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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARLON JOHNSON, Defendant and Appellant.	H037980 (Monterey County Super. Ct. No. SS102192A)

Defendant Marlon Johnson appeals after conviction, by jury trial, of recklessly causing fire to an inhabited structure in violation of Penal Code section 452, subdivision (b).[1] He was placed on probation for four years, with a number of conditions, including some barring him from using or possessing alcohol, drugs, and weapons.

On appeal, defendant contends: (1) the trial court erred by failing to give a unanimity instruction, since there was evidence that he caused two separate fires; (2) the trial court erred by instructing the jury, pursuant to CALCRIM No. 359, that it could rely on his out-of-court statements to convict him if "slight" additional evidence supported a "reasonable inference that a crime was committed"; and (3) some of the probation conditions were unconstitutionally vague.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

We will modify the challenged probation conditions but affirm the judgment in all other respects.

BACKGROUND

A. Defendant's Eviction

In September of 2009, defendant became a tenant at 369 Main Street. He lived in apartment 308 on the top floor.

On September 3, 2010, the building's property manager served defendant with an eviction notice. There were several reasons for his eviction. Defendant had paid the rent late, dismantled the smoke alarm in his apartment, and violated the building's no-smoking rule. Defendant asked the property manager whether he could stay in the apartment if he paid his rent, repaired a damaged door, and reimbursed the cost of replacing the smoke alarm, which had been restored to working condition. The property manager told him that staying was not "an option."

B. The Fire

On the afternoon of September 20, 2010, the Salinas Fire Department received a report of smoke in the building at 369 Main Street. Firefighters initially used an infrared thermometer to scan the walls, but it did not detect anything. The battalion chief then used a thermal imaging camera and found light smoke coming from defendant's apartment.

Firefighters entered defendant's apartment, which was filled with a light haze. They first noticed that two stove burners were on "high," with shirts or rags smoldering on top of them. There was no food in pans on those burners. There were some dark marks on the stove top, but "[i]t was hard to tell if it was just grime or fire damage," particularly since the entire apartment was "really untidy."

Firefighters then found a second source of the smoke. Near defendant's bed, the floor was smoldering. A bunch of clothes were piled up in that spot. The carpet had

burned through to the particle board underneath it. The burn was in an oblong shape and covered a three-foot area. The burn was deepest in the center, indicating that there had been some kind of accelerant. The burn would not have been caused by simply dropping a match onto the carpet.

Thomas Wiley, who was a fire marshal at the time, smelled an acetone odor and cut out a piece of the carpet. Firefighter David Furey noticed a half-full bottle of nail polish remover on the floor but he did not collect it or determine whether or not it contained acetone. There was no evidence that the carpet fire had been ignited by any other means, such as electrical cords or wiring.

The smoke detector on the ceiling of the apartment did not work when the firefighters tested it. The wires had been tampered with and the back-up battery had been removed.

C. Defendant's Interview

The property manager called defendant's cell phone to tell him about the fire. Defendant said he did not know what had happened. Although defendant said he was "right down the street," he did not arrive at the building until one hour later.

When defendant arrived at his apartment, Fire Marshal Wiley asked him about the fire. Defendant became agitated. He was subsequently arrested and interviewed by Salinas Police Officer Christopher Silva and Fire Marshal Wiley.

During the interview, defendant said he did not know how the fire could have started, but suggested he might have "left something burning." When told, "you left the stove on," defendant admitted he had forgotten and "was rushing."

Asked about the fire on the floor next to his bed, defendant again said he did not know what had happened. He denied that he had been smoking in the room. He also denied having any acetone, but he admitted he might have spilled some nail polish remover and that he had been playing with a lighter. Defendant described "flicking " his

lighter and matches. Defendant also stated that he had spilled "almost a whole bottle" of nail glue.

During a subsequent interview, defendant clarified that by "flicking" matches, he meant he would light a match, blow it out, then throw it. He had flicked three matches. Defendant was sure that the first two had gone into a trash bag near the site of the spill, but he was not sure what happened to the third match.

Nail glue, matches, and a lighter were found in defendant's backpack, which was in his property at jail. The police did not go back to defendant's apartment to look for a bottle of nail polish.

D. Expert Testimony

Fire Marshal Wiley testified that in his opinion, the carpet fire was intentionally set. He based this opinion in part on the disabled smoke detector and the fact that defendant was in the process of being evicted, as well as the lack of any apparent accidental cause.

Defense expert Samuel Jeffrey Campbell would have concluded that the cause was "undetermined" rather than intentional. It was possible that the carpet fire had been started with ignitable liquid. The fire could not have been started with a dropped match or cigarette; it needed some kind of fuel. If it had been started with matches, he would have expected to find remnants.

E. Charges, Verdicts, and Sentencing

Defendant was charged, by information, with arson (count 1; § 451, subd. (b)) and, as a lesser-included offense, recklessly causing fire to an inhabited structure (count 2; § 452, subd. (b)).

The jury found defendant not guilty of count 1 (arson), but it convicted him of count 2 (recklessly causing fire to an inhabited structure). At the sentencing hearing, the trial court suspended imposition of sentence and placed defendant on probation for four

years, under a number of terms and conditions, including some barring him from using or possessing alcohol, drugs, and weapons.

DISCUSSION

A. Unanimity Instruction

Defendant contends the trial court erred by failing to instruct the jury that it had to unanimously agree whether the stove fire or floor fire constituted the charged offenses.

1. Proceedings Below

In his trial brief, defendant requested the jury be instructed with CALCRIM No. 3500, which would have told the jury that the People had "presented evidence of more than one act to prove that the defendant committed" the charged offense and that the jury "must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

The jury instruction conference was held in chambers just before the prosecution finished presenting its case. The jury instruction conference was not reported. The trial court did not instruct the jury with CALCRIM No. 3500.

The trial court instructed the jury on the elements of "unlawfully causing a fire that burned an inhabited structure, in violation of Penal Code section 452" pursuant to CALCRIM No. 1531. The jury was instructed that the People had to prove, inter alia, that defendant "set fire to or burned or caused the burning of a structure or property" and that "the fire burned an inhabited structure." The instruction defined a "structure" as "a building."

During argument to the jury, the prosecutor emphasized that the jury could not convict defendant of count 2 unless it found he "set fire or actually caused the burning of a structure." He reminded the jury that it had to find "that the inhabited structure was burned."

The prosecutor argued that "this fire" was caused by defendant intentionally spilling the nail polish remover and using it as an accelerant. The prosecutor argued that there were two "sites of origin for the fire." He argued it was more than a "coincidence that on the same date at the same time two accidental fires are started." He reiterated that "we have a separate origin for that fire" and that it could not have been accidental since there were "two different locations for such fire." When arguing about count 2, the prosecutor likewise referred to "this fire, these multiple fires."

Defense counsel similarly referred to "the fire" in the singular throughout his argument to the jury. He argued that defendant was not guilty because "the fire" was an accident.

In closing, the prosecutor argued that recklessness was shown by defendant's act of "flicking matches in that apartment in that manner towards a trash receptacle and a pool of fluid." He argued that "based on that alone, you should return a verdict of guilty on Count 2."

2. Analysis

"In a criminal case, a jury verdict must be unanimous. . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).)

"This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.] . . . 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order

to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' [Citation.]" (*Russo, supra,* 25 Cal.4th at p. 1132.)

Whether or not a unanimity instruction is requested, it should be given " 'where the circumstances of the case so dictate.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1199 (*Riel*).) "[T]he unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Russo, supra,* 25 Cal.4th at p. 1135.)

It appears that here, the trial court determined that there was no risk the jury would "divide on two discrete crimes and not agree on any particular crime." (*Russo, supra,* 25 Cal.4th at p. 1135.) We agree that the " 'circumstances of the case' " did not " 'dictate' " that a unanimity instruction be given. (*Riel, supra,* 22 Cal.4th at p. 1199.) In light of the evidence presented and the jury instructions for the charged offenses, the trial court could reasonably find that there was no danger any of the jurors would vote to convict defendant of arson or recklessly causing fire to an inhabited structure based on the stove fire alone. The jury instructions for the charged offenses required the jury to find that the fire actually "burned an inhabited structure," and they defined "structure" as "a building." However, there was no substantial evidence that the stove fire caused any part of the structure to burn. Even if the stove itself is considered a fixture and thus part of the structure, the evidence did not establish that the stove was burned, charred, or destroyed. (See *In re Jesse L.* (1990) 221 Cal.App.3d 161, 168; *People v. Lee* (1994) 24 Cal.App.4th 1773, 1778 (*Lee*) [arson to inhabited structure may be based on burning of personal

property that is "affixed to the real property so securely and permanently" that is has become "an integral part of the structure"].) While there were "some dark markings" on the stove, firefighter Furey could not tell if "it was just a lack of cleaning or if it was smoke damage." This testimony would not have supported a finding that the stove fire burned any part of the structure. In contrast, the evidence showed that the floor fire did burn part of the structure—i.e., the carpet and the flooring underneath it. (See *Lee, supra,* at p. 1778 ["the jury could reasonably find the carpet in this case was a fixture"].)

We find support for our analysis in *Riel, supra,* 22 Cal.4th 1153. In *Riel*, an accomplice testified that he, the defendant, and a third person robbed, kidnapped, and murdered a truck stop attendant. (*Id.* at pp. 1172-1173.) The accomplice testified that they first robbed the attendant at the truck stop and that later, while they were driving, they robbed the attendant of his wallet. Only the truck stop robbery was corroborated by the physical evidence.

On appeal, the defendant argued the court should have given a unanimity instruction because there were two distinct robberies—one at the truck stop and one in the car. (*Riel, supra,* 22 Cal.4th at p. 1199.) The Supreme Court held that a unanimity instruction was unnecessary. The court acknowledged that it was "conceivable that some, or even all, of the jurors might have had a reasonable doubt that the robbery in the car occurred. They might have considered it a possible embellishment on [the accomplice/witness's] part. These jurors might have found defendant guilty based on the truck stop robbery but not the car robbery. But the reverse is not true. If the jury believed [the witness], defendant was clearly guilty of the truck stop robbery, which the physical evidence shows occurred. It is inconceivable that a juror would believe [the witness's] testimony that defendant committed the robbery in the car but somehow find he did not commit the truck stop robbery." (*Id.* at p. 1200.)

A similar analysis applies here. It is conceivable that some or all of the jurors might have had a reasonable doubt that the stove fire caused the burning of a structure,

and these jurors might have found defendant guilty based on the floor fire only. "But the reverse is not true." (*Riel, supra,* 22 Cal.4th at p. 1200.) As there was no substantial evidence that the stove fire caused any part of the structure to burn, it is inconceivable that a juror would vote to convict defendant based on the stove fire only.

A unanimity instruction was also unnecessary in light of the prosecutor's argument to the jury. No unanimity instruction is required when the prosecutor elects in opening statement or in argument to the jury which among several acts should be the basis for conviction (*People v. Diaz* (1987) 195 Cal.App.3d 1375, 1382-1383; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455) or relies on two or more acts that amount to one crime. (*People v. Turner* (1983) 145 Cal.App.3d 658, 681 ["the prosecutor . . . argued the taking of the money, gold chains and the car constituted a single robbery"], disapproved on other grounds by *People v. Majors* (1998) 18 Cal.4th 385, 411 and by *People v. Newman* (1999) 21 Cal.4th 413, 422, fn. 6; see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 100 (*Stankewitz*) [no unanimity instruction is required "when the acts alleged are so closely connected as to form part of one transaction"].)

Here, the prosecutor's argument made it clear that the charges were based on one fire that had two "sites of origin." He pointed out it could not have been a "coincidence that on the same date at the same time two accidental fires are started." His argument focused almost entirely on the evidence showing that defendant intentionally or recklessly set the floor fire. He never argued that the jury could convict defendant based on the stove fire alone. Further, defendant presented "essentially the same defense to each of the acts"—that both fires were accidental. (*Stankewitz, supra,* 51 Cal.3d at p. 100.)

Even assuming that a unanimity instruction should have been given, there are no grounds for reversal, whether we apply the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24 or the prejudice test of *People v. Watson* (1956) 46 Cal.2d 818, 836, which is whether "it is reasonably probable that a

result more favorable to the appealing party would have been reached in the absence of the error." (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562 [noting "split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction"]; *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647 [same].)

Defendant contends the error cannot be found harmless because the jury could have found that he acted recklessly in leaving the stove on while finding he set the floor fire by accident. However, as pointed out above, based on the evidence presented, no reasonable juror would have found that defendant caused the structure to burn by setting the stove fire. Moreover, the prosecutor never advocated for conviction based on the stove fire alone. Nearly all of the evidence and arguments were focused on the floor fire. On this record, it is not reasonably probable that a different result would have been reached if the jury had been given a unanimity instruction, and the trial court's failure to give such an instruction was harmless beyond a reasonable doubt.

B. CALCRIM No. 359

Defendant contends that his federal right to due process was violated when the trial court instructed the jury with CALCRIM No. 359 regarding the corpus delicti rule. He contends the instruction improperly diluted the reasonable doubt standard because it told the jury that his out-of-court statements were sufficient proof of his guilt if there was "slight" corroborating evidence.

1. Instruction Given

The trial court instructed the jury pursuant to CALCRIM No. 359 as follows: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows the charged crime was committed. That other evidence may be *slight* and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime may be

proved by the defendant's statements alone. [¶] You must not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." (Italics added.)

2. Analysis

Defendant argues that the use of the word "slight" in CALCRIM No. 359 impermissibly lessened the prosecutor's burden of proof. He relies on federal cases holding that it is error to tell a jury that a defendant can be convicted of conspiracy when there is only "slight evidence" of his or her participation. (See *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500.)

The Attorney General contends that defendant forfeited this claim because he did not object below. The Attorney General also argues that CALCRIM No. 359 provides a correct statement of the law (see *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498), and that when the instructions are considered as a whole, the jury was clearly informed it could only convict defendant if it found him guilty beyond a reasonable doubt.

Defendant replies that his claim has not been waived or forfeited. He relies on section 1259, which provides that "[t]he appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

Assuming defendant's claim has not been forfeited, we find unpersuasive his argument that the instruction lessened the prosecutor's burden of proof.

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) " ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 (*Musselwhite*); *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061

(*Carrasco*) [appellate court must consider the jury instructions as a whole in determining their correctness].)

CALCRIM No. 359 explains the corpus delicti rule. Under this rule, "every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition* to [defendant's extrajudicial] statements, and . . . the jury must be so instructed." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165 (*Alvarez*).) "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Id.* at p. 1169.)

"The independent proof [of the corpus delicti] may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Alvarez, supra,* 27 Cal.4th at p. 1171.) "The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues." (*Id.* at p. 1181.)

Thus, the jury in this case was properly instructed that it was required to take a preliminary, cautionary step before considering whether the prosecution had proven defendant's guilt beyond a reasonable doubt. Specifically, before relying on defendant's out-of-court statements, the jury was required to first determine whether there was "other evidence" showing that the charged crime was committed. It was proper to inform the jury that such "other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed." (CALCRIM No. 359; see *Alvarez,*

supra, 27 Cal.4th at pp. 1171, 1181.) If the necessary quantum of independent evidence was presented, defendant's extrajudicial statements could then be considered "for their full value to strengthen the case on all issues." (*Alvarez, supra,* 27 Cal.4th at p. 1171.) And, in this regard, the jury was cautioned pursuant to CALCRIM No. 359 that it "must not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." Additionally, the court instructed the jury with CALCRIM No. 220, which defines reasonable doubt, informs the jury that "[i]n deciding whether the People have proved their case beyond a reasonable doubt" the jury "must impartially compare and consider all . . . evidence that was received throughout the entire trial," and instructs the jury that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

We thus conclude that CALCRIM No. 359 correctly states that the "other evidence" showing that the charged crime was committed may be "slight." (See *Alvarez, supra,* 27 Cal.4th at pp. 1171, 1181.) Further, in considering the instructions as a whole that were given to the jury (*Musselwhite, supra,* 17 Cal.4th at p. 1248; *Carrasco, supra,* 137 Cal.App.4th at p. 1061), we do not believe it was likely that the jury understood the instruction in a manner that violated defendant's right to due process.

C. Probation Conditions

In placing defendant on probation, the trial court imposed a number of terms and conditions, which included the following conditions regarding use and possession of alcohol, drugs, and weapons:

"Totally abstain from the use of any alcoholic beverages. Do not purchase or possess alcoholic beverages. Stay out of places where alcohol is the main item of sale. "

"Do not use or possess any alcohol, narcotics, intoxicants, drugs or other controlled substances without the prescription of a physician."

"Do not possess, receive or transport any firearms, ammunition or any deadly or dangerous weapons. Immediately surrender any firearms or ammunition you own or

possess to law enforcement." The signed minute order includes a statutory reference to former section 12021 following this condition.

Defendant contends that each of the above probation conditions are unconstitutionally vague, in violation of his federal constitutional right to due process, because they do not include "an actual knowledge mandate."[2]

Since probation conditions that implicate constitutional rights must be narrowly drawn, the knowledge requirement in some probation conditions "should not be left to implication." (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) Absent a requirement that the defendant knows he or she is disobeying the condition, the defendant is vulnerable, and unfairly so, to punishment for unwitting violations of it. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629.) An appellate court is empowered to modify a probation condition in order to render it constitutional. (*In re Sheena K.* (2007) 40 Cal.4th 875, 892.)

With respect to the conditions regarding use and possession of drugs and alcohol, defendant relies mainly on *People v. Patel* (2011) 196 Cal.App.4th 956 (*Patel*). In *Patel*, a condition of probation prohibited the defendant "from drinking alcohol, possessing it, or being in any place where it is the chief item of sale." (*Id.* at p. 959.) As the condition did not "include a qualification that he must commit the proscribed conduct knowingly" (*ibid.*), the court modified it to read: " 'Defendant shall abstain from the consumption of any alcoholic beverage knowingly in any amount whatsoever, and shall not knowingly possess alcohol, nor be in places where he knows alcohol is the chief item of sale.' " (*Id.* at p. 961.)

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[2] Below, trial counsel objected to the drug and alcohol conditions on the basis there was "no nexus to either the incident in this case or [defendant's] rehabilitation."

The Attorney General "does not object to the Court directing the trial court clerk to modify the probation order to include scienter" as to the conditions regarding use and possession of drugs and alcohol. We will so modify those conditions.

Regarding the weapons condition, defendant relies primarily on *People v. Freitas* (2009) 179 Cal.App.4th 747 (*Freitas*). In *Freitas*, a condition of probation ordered that the defendant " '[n]ot own, possess or have custody or control of any firearms or ammunition.' " (*Id.* at p. 750, fn. omitted.) In *Freitas*, the court cited former section 12021 and noted that "defendant, as a felon, has no constitutional right to bear arms. [Citations.]" (*Id.* at p. 751.) The court noted that it was unnecessary "to specify that defendant must know a gun is a gun," but agreed that a knowledge element was necessary to ensure the defendant would not be punished if he had "no knowledge of the presence of a firearm or ammunition" in his possession, such as if he had borrowed a car that contained a gun in the trunk. (*Id.* at p. 752.) The court therefore modified the probation condition to order the defendant to " 'not knowingly own, possess or have custody or control of any firearms or ammunition.' " (*Id.* at p. 753.)

This court disagreed with *Freitas* in *People v. Kim* (2011) 193 Cal.App.4th 836 (*Kim*). In *Kim*, the probation condition provided, " 'You shall not own, possess, have within your custody or control any firearm or ammunition for the rest of your life under Section[s] 12021 and 12316[, subdivision] (b)(1) of the Penal Code.' " (*Id.* at p. 840.) This court declined to modify the condition, explaining that "where a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement that is necessarily implied in the statute." (*Id.* at p. 843.) Thus, because the condition "explicitly reference[d] sections 12021 and 12316" and because knowledge was required under those statutes, the probation condition did not need not be modified to add an explicit knowledge requirement. (*Id.* at p. 846.)

With regard to the probation condition in this case prohibiting appellant from possessing a firearm, the rationale of *Kim* is not entirely applicable. As defendant points out, the probation condition in this case is not the same as the statutory provision in former section 12021, which prohibited a person convicted of a felony from possessing firearms. Here, defendant was not only prohibited from possessing any firearms, but also "any deadly or dangerous weapons." We will therefore modify the condition to include an explicit knowledge requirement.

Further modification of the signed minute order, which references former section 12021, is required in this case. Former section 12021 was repealed operative January 1, 2012. (See *People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2; Stats. 2010, ch. 711, § 4.) The statute forbidding, among other things, a felon to be in possession of a firearm is now contained in section 29800. (See *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 1; Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.) Accordingly, to avoid any confusion, we will modify the weapons condition by deleting the reference to section 12021 and replacing it with a reference to section 29800.

Finally, the Attorney General suggests we add the phrases "know or reasonably should know," "reason to know," and "know or suspect" if we modify the probation conditions regarding possession and use of drugs and alcohol. Defendant urges us not to include any kind of constructive knowledge element, contending that such phrases would render the conditions vague.

This court previously held that "the word 'suspect' fails to provide [a] defendant with adequate notice of what is expected of him when he lacks actual knowledge that a person is a gang member, drug user, or on probation or parole" and that "inclusion of this word renders the condition insufficiently precise for a court to determine whether a violation has occurred." (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) We decline to include the word "suspect" in our modification of the probation conditions at issue here.

We do not decide the issue of whether inclusion of the phrases "reasonably should know" and "reason to know," as proposed by the Attorney General, is also necessary or proper. The Attorney General does not object to the inclusion of an actual knowledge requirement as requested by defendant and only suggests, without any substantive analysis, that the probation conditions include the "reasonably should know" and "reason to know" language. We therefore decline to include these phrases in the modified conditions.

DISPOSITION

The probation conditions regarding possession and use of alcohol, drugs, and weapons, as specified in the trial court's oral pronouncement on February 22, 2012 and in the trial court's signed minute order regarding the February 22, 2012 proceedings, shall be modified to state as follows:

"Totally abstain from the use of beverages you know to be alcoholic. Do not purchase or possess any beverage you know to be alcoholic. Stay out of places where you know that alcohol is the main item of sale."

"Do not knowingly use or possess any alcohol, narcotics, intoxicants, drugs or other controlled substances without the prescription of a physician."

"Do not knowingly possess, receive or transport any firearms, ammunition or any deadly or dangerous weapons. Immediately surrender any firearms or ammunition you own or possess to law enforcement. (Pen. Code, § 29800.)"

As so modified the judgment (order of probation) is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.