T.A. Defendant's neighbors, Mr. and Mrs. E.,

were witnesses to the charged offenses and to prior incidents of domestic violence, and were subpoenaed to appear as witnesses at defendant's scheduled trial. While his case was pending, defendant allegedly threatened to harm Mr. and Mrs. E. if they testified against him. Defendant subsequently entered into a negotiated disposition, and he was placed on probation. As a condition of probation, the court issued an order prohibiting defendant from having any contact with T.A., Mr. E., and/or Mrs. E.

As we will explain *post*, Mr. and Mrs. E. reported that defendant continued to threaten them, and the People sought to revoke defendant's probation. However, the court had mistakenly terminated the protective order as to Mr. and Mrs. E. The court decided to reinstate defendant on probation, but again issued a protective order as to Mr. and Mrs. E. as a condition of defendant's probation.

On appeal, defendant contends the superior court lacked jurisdiction to issue the protective order as to Mr. and Mrs. E. because they were not victims of domestic violence, and such an order was not appropriate as a condition of his probation. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Case No. F08903972¹

On June 15, 2008, Fresno police officers were dispatched to a residence after a 911 hang-up call was received from that location. Upon their arrival at the house, the officers interviewed T.A., defendant's wife, who reported that defendant had hit her on several occasions.

T.A. stated that defendant hit her on three occasions prior to June 8, 2008. One of these incidents occurred in November 2007 when she arrived home late. Defendant grabbed her purse, repeatedly hit her with the purse, and broke her finger.

¹ The facts of the underlying incidents are taken from the preliminary hearing transcripts and the prosecution's motion to consolidate the two cases.

T.A. said that on June 8, 2008, she called defendant to tell him that she would get home late from a party, and they argued. T.A. asked a friend, P.W., to accompany her home. When they arrived at her house, defendant was waiting for her and told the friend to leave. After the friend left, defendant hit T.A. and inflicted bruises on her arm.

T.A. further stated that on June 14, 2008, she went shopping and arrived home late. Defendant was angry, and they argued. Defendant dumped out her purse and demanded the car keys. She refused to give him the keys. He grabbed her arm and dragged her to the back room. She hit her head on the treadmill. Defendant punched her in the back with his fists, and she suffered bruises on her body. T.A. got up and slapped defendant in the face, and the incident ended.

T.A. also reported that on June 15, 2008, defendant's daughter arrived at the residence, she hit T.A. in the face, and T.A. fought back. T.A. said defendant called 911, the police arrived at the house, and they asked her about the bruises on her body.²

Mr. and Mrs. E. lived next to defendant and T.A. Mr. E. observed part of the incident between T.A. and defendant's daughter. Mrs. E. had seen past incidents of domestic violence between defendant and T.A.

On June 17, 2008, complaint No. F08903972 was filed in the Superior Court of Fresno County, charging defendant with two counts of infliction of corporal injury to a spouse (Pen. Code,³ § 273.5, subd. (e)), based on the June 8 and 14, 2008, incidents.

On July 8, 2008, the preliminary hearing was held and defendant was held to answer. The court granted T.A.'s request and issued a protective order prohibiting defendant from having any contact with T.A.

² At the preliminary hearing, T.A. admitted that she was bipolar; she previously used methamphetamine; she was previously on parole; she continued to drink alcohol and she was taking medication prescribed by a psychiatrist.

³ All further statutory citations are to the Penal Code unless otherwise indicated.

On July 11, 2008, the information was filed which charged defendant with three felony charges of infliction of corporal injury to a spouse, T.A., with the offenses being committed on June 8 and 14, 2008, and November 10, 2007. The information further alleged defendant had two prior domestic violence convictions.⁴

On July 22, 2008, defendant pleaded not guilty, and he was released on bail.

As of November 2008, defendant's trial was set for March 5, 2009. Mr. and Mrs. E. were subpoenaed as prosecution witnesses for the pending trial, and they intended to testify against defendant.

Case No. F09900595

On December 25, 2008, while defendant's case was pending, Mr. and Mrs. E. were at T.A.'s house to celebrate Christmas with her. Defendant called T.A.'s home telephone and Mrs. E. answered. Mrs. E. told defendant that he was violating the court order by calling T.A.'s house. Defendant cursed Mrs. E. because she was with T.A., and said he was going to have someone perform a "drive-by" and "shoot up" Mrs. E.'s house.

A few minutes later, defendant called T.A.'s cell phone. Mrs. E. answered and again told defendant that he was violating the court order. Defendant told Mrs. E. that she would not know "what goes on in court because you won't be around."

Defendant called a third time, Mr. E. answered, and defendant asked for T.A. Mr. E. told defendant that he was violating the restraining order, and T.A. did not want to talk to him. Defendant cursed Mr. E. and said, "You don't know who you're dealing with and you're a dead man."

⁴ Defendant was a long-time employee of the Fresno County Planning Department. According to the appellate record, defendant pleaded no contest in 2003 to felony cultivation of marijuana (Health & Saf. Code, § 11358), felony corporal injury to a spouse (§ 273.5), and he was placed on probation. In 2006, defendant pleaded no contest to misdemeanor corporal injury to a spouse. Defendant was on probation when he committed the offenses against T.A. in June 2008.

On January 17, 2009, defendant called T.A., and sent her a certified letter in violation of the existing protective order.

In case No. F09900595, defendant was charged with two counts of intimidating a victim and/or witness (§ 136.1, subd. (c)(1)); two counts of attempted terrorist threats (§§ 664/422); and two counts of misdemeanor willful violation of a protective order (§ 166, subd. (c)(1)), with an on-bail enhancement (§ 12022.1), with the victims being T.A., Mr. E., and Mrs. E., based on the December 2008 and January 2009 incidents.

On March 16, 2009, defendant was returned to custody.

On March 18, 2009, the preliminary hearing was held in case No. F09900595. Mr. and Mrs. E. testified about defendant's telephone calls in December 2008. Defendant was held to answer on four counts, and the court dismissed two counts. The court further stated:

“Based on the testimony the Court heard, I'll issue a criminal protective order pending trial. [¶] Mr. Armenta, that means until further order of the court, you're ordered to have no personal, telephonic, written, electronic or third-party contact with [Mr. or Mrs. E.]. You're ordered to not come within 100 yards of them or their residence.... The deputy will hand a copy of this order to you in just a couple minutes.”

Defendant's pleas and probation conditions

The prosecution moved to consolidate case Nos. F08903972 and F09900595. The court never ruled on the motion, however, because defendant entered into a negotiated disposition to resolve both pending matters.

On April 24, 2009, defendant pleaded no contest to counts I and II, infliction of corporal injury on a spouse, based on the June 2008 incidents, in case No. F08903972. He admitted one prior domestic violence conviction. The court dismissed count III.

The court also dismissed the pending charges in case No. F09900595, “reserving comment and restitution at the time of sentencing.”

In case No. F08903972, defendant was placed on probation for three years, subject to specific terms and conditions, including service of 365 days in jail, to obey all laws, to submit to alcohol and drug testing, and to complete a batterer's treatment program.

The court also advised defendant that as another condition of his probation, the court was going to order him to stay away from T.A., Mr. E., and Mrs. E.:

“Until further order of the Court, you’re ordered to have no personal, telephonic, or written contact with [T.A.], [Mrs. E.] and/or [Mr. E.]. You’re ordered to not come within 100 yards of these people or their residences. [¶]...[¶] If you violate *this restraining order or any other term and condition of your grant of probation*, you will not do the time on the work furlough program and you’ll be out of work. Do you understand, sir?” (Italics added.)

Defendant said he understood.

The appellate record contains the “restraining order” about which the court advised defendant. The court used the two-page Judicial Council Form CR-160, a preprinted form which is entitled “Criminal Protective Order—Domestic Violence,” and has boxes for the court to check to reflect whether the order was being issued “pending trial” pursuant to section 136.2, or as a “posttrial probation condition” pursuant to section 1203.097.⁵

The court checked the box on the first page of the preprinted form to indicate the order was being issued as a condition of probation in a domestic violence case pursuant to section 1203.097. The order prohibited defendant from having personal, electronic, telephonic or written contact with T.A., Mr. E., and Mrs. E.; having contact with them through third parties, or coming within 100 yards of their residences. The second page

⁵ As we will discuss, *post*, section 136.2 authorizes the issuance of a protective order but only prior to judgment. Section 1203.097, subdivision (a)(2), mandates the imposition of a protective order as a condition of probation when the defendant is convicted of a domestic violence offense, but only as to a domestic violence victim. (§ 1203.097, subd. (a)(2); Fam. Code, § 6211.)

contained preprinted language which stated that a violation of the protective order was subject to criminal prosecution for a misdemeanor, felony, or contempt of court.

Probation Violation

On October 20, 2009, the court found defendant violated probation because he tested positive for methamphetamine. The court subsequently sentenced defendant to five years four months in state prison, stayed the term, and reinstated him on probation subject to the same terms and conditions, including service of jail time.

On December 4, 2009, defendant filed a notice of appeal based on the probation violation finding in case No. F08903972. On April 14, 2011, this court filed an unpublished opinion, correcting the record to reflect that defendant admitted only one prior conviction when he entered his pleas, and affirming in all other respects. (*People v. Gustavo Armenta* (Apr. 14, 2011, F059121) [nonpub. opn.]⁶)

Mistaken termination of criminal protective order

On June 15, 2010, the court heard and denied defendant's motion to modify the terms and conditions of his probation so he could use medical marijuana.

At the same hearing, defendant's wife, T.A., appeared and asked the court to lift the existing protective order against defendant. The court asked about defendant's progress in the batterer's program. The court was advised that defendant had attended all classes, he was scheduled to complete the program in three months, and "[t]hey think his potential for further violence has decreased and the victim's level of safety has increased."

The court granted T.A.'s request to terminate the protective order. In doing so, the court admonished defendant to be careful because he still faced a stayed state prison

⁶ We grant defendant's request, and take judicial notice of this court's unpublished opinion.

term, and “you’ll be on your way to state prison” if he violated any of the terms and conditions of probation.

On the same day, the court filed an order which terminated the April 24, 2009, protective order as to T.A., Mr. E., and Mrs. E. The order was thus terminated not just as to T.A., who made the motion, but also as to Mr. E. and Mrs. E., even though they did not appear before the court and make the same motion.

Subsequent probation violation allegation

On September 28, 2010, the probation officer received a police report that defendant had threatened Mrs. E. that day. Mrs. E. reported that she saw defendant standing outside his former residence, which was near Mr. and Mrs. E.’s house. He looked at Mrs. E., pointed his index finger at her, and pointed his thumb upwards. He then moved his hand upwards. Mrs. E. took this signal as a threat that he was going to shoot her. Mrs. E. further reported that on August 17, 2010, Mr. and Mrs. E. heard loud sounds outside their house. Mrs. E. saw defendant’s vehicle driving away from her house, and Mr. E. saw defendant in the car. They found several orange paint balls had been fired at their parked car.

Also on September 28, 2010, the court conducted a hearing on defendant’s probation status. Mr. E. appeared before the court and stated that numerous people had appeared at their house and threatened them in defendant’s name, that their house would be burned or riddled with bullets. Mr. E. further stated that he saw defendant fire a paint gun at their car. Mrs. E. stated that defendant always drove around the neighborhood and parked by their house. Mrs. E. said that according to T.A., defendant had marked an area near Mr. and Mrs. E.’s house, where he could legally park without violating the protective order.

The court reviewed the police reports about the Mr. and Mrs. E.’s allegations. It ordered defendant’s probation revoked, set a probation violation hearing, and remanded

defendant into custody. In making these orders, the court believed the protective order was still in existence as to Mr. and Mrs. E.

Reinstatement of protective order as to Mr. and Mrs. E.

On October 29, 2010, the court convened the scheduled hearing on defendant's probation violation. The probation officer had recommended the court find that defendant violated probation and the protective order when he threatened Mr. and Mrs. E., and for the court to send defendant to state prison in case No. F08903972.

At the hearing, however, the prosecutor withdrew the probation violation allegation. The prosecutor stated that he had just learned that the criminal protective order had been mistakenly terminated as to Mr. and Mrs. E. at the June 15, 2010, court hearing, and it was not in effect when the alleged incidents occurred against Mr. and Mrs. E. in August and September 2010.

The court acknowledged that "one of the protected parties," T.A., had previously appeared before another judge and requested termination of the protective order. At that time, the court terminated the entirety of the protective order, "but did not note specifically that it was only terminated as to the single party that requested the termination; therefore, that order was terminated as to all three named parties," including Mr. and Mrs. E.

The court further noted that it had issued a protective order as to Mr. and Mrs. E. during the pendency of case No. F09900595, but that order was terminated by operation of law when that case was dismissed. "That was the reason why the Court included [Mr. and Mrs. E.] in the other order [when defendant entered his pleas] to make sure that those folks were protected," but the other judge "inaccurately or inappropriately terminated it as to all three parties."

The court stated that it would issue "a new order" which prohibited defendant from having any contact with Mr. and Mrs. E.

“And you are advised, Mr. Armenta, that *you’re not to have any contact with them* directly, indirectly, through third parties or otherwise. You’re not to come within 100 yards of them or their residence. You’re not to communicate with them in any fashion at all and they can report any prohibited communications made by you. I’m going to accept that you likely engaged in the behaviors that are complained of and *but for the mistake of the Court you could be now shipped off to state prison for four years, so get with the program.* Leave these people alone, and that is my order. The order’s effective forthwith, and for the record the defendant is present being served with this copy of the order in open court.” (Italics added.)

The court apologized to Mr. and Mrs. E. for the error. The court reinstated defendant on probation subject to the same terms and conditions, and defendant was released from custody.

The record contains the protective order which the court issued at the hearing. The court again used the preprinted two-page Judicial Council Form CR-160, entitled “Criminal Protective Order—Domestic Violence.” The first page contained boxes for the court to check to indicate whether the order was being issued pursuant to section 136.2, as a condition of probation under section 1203.097, or pursuant to section 273.5, subdivision (k) or section 646.9, subdivision (k).⁷

The court checked the box on the first page to indicate the order was being issued as a condition of probation pursuant to section 1203.097, and it prohibited defendant from having personal, electronic, telephonic or written contact with Mr. and Mrs. E., contact with them through a third party, and not to come within 100 yards of them and their residence. The preprinted language on the second page stated that violation of the order was subject to criminal prosecution for a misdemeanor, felony, or contempt of court.

⁷ A court has statutory authority to issue restraining or protective orders in cases where a defendant is convicted for corporal injury to a spouse resulting in a traumatic condition (§ 273.5, subd. (i)), and stalking (§ 646.9).

DISCUSSION

On appeal, defendant challenges the court's decision at the October 29, 2010, hearing to impose a protective order as to Mr. and Mrs. E. as a condition of his probation. Defendant argues the court lacked statutory authority to issue the order because it relied on section 1203.097 to do so, and Mr. and Mrs. E. are not victims of domestic violence as defined by statute.

A. Failure to object

We first note that defendant never objected to the court's imposition of the protective order as to Mr. and Mrs. E. as a condition of his probation, either when he entered his pleas and was initially placed on probation on April 24, 2009, or when he was reinstated on probation on October 29, 2010, which is the order that defendant now challenges.

As a general rule, the failure to object to a probation condition at the time it is imposed forfeits any challenge to that condition on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) As defendant notes, however, there is "a narrow exception ... for 'unauthorized sentences' or sentences entered in 'excess of jurisdiction.'" [Citation.] Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Anderson* (2010) 50 Cal.4th 19, 26.) We will thus consider defendant's argument that the protective order issued in favor of Mr. and Mrs. E., was an unauthorized condition of his probation. (See, e.g., *People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382 (*Ponce*).)

The court imposed the order as to Mr. and Mrs. E. as a condition of probation by using Judicial Council Form CR-160. That form is usually utilized "to issue: (1) criminal protective orders under section 136.2, (2) domestic violence protective orders

under section 1203.097, or (3) ‘posttrial probation condition’ orders.” (*Ponce, supra*, 173 Cal.App.4th at p. 382.) We will review each of these possible alternatives.

B. Section 136.2

Section 136.2 is one of many statutes that authorize court orders to protect victims and witnesses. “Under section 136.2 ..., during the pendency of a criminal proceeding when the court has a ‘good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur,’ the court is authorized to issue a restraining order. However, section 136.2 is limited ‘to the pendency of [a] criminal action’ because section 136.2 ‘is aimed at protecting only “victim[s] or witness[es].” ’ [Citation.]” (*People v. Selga* (2008) 162 Cal.App.4th 113, 118 (*Selga*)). Thus, a protective order issued under section 136.2 is operative only during the pendency of a criminal proceeding and as a prejudgment order. (*Selga, supra*, 162 Cal.App.4th at pp. 118-119; *Ponce, supra*, 173 Cal.App.4th at pp. 382-383.)

In case No. F09900595, defendant was charged with several felonies based on the telephonic threats he made to Mr. and Mrs. E. in December 2008, so that they would not testify against him in pending case No. F08903972. On March 18, 2009, the court conducted the preliminary hearing in case No. F09900595, and imposed an order which prohibited defendant from having any contact with Mr. and Mrs. E. At the time the court issued that order, it was valid pursuant to section 136.2 since both criminal cases were pending against defendant, and Mr. and Mrs. E. were both victims and witnesses in those cases.

On April 24, 2009, however, defendant entered his pleas in case No. F08903972, based on the domestic violence offenses against his wife, T.A. The court placed him on probation, and dismissed the pending charges in case No. F09900595, which involved defendant’s threats against Mr. and Mrs. E. Once defendant entered his pleas and the other case was dismissed, the court was not authorized to impose a protective order as to

Mr. and Mrs. E. based on section 136.2, because criminal charges were no longer pending against defendant. (*Selga, supra*, 162 Cal.App.4th at pp. 118-119.)

C. Section 1203.097

As set forth *ante*, when the court initially placed defendant on probation on April 24, 2009, and when it reinstated defendant on probation on October 29, 2010, the court imposed a protective order as to Mr. and Mrs. E. and advised him that the order was being issued as a condition of probation. The court also used Judicial Council Form CR-160, and it checked the box which indicated that the order being imposed was a condition of probation pursuant to section 1203.097.

Defendant is correct that the court erroneously checked the box for section 1203.097 when it issued the order as to Mr. and Mrs. E. “Under section 1203.097, subdivision (a)(2) ..., where defendant is convicted of a crime of domestic violence and placed on probation, the court is required to issue a criminal protective order. Because section 1203.097 is directed at the protection of victims of domestic violence, a protective order under this section may be issued for the protection of *only persons identified in section 6211 of the Family Code*. (§ 1203.097, subd. (a)) These victims include cohabitants and spouses, as well as former cohabitants and spouses, those who have or have had a dating or engagement relationship, one with whom the defendant has had a child, the child of a defendant, or any other person related by consanguinity or affinity within the second degree. (Fam. Code, § 6211)” (*Selga, supra*, 162 Cal.App.4th at p. 119, italics added.)

The court lacked statutory authority to impose a protective order as to Mr. and Mrs. E. as a condition of probation pursuant to section 1203.097, at either the April 24, 2009, or October 29, 2010, hearings. There is no evidence that Mr. and Mrs. E. were “victims” of domestic violence within the meaning of section 1203.097, subdivision (e)(2), and Family Code section 6211. Thus, the court lacked authority to issue the order

as to Mr. and Mrs. E. pursuant to section 1203.097. (*Selga, supra*, 162 Cal.App.4th at p. 119.) This conclusion, however, does not end our analysis.

D. Section 1203.1

While the court could not have relied on section 1203.097, it still retained discretion to impose a protective order on behalf of Mr. and Mrs. E. as a condition of defendant's probation in case No. F08903972.

Section 1203.1, subdivision (j) permits the court to “impose and require ... reasonable conditions [of probation], as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer”

“Section 1203.1 gives trial courts broad discretion to impose conditions of probation to foster rehabilitation of the defendant, protect the public and the victim, and ensure that justice is done. [Citations.] ‘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.’ [Citation.] As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]” (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702; see also *Selga, supra*, 162 Cal.App.4th at p. 120.)

Defendant argues that the court lacked discretion to impose the protective order as to Mr. and Mrs. E. as a condition of his probation, because the order was not reasonably related to the offenses for which he was placed on probation. To the contrary, the court's

order which prohibited defendant from having any contact with Mr. and Mrs. E. was directly related to the criminal offenses to which defendant pleaded no contest and was placed on probation in case No. F08903972, and reasonably related to his future criminality. Mr. and Mrs. E. had been subpoenaed as witnesses to the domestic violence offenses which defendant committed against his wife, as charged in case No. F08903972. The court was advised that while that case was pending, defendant repeatedly threatened Mr. and Mrs. E. based on their intent to testify against him.

At the April 24, 2009, hearing, when defendant entered his pleas, the court ordered defendant not to have any contact with Mr. and Mrs. E. as a condition of his probation, and that he could be sent to prison if he violated the court's order. Despite that warning, defendant engaged in the conduct reported by Mr. and Mrs. E. in August and September 2010.

Under these circumstances, the court's decision to again order defendant not to have any contact with Mr. and Mrs. E., when it reinstated him on probation at the October 29, 2010, hearing, would have been a valid condition of probation under section 1203.1. Based on the entirety of the record, the court would have acted well within its discretion to prohibit defendant from having any contact with Mr. and Mrs. E. as a condition of his probation under section 1203.1. (See, e.g., *People v. Jungers, supra*, 127 Cal.App.4th at p. 703.)

E. Selga

While the court had discretion to impose such an order as a condition of defendant's probation under section 1203.1, it checked a box on a preprinted form reflecting that the order was imposed pursuant to section 1203.097. A similar situation was addressed by the Third Appellate District in *Selga, supra*, 162 Cal.App.4th 113, where the defendant pleaded guilty to stalking his ex-girlfriend, and the court issued a criminal protective order to prohibit the defendant from having any contact with the victim's current boyfriend. When the court issued the order, it used a preprinted Judicial

Council form which stated that the criminal protective order was a posttrial condition of probation pursuant to section 1203.097, subdivision (a)(2). On appeal, the defendant argued the protective order was statutorily invalid. (*Selga* at pp. 115-116, 119.)

Selga agreed with the defendant and held the protective order was invalid because the victim's current boyfriend was not a domestic violence "victim" within the meaning of section 1203.097. (*Selga, supra*, 162 Cal.App.4th at p. 120.) *Selga* further held that the superior court had broad discretion to impose such an order as a reasonable condition of probation under section 1203.1. (*Id.* at pp. 117, 119, 120.) However, *Selga* rejected the People's argument that "since the condition could have been imposed under section 1203.1, there is no prejudice." (*Id.* at p. 120.)

"We cannot accept the People's position. The criminal protective order itself advises that a violation of the restraining order may be punished as a contempt of court, a misdemeanor or a felony. By contrast, for conduct that is not otherwise criminal, as defendant points out, a stay-away order imposed as a condition of probation is not punishable as a separate offense. 'The ramifications of a violation of a condition of probation are stated by the court and established by statute, i.e., that probation may be revoked. Following revocation of probation, a defendant is to receive no greater sentence than that he could have received at the time probation was granted, and the length of a sentence shall be based on circumstances as they existed at the time probation was granted.' [Citation.]" (*Selga, supra*, 162 Cal.App.4th at p. 120.)

Selga acknowledged that a stay-away order to protect the victim's current boyfriend "may nonetheless be an appropriate condition of probation in light of the circumstances of the offense, which included defendant making threats to [the current boyfriend] and damaging his car. [Citation.]" (*Selga, supra*, 162 Cal.App.4th at p. 120.) *Selga* ordered the protective order stricken as to the current boyfriend, but remanded the matter to the superior court "to exercise its discretion on whether to impose a similar stay-away order as a condition of probation under section 1203.1." (*Id.* at p. 121.)

F. Analysis

Based on the reasoning in *Selga*, it might seem that the appropriate remedy in this case would be to strike the October 29, 2010, criminal protective order, and remand the matter to the superior court to exercise its discretion as to whether to impose a stay-away order as to Mr. and Mrs. E. as a condition of defendant's probation pursuant to section 1203.1.⁸

As we will explain, however, the entirety of the record permits this court to affirm the superior court's order of October 29, 2010. When the superior court imposed protective orders as to Mr. and Mrs. E. at both the April 24, 2009, and October 29, 2010, hearings, it repeatedly admonished defendant that the protective order was being imposed as a condition of his probation, and that if he violated the order and continued to contact Mr. and Mrs. E., his probation would be revoked and he would be sent to state prison. We have already explained that such an order would have been a proper exercise of the court's discretion under section 1203.1, since the contacts were based on defendant's underlying motive to prevent Mr. and Mrs. E. from testifying against him in case No. F08903972, the case in which he entered his pleas and was placed on probation.

When the court orally imposed the protective order, the court never cited section 1203.097, or any other statute, but instead made clear that the order was being imposed as a condition of defendant's probation. Indeed, there is no evidence the superior court believed it was acting under the authority of section 1203.097 instead of section 1203.1. The court may have used Judicial Council Form CR-160 simply because there is no

⁸ The People separately argue the court's order of October 29, 2010, was valid independent of any statutory authority, because the superior court had the inherent authority to impose a protective order as to Mr. and Mrs. E. Such an argument has been repeatedly rejected, and trial courts have been cautioned not to exercise inherent powers in a way that negates existing statutory law regulating restraining orders. (*Ponce, supra*, 173 Cal.App.4th at p. 384.)

Judicial Council form protective order that indicates the order is being issued as a general term of probation under the authority of section 1203.1, and not because it believed it was acting under section 1203.097. Furthermore, the court may have checked the box to indicate the protective order was a condition of probation under section 1203.097, but only to make clear that it was not issuing the order under the other alternatives provided by that preprinted form, as a prejudgment order under section 136.2, or under section 273.5, subdivision (k), or section 646.9, subdivision (k).

“Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error. [Citation.]” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) “[A]ny uncertainty in the record must be resolved against the defendant.” (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Moreover, “ ‘ ‘... a trial court is presumed to have been aware of and followed the applicable law. [Citation.]’ ’ ” (*Ibid.*)

Section 1203.097 makes a protective order mandatory under the circumstances described in the statute, whereas the court has discretion to impose a stay-away order as a condition of probation under section 1203.1. Thus, there is a difference between issuing a mandatory protective order under section 1203.097, and a discretionary order under section 1203.1. We find nothing in the record to suggest the superior court believed it had to issue a protective order under section 1203.097, as opposed to exercising its discretion to issue one as a condition of probation under section 1203.1. As we have noted, the court repeatedly advised defendant that the order was being issued as a condition of his probation, and that he could be sent to prison if he violated the order and continued to contact Mr. and Mrs. E.

On the record before us, we are not persuaded that the trial court mistakenly issued a mandatory protective order under section 1203.097, rather than properly issuing a discretionary protective order as a condition of probation under section 1203.1. In any event, even if we were to find the trial court acted only under section 1203.097, it would

make no difference because “ “[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.” [Citation.]’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 976 (*Zapien*).

In other words, it does not matter that the trial court may have mistakenly believed section 1203.097 gave it authority to issue the protective order, because section 1203.1 provided that authority. Thus, the order was lawfully issued regardless of whether the trial court acted under the wrong statute.

We acknowledge that in *Selga*, the court decided that remand was the appropriate remedy for a similar situation. *Selga* rejected the People’s argument that the superior court’s reliance on the wrong code section was not prejudicial. *Selga* held defendant was prejudiced by the erroneous order because “a violation of [a] restraining order may be punished as a contempt of court, a misdemeanor or a felony. By contrast, for conduct which is not otherwise criminal, ... a stay-away order imposed as a condition of probation is not punishable as a separate offense.” (*Selga, supra*, 162 Cal.App.4th at p. 120.) Accordingly, *Selga* ordered the criminal protective order stricken, and remanded the case to the superior court to exercise its discretion on whether to impose a similar stay-away order as a condition of probation under section 1203.1. (*Selga, supra*, 162 Cal.App.4th at p. 121.)

Selga does not control the outcome of this case. While *Selga* decided the superior court abused its discretion by issuing the protective order under section 1203.097 instead of section 1203.1, *Selga* did not consider the fundamental principle from *Zapien*, upon which we rely here, that a decision correct in law will not be disturbed on appeal merely because it was given for a wrong reason. This leads us to another fundamental principle

that “an opinion is not authority for a proposition not therein considered. [Citation.]” (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2; *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9.) Since *Selga* did not consider whether the protective order could be upheld under *Zapien*’s “right for the wrong reason” principle, we conclude that *Selga* is not persuasive authority on the question of whether the order before us was lawfully issued. (*Zapien, supra*, 4 Cal.4th at p. 976.)

Defendant might argue that the October 29, 2010, order was prejudicial because he could be subject to a separate criminal prosecution if he violated the protective order in the future, based on a prosecuting agency’s possible mistaken belief that the order was validly issued under section 1203.097. While a cursory review of the form could lead a casual reader to that conclusion, the present opinion effectively precludes an improper criminal action. Instead, if defendant violates the October 29, 2010, protective order as to Mr. and Mrs. E., the ramification of any such violation is as “stated by the court and established by statute, i.e., that probation may be revoked.” (*People v. Johnson* (1993) 20 Cal.App.4th 106, 112.) No error or prejudice appears.

Finally, we note that “ ‘[i]t is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. [Citation.] The court may correct such errors on its own motion or upon the application of the parties.’ [Citation.] Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

We find that the superior court’s erroneous use of Judicial Council Form CR-160 does not require reversal of this case. We will order the record corrected to reflect that

the protective order issued by the court on October 29, 2010, as to Mr. and Mrs. E., was imposed as a condition of defendant's probation in case No. F08903972, thus clarifying that defendant is not subject to a separate criminal prosecution under section 1203.097 if he violates that order.⁹

DISPOSITION

The matter is remanded to the Fresno County Superior Court to correct the record of October 29, 2010, in accordance with the terms of this opinion, to reflect that the protective order issued by the superior court that day, as to Mr. and Mrs. E., was imposed as a condition of defendant's probation in case No. F08903972, and it was not imposed pursuant to Penal Code section 1203.097. In all other respects, the judgment is affirmed.

Poochigian, J.

WE CONCUR:

Cornell, Acting P.J.

Detjen, J.

⁹ We note that defendant's conduct might still constitute a separate criminal violation for either intimidation of witnesses (§ 136.1) or criminal threats (§ 422), entirely independent of the existence of a protective or stay-away order. We do not pass on whether defendant's conduct toward Mr. and Mrs. E. amounted to a separate criminal violation. If so, however, then he would have also violated the condition of probation to obey all laws, regardless of whether there was a valid protective or stay-away order in effect at the time of his conduct.