

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL DEJESUS,

Defendant and Appellant.

H038756

(Santa Clara County

Super. Ct. No. C1222924)

**I. INTRODUCTION**

Defendant Daniel DeJesus was convicted by guilty pleas of attempted first degree burglary (Pen. Code, §§ 664, 459 - 460, subd. (a))<sup>1</sup> and resisting a peace officer (§ 148, subd. (a)(1)). Pursuant to a court offer, the trial court placed defendant on three years' probation with conditions including one year in county jail.

The court imposed other probation conditions, three of which defendant challenges on appeal. He contends that the costs of installing a burglar alarm system (\$1,765.00) and monitoring it for two years (\$1,151.76) are not reasonably related to his crime and should not be included in the victim restitution ordered. Also, the conditions requiring defendant to not contact and stay 100 yards from the three victims should include an express knowledge element. The Attorney General responds that a knowledge

---

<sup>1</sup> Unspecified section references are to the Penal Code.

element is implicit in the stay away orders and the restitution order is a reasonable probation condition, even if it is not expressly authorized by section 1202.4, subdivision (f)(3)(J). Since 2000, that subsection has authorized restitution to the victims of violent crimes for “[e]xpenses to install . . . residential security . . . including, but not limited to, a home security device . . . .” (§ 1202.4, subd. (f)(3)(J).) There has been no published authority upholding such a victim restitution order. For the reasons stated below, we will affirm the judgment as modified.

## **II. TRIAL COURT PROCEEDINGS**

### **A. CHARGES AND GUILTY PLEAS**

Defendant was originally charged (along with a codefendant) with first degree burglary (count 1) of a residence on Yerba Buena Avenue in San Jose on December 30, 2011 while minors Moriah V. and Valerie V. were present in the home. (§ 667.5, subd. (c)(21).) Defendant was also charged with misdemeanor resisting a peace officer (count 2).

An arrest warrant issued when defendant failed to appear for a preliminary examination scheduled for May 16, 2012.

At a hearing on July 9, 2012, defendant agreed to plead guilty to both counts after the prosecution amended the complaint to allege attempted first degree burglary, in exchange for defendant receiving a grant of probation and serving one year in jail. The court inquired if the allegation of present victims still applied, and the prosecutor answered, “No, Your Honor, not on an attempted.” Defendant signed a written waiver of his rights and pleaded guilty to the charges as amended.

### **B. SENTENCING**

A probation report recommended three years of probation with one year in county jail and, among other probation conditions, that defendant have no contact with the victims and stay 300 yards from their residence at a specified address on Yerba Buena Avenue in San Jose. Another recommended condition was that defendant pay victim

restitution of at least \$5,779.64. That amount included one victim's lost wages of \$116 while she attended a court hearing, and installation of a security system at a cost of \$3,576.00 plus \$2,087.64 for three years of monitoring service at \$57.99 per month. The amounts were listed in a written estimate attached to the probation report. The estimate described alternative monthly service of \$47.99 and an installation cost of \$1,759.00 if security cameras were not included. The victim also requested compensation for a damaged window screen, but had not yet obtained an estimate.

At the sentencing hearing on August 31, 2012, defendant objected to the victim restitution amount of \$5,779.64 for a burglar alarm system. The court advised defendant that he could have a hearing regarding the amount, explaining: "I've handled many of those after the fact precautionary measures to protect the victims after things like a first degree burglary. Case law upholds reasonable efforts, expenses for reasonable efforts of victims to do that." Defense counsel declined the court's invitation to have a separate hearing regarding the amount, but reiterated a general objection to restitution for installation of the system.

The court stated: "In mitigating the damages, not to make it more punitive or onerous as necessary for the defendant, the court finds the following:

"The system without cameras, with the alarm is certainly reasonable. I don't know that adding the expense for the cameras would be. So in an abundance of caution, the court finds the \$1,759 for the installation without cameras[] of the alarm is warranted in this case and reasonable. [¶] And also it's reasonable to have two years worth of security paid at \$47.99 a month and restitution is ordered for that reason of \$2,910.76. That will be the court's ruling." At the prosecutor's suggestion, the court later included \$116.00 in victim restitution for "one missed day of work" for a new total of \$3,026.76.

In addition to other probation conditions, the court stated: "Sir, you cannot have any contact, stay a hundred yards away from Carolyn [V.] and minors are Moriah and Valerie. [¶] And don't contact them in any way by e-mail or anything[,] text[,] or any

other means[,] [p]hone calls, anything else. You must stay a hundred yards away from [their address].”

The court imposed a \$200 restitution fine and a ten percent administrative fee under section 1202.4, suspended an equivalent probation revocation fine under section 1202.44, and found that defendant had no ability to pay any discretionary fines and fees. Defendant affirmed that he understood and accepted the terms and conditions of probation, and the court dismissed the section 667.5, subdivision (c)(21) allegation of victims being present during the home burglary.

Counsel filed a notice of appeal on defendant’s behalf without obtaining a certificate of probable cause.

### **III. STANDARD OF REVIEW**

We review probation conditions for abuse of discretion, and will uphold the trial court’s broad discretion so long as a challenged condition relates generally to criminal conduct or future criminality or specifically to the probationer’s crime. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Olguin* (2008) 45 Cal.4th 375, 379-380.) The reasonableness of a probation condition may be challenged on appeal only if the probationer has questioned it in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237; see *In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*.) However, a reviewing court may examine the constitutionality of a probation condition, even if not raised in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.)

Here we are asked to review the reasonableness of a condition requiring victim restitution, and the constitutionality of a condition prohibiting victim contact.

### **IV. VICTIM RESTITUTION FOR HOME SECURITY**

#### **A. STATUTORY FRAMEWORK**

Sections 1203.1 and 1202.4 both provide for restitution to a crime victim. Section 1203.1 applies when restitution is ordered as a condition of probation. Later enacted

section 1202.4 mandates victim restitution in every case involving conviction of a crime regardless of the disposition.

*People v. Anderson* (2010) 50 Cal.4th 19, 27 (*Anderson*) addressed restitution ordered under section 1203.1. “Restitution as a condition of probation has always been expressly authorized by section 1203.1. Originally, the statute called on trial courts to consider reparation or restitution as a condition of probation. (See Stats. 1935, ch. 604, § 2, p. 1708; *People v. Birkett* (1999) 21 Cal.4th 226, 234, fn. 8.) The statute was amended in 1982 to require that restitution be imposed ‘in proper cases.’ (Stats. 1982, ch. 1413, § 6, pp. 5403-5404; now § 1203.1, subd. (a)(3).)

“While restitution under section 1203.1 may serve to compensate the victim of a crime, it also addresses the broader probationary goal of rehabilitating the defendant. “Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” ([*People v.*] *Carbajal* [(1995)] 10 Cal.4th [1114] at p. 1124 [(*Carbajal*)].) Restitution ‘impresses upon the offender the gravity of the harm he has inflicted upon another, and provides an opportunity to make amends.’ [Citation.]”

*People v. Giordano* (2007) 42 Cal.4th 644 (*Giordano*) explained the enactment of section 1202.4. “In 1982, California voters passed Proposition 8, also known as The Victims’ Bill of Rights. At the time this initiative was passed, victims had some access to compensation through the Restitution Fund, and trial courts had discretion to impose restitution as a condition of probation. [Citations.] Proposition 8 established the right of crime victims to receive restitution directly ‘from the persons convicted of the crimes for losses they suffer.’ (Cal. Const., art. I, § 28, subd. (b).) The initiative added article I, section 28, subdivision (b) to the California Constitution: ‘It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons

in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.’”

(*Giordano, supra*, 42 Cal.4th at p. 652.)

“The Legislature has enacted a statutory scheme that implements the broad mandate of California Constitution, article I, section 28, subdivision (b). Penal Code section 1202.4 begins: ‘It is the intent of the Legislature that a victim of a crime who incurs *any economic loss* as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.’ (*Id.*, subd. (a)(1), italics added.) It requires also that the restitution order ‘shall be of a dollar amount that is sufficient to *fully* reimburse the victim or victims for *every* determined economic loss incurred as the result of the defendant’s criminal conduct . . . .’ (*Id.*, subd. (f)(3), italics added.) Additionally, ‘[t]he court shall order *full restitution* unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.’ (*Id.*, subd. (g), italics added.) [¶] The Legislature has supplied one limitation to the scope of losses that must be included in a restitution order that is not expressly included in California Constitution, article I, section 28, subdivision (b). That is, it has limited restitution orders primarily to ‘*economic loss[es]*.’ (Pen. Code, § 1202.4, subds. (a), (f), italics added.)”

(*Giordano, supra*, 42 Cal.4th at p. 656.)<sup>2</sup>

---

<sup>2</sup> Section 1202.4, subdivision (f)(3) states in part: “To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited to, all of the following: [¶] . . . .” It has so provided since 2000. (Stats. 1999, ch. 121, § 1, p. 1741; Stats. 1999, ch. 584, § 4, p. 4144.)

Section 1202.4, subdivision (f)(3) (“subdivision (f)(3)”) includes an illustrative list of various losses for which restitution may be due.<sup>3</sup> But the mandatory provisions for victim restitution under section 1202.4 have never been understood to restrict trial court discretion to impose victim restitution as a condition of probation under section 1203.1. *Carbajal, supra*, 10 Cal.4th 1114 concluded, “nothing in Proposition 8 [which added the constitutional mandate for victim restitution] or in [former] Penal Code section 1203.04 purports to limit or abrogate the trial court’s discretion, under Penal Code section 1203.1, to order restitution as a condition of probation where the victim’s loss was not the result of the crime underlying the defendant’s conviction, but where the trial court finds such restitution will serve one of the purposes set out in Penal Code section 1203.1, subdivision (j).” (*Carbajal, supra*, at p. 1122.) *Anderson, supra*, 50 Cal.4th 19 later elaborated: “Trial courts continue to retain authority to impose restitution as a condition of probation in circumstances not otherwise dictated by section 1202.4. In both sections 1203.1 and 1202.4, restitution serves the purposes of both criminal rehabilitation and victim compensation. But the statutory schemes treat those goals differently. When section 1202.4 imposes its mandatory requirements in favor of a victim’s right to restitution, the statute is explicit and narrow. When section 1203.1 provides the court with discretion to achieve a defendant’s reformation, its ambit is necessarily broader,

---

<sup>3</sup> The statute is generally not intended to compensate a victim for the noneconomic losses of pain and suffering (see *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1132), except for “[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288.” (§ 1202.4, subd. (f)(3)(F); former subsection (E); added by Stats. 1996, ch. 629, § 3, p. 3467; *People v. Smith* (2011) 198 Cal.App.4th 415, 437.) The statute specifically references “Expenses to install or increase residential security incurred related to a violent felony, as defined in subdivision (c) of Section 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks,” but only in the context of felonies considered violent under section 667.5, subdivision (c). (§ 1202.4, subd. (f)(3)(J).)

allowing a sentencing court the flexibility to encourage a defendant's reformation as the circumstances of his or her case require." (*Anderson, supra*, 50 Cal.4th at p. 29.)

## **B. REASONABLENESS OF THE VICTIM RESTITUTION ORDER**

We understand defendant to make three related contentions about the victim restitution award of \$1,765.00 for installing a home security system in the victims' residence and \$1,151.76 for monitoring the system for two years.

### **1. SECTION 1202.4, SUBSECTION (F)(3)(J)**

Defendant first contends the order is not authorized by subsection (f)(3)(J), because his admitted crime does not qualify as a violent felony.<sup>4</sup> We agree, but this subsection is not the sole basis for the order.

As the Attorney General points out, the list of potential losses in subdivision (f)(3) is illustrative, not exclusive. In *People v. Keichler* (2005) 129 Cal.App.4th 1039 (*Keichler*), the court reasoned, "Because the statute uses the language 'including, but not limited to' these enumerated losses, a trial court may compensate a victim for any economic loss which is proved to be the direct result of the defendant's criminal behavior, even if not specifically enumerated in the statute." (*Id.* at p. 1046.)

In 2007, the California Supreme Court noted the expansion of the potential losses listed in subdivision (f)(3), including the addition of residential security expenses and other expenses in 1999. (*Giordano, supra*, 42 Cal.4th 644, 654.) The court reasoned: "Defendant . . . suggests that because the Legislature has expressly permitted awards to

---

<sup>4</sup> Section 667.5, subdivision (c)(21) limits which burglaries qualify as violent felonies, namely "[a]ny burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." In this case, while a section 667.5, subdivision (c)(21) allegation was included in the original complaint, the trial court later dismissed the allegation, presumably in view of defendant's guilty plea to attempted burglary.

derivative victims from the Restitution Fund for loss of support, [fn. omitted] but has not specifically provided that direct restitution orders [under section 1202.4] include such awards, the Legislature did not intend direct restitution orders to include awards for loss of support. Given the constitutional and legislative intent to provide restitution for all crime victim losses, and the expressly nonexclusive list of categories of loss included in the direct restitution statute, we decline to read into that statute an implied limitation on restitution to surviving spouses based on a failure to enumerate that type of loss explicitly.” (*Id.* at pp. 659-660.)

Defendant’s argument that “including, but not limited to” reflects a legislative intent to limit restitution awards for home security to victims of violent crimes is unconvincing in light of the above authority. While subsection (f)(3)(J) is not literally applicable, the home security system costs here may nonetheless qualify more broadly as an economic loss under subdivision (f)(3).

As this court noted in *People v. Long* (2010) 189 Cal.App.4th 826, “The burglary statutes were intended to give security and peace of mind to people in their residences.” (*Id.* at p. 834.) It would be a rare person who would not feel some deprivation of peace of mind and security upon learning of a burglary of his or her home, whether the person was present or absent during the burglary. There may be policy reasons in other contexts for classifying a residential burglary as violent only when a non-accomplice is present during the crime, but it would be unrealistic to think that absent burglary victims have no psychological sense of invasion correlating to the physical invasion of their dwellings.

It is clear that a burglar should pay restitution for the cost of restoring or replacing property physically damaged in the course of the burglary. (E.g., *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1544 [victim restitution order included labor and materials to replace damaged fencing, door jamb, latch, shelf, security camera and monitor].) The correlative damage to a burglary victim’s psyche may be less tangible, but it is no less real than a broken door jamb, window, or screen. Although there is no ready measure for

quantifying the emotional toll of insecurity in one's home, we regard the victim's loss of a sense of security to be a predictable and direct result of a residential burglary.

Whether or not mandated by section 1202.4, subdivision (f)(3), the victim restitution order in this case can be upheld as a probation condition under section 1203.1.

## **2. THE RESTITUTION ORDER SERVES THE OBJECTIVES OF PROBATION**

Defendant's second, broader contention is that "[t]he installation and maintenance of that system were not caused by [his] crime, and do not directly represent an injury done to the victim." Defendant asserts, "While restitution in a probation case 'may exceed the losses for which a defendant may be held culpable,' it must still be 'narrowly tailored to serve a purpose described in section 1203.1,' namely 'mak[ing] amends "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."['] (*Carbajal, supra*, [10 Cal.4th 1114] at p. 112[6], quoting Pen. Code § 1203.1, subd. (j).)"

The quoted reference in *Carbajal* to "narrowly tailored" restitution is from *People v. Richards* (1976) 17 Cal.3d 614, 620 (*Richards*). *Carbajal* distinguished *Richards* factually and disapproved of it on another ground. (*Carbajal, supra*, 10 Cal.4th at p. 1126.) While *Carbajal* did not expressly disapprove of the "narrowly tailored" language, it cast doubt on it. The court upheld a restitution order that a hit-and-run driver pay restitution to the owner of the car he hit, reasoning, "restitution is . . . related to the goal of deterring future criminality. By seeking to force the defendant to accept the responsibility he attempted to evade by leaving the scene of the accident without identifying himself, the restitution condition acts both as a deterrent to future attempts to evade his legal and financial duties as a motorist and as a rehabilitative measure tailored to correct the behavior leading to his conviction." (*Id.* at p. 1124.) *Carbajal* upheld the order saying it was "tailored," not narrowly tailored. It also cited *Lent, supra*, 15 Cal.3d 481, 483, for the proposition that restitution has been upheld as a probation

condition though the loss was caused “by conduct resulting in an acquittal.” (*Carbajal, supra*, 10 Cal.4th at p. 1121.) In later decisions, the Supreme Court has emphasized the trial court’s “‘broad general discretion’” under section 1203.1. (E.g., *Anderson, supra*, 50 Cal.4th 19, 28.)

Defendant asserts that the security system represents “protection against *future loss* by potential and unknown burglars, not [defendant] himself.” We disagree. While avoiding prospective property losses is one objective of a security system, requiring defendant to finance the installation of a home security system is a way for defendant to make amends to the victims of his attempted burglary by attempting to restore the peace of mind taken by defendant’s crime.

“We determine whether the restitution order, as a condition of probation, is arbitrary or capricious or otherwise exceeds the bounds of reason under the circumstances.” (*Anderson, supra*, 50 Cal.4th 19, 32.) As we have explained, installing a home security system is a cost directly related to restoring the victims’ sense of security following a burglary of their residence. As such, it is reasonably related to defendant’s crime of attempted burglary and served to deter defendant from burglarizing the victims’ residence. The trial court did not abuse its discretion in so concluding.

### **3. THE COST OF MONITORING THE HOME SECURITY SYSTEM IS JUSTIFIED**

Defendant’s third and narrower contention is, “even if the installation of the residential security system were an appropriate subject for a restitution order, the additional amount awarded for monitoring the home for two years is excessive. (Cf. Pen. Code, § 1202.4, subd. (f)(3)([J]) [authorizing expenses for ‘install[ing] or increas[ing] residential security’ but silent on maintenance or monitoring costs].) There was no evidence below explaining why these maintenance costs are necessary or whether there are lower-cost alternatives.”

As the Attorney General points out, the installation of a home security system that is not activated or monitored would not go far in restoring a victim’s sense of security.

For the same reasons that we find the cost of installing a home security system for his victims to be reasonably related to defendant's attempted burglary, we conclude that it was no abuse of discretion to include in the restitution order the cost of monitoring the system for a limited period of two years. This aspect of the order serves the rehabilitative purpose of impressing upon defendant the full and ongoing consequences of his criminal conduct.

Regarding the existence of lower cost alternatives, in the trial court "[t]he burden is on the party seeking restitution to provide an adequate factual basis for the claim." (*Giordano, supra*, 42 Cal.4th at p. 664.) This court has previously observed that "[t]he standard of proof at a restitution hearing is preponderance of the evidence, not reasonable doubt." (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1319.) Once the prosecution makes a prima facie showing, the burden shifts to the defendant to show a claimed amount is not recoverable. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886-887; *People v. Gemelli, supra*, 161 Cal.App.4th 1539, 1543; *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172; *People v. Taylor* (2011) 197 Cal.App.4th 757, 761; cf. *People v. Holmberg, supra*, 195 Cal.App.4th at p. 1320.)

The monthly monitoring charges awarded were based on a written estimate from a home security company. This was a prima facie showing by the prosecution of the actual cost sufficient to shift the burden to defendant to produce evidence of lower cost alternatives. His failure to do so has forfeited the factual contention that lower cost alternatives existed. (*Anderson, supra*, 50 Cal.4th 19, 26, fn. 6 [claim that hospital might have accepted less than full amount billed].)

We find no abuse of discretion in the trial court requiring as a probation condition that defendant pay victim restitution for the costs of both installing a home security system and monitoring it for two years.

## V. CONSTITUTIONALITY OF THE NO CONTACT/STAY AWAY CONDITION

The trial court imposed three related prohibitions: that defendant stay 100 yards away from the residence of the three burglary victims, that defendant stay 100 yards away from their persons, and that defendant not contact them by any means.

Defendant contends “[t]he stay-away condition in the instant case is both overbroad, in that it is not closely tailored with a knowledge requirement to only knowing harassment of the victims, and void for vagueness in that [defendant] cannot not have sufficient notice of what unwitting behavior might violate the condition.” Defendant does not appear to challenge the requirement of avoiding the victims’ residence.

### A. VAGUENESS

The dual requirements of staying 100 yards from the victims and not contacting them are related to probation conditions that prohibit association with types of people. Beginning with *People v. Garcia* (1993) 19 Cal.App.4th 97 (*Garcia*), California appellate courts have repeatedly added explicit knowledge elements to adult and juvenile probation conditions that prohibit association.<sup>5</sup> The issue reached the California Supreme Court in 2007 in *Sheena K., supra*, 40 Cal.4th 875, in which the court considered “whether defendant’s probation condition requiring that she not associate with anyone ‘disapproved’ of by ‘probation’ is vague or overbroad and thus violates defendant’s constitutional rights.” (*Id.* at p. 878.)

---

<sup>5</sup> *Garcia, supra*, 19 Cal.App.4th 97, 102; *People v. Lopez* (1998) 66 Cal.App.4th 615, 638 (*Lopez*); *In re Kacy S.* (1998) 68 Cal.App.4th 704, 713; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1437 (*Turner*); *In re Vincent G.* (2008) 162 Cal.App.4th 238, 247; *In re H. C.* (2009) 175 Cal.App.4th 1067, 1072; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 679; *People v. Leon* (2010) 181 Cal.App.4th 943, 954 (*Leon*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 931; *People v. Moses* (2011) 199 Cal.App.4th 374, 381-382 (*Moses*).

The court applied to probation conditions the same due process concerns expressed by courts about vagueness in penal statutes. “As we have explained on other occasions, the underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).’ [Citation.] The vagueness doctrine “‘bars enforcement of ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” [Citations.]’ (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 (*Acuna*)). A vague law ‘not only fails to provide adequate notice to those who must observe its strictures, but also “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” [Citation.]’ (*Id.* at p. 1116.) . . .

“A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K., supra*, 40 Cal.4th 875, 890.) The court determined that the probation condition at issue needed the addition of an explicit knowledge requirement because it “did not notify defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer.” (*Id.* at pp. 891-892.)

We note a substantial difference between probation conditions that have been modified by reviewing courts and the conditions challenged here. The conditions

modified in previous cases prohibited contact based on status (probationer, parolee, ex-felon, gang member), pastime (drug user), or age (under 18) that “may not be readily apparent” from a first encounter. (*People v. Kim* (2011) 193 Cal.App.4th 836, 845.) In contrast, the order here told defendant *exactly* whom to avoid by name and address, as well as specifying how far away defendant should stay.

It is well established that a probation violation must be willful to justify revocation of probation. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 379; *People v. Galvan* (2007) 155 Cal.App.4th 978, 982; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295; § 1203.2, subd. (a).)

In reviewing probation conditions for vagueness, we must remember that the core concern of the vagueness doctrine is adequate notice to the probationer of the conduct required or proscribed. (*Lopez, supra*, 66 Cal.App.4th 615, 630; *In re H. C., supra*, 175 Cal.App.4th 1067, 1071-1072.) When a probation condition prohibits associating with a type or group of people because they have a common characteristic that may not be obvious or readily apparent, it would be difficult to find a probationer’s association with a particular person to be a willful violation absent evidence that the probationer either knew or reasonably should have known the person has that characteristic. This difficulty is not presented by the condition here.

A no contact condition that names particular individuals avoids the potential vagueness of a more general description of undesirable characteristics. The condition in this case affords defendant advance notice of whom to avoid and how far to stay away. We might reach a different conclusion if, instead of simply naming the individuals to avoid, the order classified them more generally as the victim’s family or relatives, because a person’s family ties may not be readily apparent on a first encounter. The same is true for a probation condition requiring a probationer to stay away from the victim’s vehicles, as a vehicle’s ownership is usually not readily apparent.

## **B. OVERBREADTH**

Defendant contends the stay away order is overbroad in that the condition “limits [his] constitutional freedoms to movement, speech, and association.” Defendant argues that “[w]ithout a knowledge requirement, [he] could unwittingly violate this rule by shopping at the same mall as the victims, by posting in a Facebook group they share in common, or by heading to the beach on the same sunny day.” First, we do not see that defendant has any constitutional right to associate with persons disinclined to associate with him. His right of association does not trump their rights of privacy. (*People v. Petty* (2013) 213 Cal.App.4th 1410, 1424 (*Petty*)). [“He has no ‘right’ to associate with those who shun him because of his past crimes against them.”].) The condition in this case preserves any constitutional rights to speak, associate, and travel that defendant has not forfeited by attempting to burglarize the residence of these particular victims.

Second, probation conditions are to be given “the meaning that would appear to a reasonable, objective reader.” (*People v. Olguin, supra*, 45 Cal.4th 375, 382.) No reasonable probation officer or court can expect defendant to know at all times where his victims are. Defendant cannot willfully violate the 100-yard stay away unless he knows they are near. The probation condition does not require defendant to stay away from all locations where the victims might conceivably be except for their residence. It requires defendant to remove himself (“stay a hundred yards away”) when he knows or learns of their presence.

As for defendant’s claim about an Internet posting to a group as potentially violating the trial court’s prohibition on contacting the named victims, using an Internet messaging service to direct a communication to a victim would be a willful violation of the order, as would leaving a post on a victim’s virtual Facebook wall. On the other hand, defendant’s updates to his own status on Facebook, for example, assuming no element of targeting a message at a victim, would not qualify as “contacting” a victim, even if the victim were able to view the posting.

We need not attempt to list all possible ways in which online activity by defendant may or may not qualify as contacting a victim. The verb “contact” in the trial court’s order can be reasonably understood to refer to the purposeful act of attempting to communicate, and the Attorney General points out that scienter is reasonably implicit in the condition.

Relying on *Sheena K.*, *supra*, 40 Cal.4th 875, 890-892, *Moses*, *supra*, 199 Cal.App.4th 374, 376-377, *In re Victor L.*, *supra*, 182 Cal.App.4th 902, 911-912, and *Leon*, *supra*, 181 Cal.App.4th 943, 950, but without any elaboration, the First District Court of Appeal recently modified an order in a similar case to provide that the defendant must not “knowingly” come within 100 yards of the victims. (*Petty*, *supra*, 213 Cal.App.4th 1410, 1425.) It does not appear that the Attorney General contested the addition of a knowledge element in that case, nor does she object to a similar modification here.

In view of the mobile nature of the victims themselves, in contrast to the fixed location of their residence, the addition of an explicit knowledge element in the victim contact and victim stay away orders will eliminate the potential for overbreadth in the condition’s application.

## **VI. DISPOSITION**

The challenged probation condition is modified to reflect that defendant is not to knowingly contact or knowingly come within 100 yards of the individual victims. As so modified, the judgment is affirmed.

---

Grover, J.

### **WE CONCUR:**

---

Rushing, P.J.

---

Márquez, J.