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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PETE HERNANDEZ et al.,

Defendants and Appellants.

H042275

(Santa Clara County
Super. Ct. No. C1356313)

I. INTRODUCTION

Defendants Pete Hernandez and Michaela Irene Roman pleaded no contest to carrying a loaded firearm. (Pen. Code, § 25850, subd. (a).)¹ Hernandez admitted that he had committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Both defendants were placed on probation for three years, with various probation conditions, and both defendants were ordered to pay probation supervision fees of \$75 per month.

On appeal, Hernandez contends the trial court erred by denying his motion to suppress evidence. (See § 1538.5, subd. (a)(1).) Both defendants challenge a probation condition requiring them to provide passwords to electronic devices and social media

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

sites. Roman also challenges a probation condition banning her from court proceedings, and she challenges the \$75 per month probation supervision fee. For reasons that we will explain, we will affirm the judgment as to both defendants.

II. BACKGROUND

A. The Search

At about 11:13 p.m. on May 5, 2013, San Jose Police Officers Tony Diep and Casey Higgins were driving in an unmarked patrol vehicle on Santa Clara Street near 20th and 21st Street. The officers had gone to that area in response to a report that people were throwing bottles at other officers at 19th Street and Santa Clara Street. The area, which was around Roosevelt Park, typically had a lot of crime and gang activity, particularly around Cinco de Mayo. Norteño gang members often congregated at Roosevelt Park.

The officers noticed a group of about eight to 10 people walking in a direction away from Roosevelt Park. Three of the people were walking “really close together,” about five or six feet behind the others. The three people were defendant Hernandez, defendant Roman, and Roman’s boyfriend at the time, named Blanco. Blanco was wearing a San Jose Sharks shirt and hat, which were items often worn by Norteño gang members. Officer Diep noticed that the crossing light was showing a red hand as the group crossed the street.

Officer Diep saw Roman hand Hernandez a black object that appeared to be a tall can of beer. Roman had taken the object out of her waistband area. After receiving the object, Hernandez looked to the right and the left. Officer Diep suspected the object, if it was a beer can, might have been intended to be used as a weapon, since other people had been throwing bottles nearby. Officer Diep’s suspicions were aroused by the fact that Hernandez had made furtive movements and had attempted to conceal the object upon

receiving it from Roman, and by the fact that the object came from Roman's waistband area, since contraband is often concealed in the waistband area.

Officer Higgins also observed Roman hand an object to Hernandez. He saw Hernandez place the object in his waistband area underneath the large Pendleton he was wearing.² Officer Higgins believed the object was likely illegal, based on the attempts to conceal it as well as the fact the area was "a known gang area," the fact that it was Cinco de Mayo and people often drink at the park on that holiday, and the fact that the group was coming from the direction of the area where bottles had been thrown at officers. Officer Higgins knew that Norteño gang members often conceal weapons in their waistband area.

The officers made a u-turn, parked across the street from the group, and exited their vehicle. At that point, Officer Higgins noticed that Hernandez had a red bandana in his back pocket. He ordered the three individuals to stop.

Officer Higgins contacted Hernandez and did a pat search for weapons. He felt the butt of a gun in Hernandez's waistband area. As Officer Higgins began to pull the gun out of Hernandez's waistband area, Hernandez dropped his arms and ran. As Hernandez ran, the gun fell to the ground. Officer Diep retrieved the gun, which was a loaded revolver inside of a holster. Meanwhile, two other officers stopped Hernandez.

Officer Diep arrested Roman and read her the *Miranda* advisements.³ Roman denied being a gang member but admitted some of her family members were gang members. Officers looked through photographs on Roman's cell phone and found a picture of her holding a revolver similar to the one Hernandez had dropped.

Officer Higgins read the *Miranda* advisements to Hernandez. Hernandez said he was carrying a gun because "it's crazy out there."

² A Pendleton is a quilted plaid shirt.

³ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

B. Motions to Suppress

Roman filed a motion to suppress on October 29, 2013, and a supplemental motion to suppress on May 2, 2014, challenging her detention. Hernandez joined in the motion. The magistrate heard and denied the motion during the preliminary hearing, on June 17, 2014. (See § 1538.5, subd. (f).)

Hernandez filed a renewed motion to suppress on August 26, 2014, again challenging his detention as well as the pat search. (See § 1538.5, subd. (i).) The trial court denied the motion on October 6, 2014.

C. Pleas, Admissions, and Sentencing

On February 2, 2015, defendants both pleaded no contest to carrying a loaded firearm (§ 25850, subd. (a)) and Hernandez admitted that he had committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Both defendants were placed on probation for three years, with various probation conditions, and both defendants were ordered to pay probation supervision fees of \$75 per month.

III. DISCUSSION

A. Motion to Suppress

Hernandez contends the trial court erred by denying his motion to suppress. Hernandez claims that his detention was not justified because the officers did not have a reasonable suspicion that he was engaged in criminal activity and that the pat search was not justified because the officers did not have a reasonable suspicion that he was armed.

1. Standard of Review

“In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court’s resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the

applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]” (*People v. Ramos* (2004) 34 Cal.4th 494, 505.)

2. Reasonableness of the Detention

“A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).)

Hernandez argues that the officers did not have a reasonable suspicion that he was involved in criminal activity because they could not “determine what kind of object was being passed” to him by Roman. Hernandez acknowledges that the officers saw the object “being stored in waistbands,” and that he looked to his right and left after receiving the object from Roman, but he contends these facts were insufficient to support a reasonable suspicion that the object was illegal. Hernandez asserts both officers merely had a “hunch” that the object was an open beer can or a weapon, and he contends that a “hunch” cannot support a detention.

The California Supreme Court has found a detention justified where the officer “felt a ‘possible crime’ was occurring” but “expressed some uncertainty as to the nature of the criminal activity he suspected.” (*People v. Leyba* (1981) 29 Cal.3d 591, 599 (*Leyba*).) The *Leyba* court noted that an officer may have a reasonable suspicion of criminal conduct even where “ ‘[the] possibility of an innocent explanation’ ” exists, and that “ ‘the principal function’ ” of a detention “ ‘is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal.’ ” (*Ibid.*)

In *Leyba*, officers were investigating a reported grand theft at 11:30 p.m. in an area near a school. (*Leyba, supra*, 29 Cal.3d at pp. 594-595.) The area was known to have gang activity, and there had been prior burglaries at the school. (*Id.* at p. 595.) One of the officers observed two cars—one in the school parking lot and one driving by the school—blink their headlights at each other. (*Ibid.*) The parked car then followed the

other car. Suspecting illegal activity of some sort, the officers pursued the cars and stopped the lead car, of which the defendant was an occupant. The Supreme Court upheld the detention, finding that the officer had “articulated facts sufficient to raise a reasonable suspicion and justify the detention of the automobile and its occupants.” (*Id.* at p. 600, fn. omitted.) Specifically, “The lateness of the hour; the blinking of headlights by the two cars, one parked in a closed school, so as to indicate signal[ing]; the following of one by the other are all facts which support [the officer’s] suspicions when evaluated in the light of his training and experience, and his knowledge of ongoing gang activity and the occurrence of a number of school burglaries in the area.” (*Ibid.*)

In the instant case, similar factors support the detention. The detention occurred at a late hour, just as in *Leyba*. (See also *Souza, supra*, 9 Cal.4th at p. 241 [“The time of night is another pertinent factor in assessing the validity of a detention.”].) Defendants were observed in an area known for gang activity and near an area where officers had recently been assaulted by persons throwing bottles. (See *Leyba, supra*, 29 Cal.3d at pp. 595, 600; *Souza, supra*, at p. 240 [“An area’s reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment.”].) Officers Diep and Higgins observed Hernandez and Roman engage in behavior that was consistent with criminal activity, like the signaling observed in *Leyba*: Roman took an object from her waistband, then passed it to Hernandez, who looked around and placed it in his waistband. The officers knew that people often place contraband in the waistband area, and “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124 (*Wardlow*); see also *Souza, supra*, at p. 241 [“evasive actions” can add support to an officer’s suspicion that criminal activity is afoot].)

This case is not like *People v. Hester* (2004) 119 Cal.App.4th 376 (*Hester*), which Hernandez relies on. In *Hester*, officers were on patrol at nighttime, in East Side Crips territory. (*Id.* at p. 382.) A drive-by shooting had occurred earlier that night, and

members of the East Side Crips were suspected as being responsible. The officers saw four Black young adult males driving in a Chevrolet, and they knew that one of the males was a member or associate of the East Side Crips. (*Id.* at p. 383.) Two other vehicles had been driving next to the Chevrolet, but both vehicles changed lanes and began following the Chevrolet. The officers then stopped the Chevrolet and detained its occupants, including the defendant. A search of the Chevrolet revealed a firearm and narcotics. (*Id.* at p. 384.)

The *Hester* majority held that the trial court should have granted the defendant’s motion to suppress because the officer had not stated “any facts to indicate the occupants in this car were engaged in criminal activity” but had stopped the Chevrolet based on “assumptions, beliefs, opinions and guesswork.” (*Hester, supra*, 119 Cal.App.4th at p. 390.) The officer had essentially instituted the detention “because a passenger in the vehicle was a member of the East Side Crips,” but “without additional *facts* supporting an inference of criminal activity.” (*Id.* at p. 392.)

Here, the officers did not detain Hernandez and Roman based on an assumption that they were members of a gang that had recently been involved in criminal activity. Rather, the officers observed Hernandez and Roman engage in behavior—the passing of some kind of contraband—that indicated *they* were possibly engaged in criminal activity at the time. In sum, the instant case is not, as Hernandez contends, one in which the officers had only “an ‘inchoate and unparticularized suspicion or ‘hunch’ ’ of criminal activity. [Citation.]” (*Wardlow, supra*, 528 U.S. at p. 124, fn. omitted.) Considering the totality of the circumstances, the officers in this case specified facts that provided an “objective manifestation” that defendants were involved in criminal activity, and thus the detention was justified. (*Souza, supra*, 9 Cal.4th at p. 231.)

3. Reasonableness of the Pat Search

An officer may conduct a pat search for weapons if there is “reason to believe” that the individual is “armed and dangerous.” (*Terry v. Ohio* (1968) 392 U.S. 1, 27

(*Terry*.) “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [the officer’s] safety or that of others was in danger.” (*Ibid.*)

Hernandez asserts that the officers “were investigating whether Hernandez was carrying an open container of beer, not whether he was carrying a weapon,” and thus that they did not have a reasonable suspicion that he was armed and dangerous.

The record contradicts Hernandez’s claim that the officers did not suspect he was carrying a weapon. Officer Diep testified that even if the object passed from Roman to Hernandez was a beer can, it might have been intended to be used as a weapon, since other people had been throwing bottles nearby. Officer Diep also testified that contraband is often concealed in the waistband area. Officer Higgins testified that he believed the object was illegal and that he knew that Norteño gang members often conceal weapons in their waistband area.

The facts here are similar to those in *In re H.M.* (2008) 167 Cal.App.4th 136, in which the court upheld a pat search for weapons. In that case, the minor was seen running through traffic and acting nervously and evasively. The location was known for gang activity and there had been a gang-related shooting the previous day. (*Id.* at p. 140.) An officer recognized the minor, which led the detaining officer to conclude the minor had previous police contacts. The court held that these were “specific, articulable facts” supporting a reasonable belief that the minor “had been involved in a crime, and was likely armed.” (*Id.* at p. 148.)

Under the circumstances of the instant case, a reasonable officer would have been warranted in the belief that Hernandez was armed and dangerous. The officers observed Roman take an object out of her waistband and pass it to Hernandez, who looked around evasively and placed it into his own waistband—an area that is often used to conceal weapons and other contraband. The detention occurred in an area known for gang activity, near a location where people had been throwing bottles at police officers.

Considering the actions of defendants Hernandez and Roman, the location, and the recent bottle-throwing incident, the facts here supported a reasonable suspicion that Hernandez was armed, thus justifying the pat search. (*Terry, supra*, 392 U.S. at p. 27.)

B. *Electronics Search Conditions*

Defendants both challenge the imposition of probation conditions that require them to provide “all passwords to any electronic devices, including, but not limited to, cellular telephones, computers, or note pads within your custody or control,” to “submit said devices to search at any time without a warrant by a peace officer,” to “provide all passwords to any social media sites, including, but not limited to, Facebook, Instagram, and MocoSpace,” and to “submit said sites to search at any time without a warrant by a peace officer.”

Both defendants objected to these conditions below. Hernandez argued that the conditions violated his right to privacy and that there was no “evidence of any kind of gang-related communication or postings on [the] internet in this case.” Roman likewise argued that the conditions were “sweeping” with respect to her right to privacy and argued that the conditions violated the First Amendment, Fourteenth Amendment, and *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).

1. Reasonableness

Defendants contend the electronics search conditions should be stricken as unreasonable under *Lent, supra*, 15 Cal.3d 481. Under *Lent*, a condition of probation will be held invalid if 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.]” (*Lent, supra*, at p. 486, fn. omitted.) “This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as

the condition is reasonably related to preventing future criminality.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380.)

This court rejected a reasonableness challenge to the same probation conditions in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*). In that case, the defendant threatened and physically resisted an officer who was investigating the defendant for brandishing a weapon. The defendant also identified himself as a gang member and threw gang signs. The defendant pleaded guilty to making criminal threats and resisting arrest, and he admitted a gang allegation. After the prosecutor informed the trial court that the defendant had used MySpace to promote his gang (*id.* at p. 1173), the defendant was placed on probation with gang conditions that included the password conditions imposed in the instant case (*id.* at p. 1172).

On appeal, the *Ebertowski* defendant challenged the password conditions as overbroad and unreasonable. This court found the conditions were reasonably related to the defendant’s crimes as well as his future criminality. The conditions “were designed to allow the probation officer to monitor [the] defendant’s gang associations and activities. . . . The only way that [the] defendant could be allowed to remain in the community on probation without posing an extreme risk to public safety was to closely monitor his gang associations and activities. The password conditions permitted the probation officer to do so. Consequently, the password conditions were reasonable under the circumstances, and the trial court did not abuse its discretion in imposing them.” (*Ebertowski, supra*, 228 Cal.App.4th at p. 1177.)

Defendant Hernandez contends that his case is distinguishable from *Ebertowski* because there is no evidence that he used cell phones or social media to promote a gang or that he is as dangerous as the *Ebertowski* defendant. Hernandez contends his case is more analogous to *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*), in which the court held that an electronic search condition had “no relationship to the crime of misdemeanor possession of Ecstasy.” (*Id.* at p. 912.) We disagree. *Erica R.* was not a

gang case. Hernandez, in contrast, admitted that he possessed a loaded firearm for the benefit of a criminal street gang. (See § 186.22, subd. (b)(1)(A).) The rationale of *Ebertowski* applies here: the electronics search conditions were designed to allow the probation officer to closely monitor Hernandez’s gang associations and activities, which was necessary for public safety considering the potential for violence shown by his crime of carrying a loaded firearm for the benefit of a criminal street gang. (See *Ebertowski, supra*, 228 Cal.App.4th at p. 1177.)

Defendant Roman contends that nothing in the record connects her use of electronic devices or social media sites to her crime of conviction (possession of a loaded firearm), and that nothing in the record indicates her use of such media would increase her risk of future criminality. However, the record shows that Roman’s cell phone contained a photograph of her with a revolver similar to the one she was convicted of possessing, such that the probation conditions *are* related to her offense. Further, the trial court imposed gang conditions pursuant to Roman’s plea agreement, and as explained above, the password conditions will allow the probation officer to closely monitor Roman’s gang association and activities, which is reasonably related to her future criminality. (See *Ebertowski, supra*, 228 Cal.App.4th at p. 1177.)

In sum, we conclude the electronics search conditions imposed on defendants were reasonable and valid under *Lent, supra*, 15 Cal.3d 481.

2. Overbreadth

Roman argues that the electronics search conditions are constitutionally overbroad because they impact her privacy rights but are not narrowly tailored to limit the type of data that may be searched.

This court rejected a similar overbreadth argument in *Ebertowski, supra*, 228 Cal.App.4th 1170. As noted above, the *Ebertowski* defendant was a member of a criminal street gang who had promoted his gang on social media. This court rejected the defendant’s claim that the probation condition was “not narrowly tailored to [its] purpose

so as to limit [its] impact on his constitutional rights to privacy, speech, and association.” (*Id.* at p. 1175.) This court explained that the state’s interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation condition, outweighed the minimal invasion of his privacy. (*Ibid.*)

We adhere to the reasoning set forth in *Ebertowski*. Here, the probation condition requiring Roman to provide the probation officer with passwords and access to her electronic devices and social media sites serves the state’s interest in preventing Roman from using social media to associate with gangs and participate in gang activities. This interest outweighs the minimal intrusion on Roman’s First Amendment rights. We therefore conclude that the challenged probation conditions are not constitutionally overbroad.⁴

Roman also contends that the probation condition regarding “electronic devices” is confusing because it “lists social media websites as examples of the electronic devices for which [she] must provide passwords.” We disagree. The probation conditions involving electronic devices and social media sites are clearly distinguished from one another. One condition requires Roman to provide the probation officer with “all passwords to any electronic device, including, but not limited to, cellular telephones, computers, or note pads . . . within your custody or control.” A separate condition requires Roman to “provide all passwords to any social media sites, including but not limited to, Facebook, Instagram, and MocoSpace.” The conditions are not confusing.

⁴ The California Supreme Court is considering whether a probation condition requiring a minor to submit to warrantless searches of his “electronics including passwords” was overbroad. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, 679, review granted Feb. 17, 2016, S230923; see also *In re Patrick F.* (2015) 242 Cal.App.4th 104, 107, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, 560, review granted March 9, 2016, S232240.)

C. Court Proceedings Condition

Roman challenges the imposition of a probation condition that requires her to “not knowingly be present at any court proceeding where you know or your probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, you’re the defendant in a criminal action, you are subpoenaed as a witness or a member of your immediate family is the victim of activity charged in the case, a party’s attorney has asked you to testify or speak in court, or you have prior permission of your probation officer.”

Roman acknowledges that she failed to object to the court proceedings condition below. We agree that we may nevertheless review the constitutionality of the condition to the extent the issue can be resolved as a matter of law without reference to the sentencing record. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.) But because Roman did not object below, she has forfeited her argument that this condition should be stricken because there was no evidence that she or members of her gang “presented a threat to the integrity of judicial proceedings,” since that argument does not present a pure question of law.

The probation condition imposed in this case is similar to the wording this court used in modifying a probation condition in *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*). In *Leon*, the trial court imposed a probation condition that prohibited the defendant from appearing at “ ‘any court proceeding’ ” unless he was a party, subpoenaed as a witness, or had the permission of probation. (*Id.* at p. 952.) On appeal, the defendant argued that the probation condition was an overbroad restriction of his First Amendment right of access to court proceedings, and that the probation condition should either be eliminated or modified to refer to court proceedings involving gang members only. (*Ibid.*) This court acknowledged “ ‘the problem of witness intimidation’ ” but observed that “[t]here can be a variety of legitimate reasons for being at a court proceeding, other than to intimidate or threaten a party or witness” and that

other probation conditions prevented the defendant from associating with gang members. (*Id.* at p. 953.) This court concluded that, as written, the probation condition had an impermissibly “broad sweep.” (*Ibid.*) This court narrowed the condition to read as follows: “ ‘You shall not be present at any court proceeding where you know or the probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, you are a defendant in a criminal action, you are subpoenaed as a witness, or you have the prior permission of your probation officer.’ ” (*Id.* at p. 954.)

The probation condition imposed in this case contains much of the same language as in the modified probation condition in *Leon*. Defendant Roman nevertheless contends the condition should be stricken and the matter remanded to give the sentencing court an opportunity to impose a condition that follows language this court recommended in *In re E.O.* (2010) 188 Cal.App.4th 1149 (*E.O.*).

The probation condition at issue in *E.O.* prohibited the minor from coming “ ‘within 25 feet of a Courthouse when the minor knows there are criminal or juvenile proceedings occurring which involves [*sic*] anyone the minor knows to be a gang member or where the minor knows a witness or victim of gang-related activity will be present, unless the minor is a party in the action or subpoenaed as a witness or needs access to the area for a legitimate purpose or has prior permission from his Probation Officer.’ ” (*E.O.*, *supra*, 188 Cal.App.4th at p. 1152.) This court held that condition was overbroad. (*Id.* at p. 1157.) In reaching that conclusion, the panel noted that “[t]he prohibition on being *near a building* in which gang-related proceedings are known to be underway would prevent appellant not only from attending a gang-related trial but also from attending other proceedings in the same, and perhaps adjacent, buildings, or indeed from entering such a building. . . .” (*Id.* at p. 1155.) The panel further noted that the condition might infringe on the minor’s “specific right under the state Constitution to

attend and participate in court proceedings if he or a family member is a victim of a crime. . . .” (*Ibid.*, citing Cal. Const., art. I, § 28, subd. (b)(7).)

In a footnote, the *E.O.* court suggested appropriate language if the trial court were to find such a restriction justified. Relevant here, the suggested language included a restriction on attendance at any gang-related case unless, among other reasons, “You or a member of your immediate family is a victim of the activity charged in the case.” (*E.O.*, *supra*, 188 Cal.App.4th at p. 1157, fn. 5.) The probation condition imposed in this case incorporates that language. We will therefore uphold the condition as written.

D. Probation Supervision Fee

Roman contends the trial court erred by imposing a \$75 per month probation supervision fee. Roman contends the trial court failed to consider her ability to pay the probation supervision fee and instead imposed the fee based on “unrelated” factors.

1. Proceedings Below

The probation report noted that Roman had completed high school and was working at a restaurant, where she had recently been promoted to manager. The probation officer recommended Roman pay a probation supervision fee “not to exceed \$110.00 per month.”

At the sentencing hearing, Roman’s trial counsel objected to imposition of the recommended \$110 per month probation supervision fee, arguing that the fee should be waived or reduced to \$25 per month based on her inability to pay. Roman’s trial counsel noted that Roman worked at Taco Bell and that her take-home pay was \$1,000 per month on average, which she used to pay for rent, utilities, food, her cell phone, and car insurance.

The trial court imposed a \$75 monthly probation supervision fee. The court noted that “probation has more supervision” in gang cases and that the court had also imposed a reduced fee of \$75 per month as to Hernandez.

2. Legal Standards

Section 1203.1b, subdivision (a) states in relevant part: “[I]n any case in which a defendant is granted probation . . . , the probation officer . . . shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision. . . .” “[I]f the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability.” (*Id.*, subd. (b)(2).)

The term “ability to pay” is defined in section 1203.1b, subdivision (e) as “the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the preplea or presentence report, . . . and probation supervision . . . , and shall include, but shall not be limited to, the defendant’s: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. . . . [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant’s financial capability to reimburse the county for the costs.”

3. Analysis

Roman contends that instead of considering the ability to pay factors listed in section 1203.1b, subdivision (e), the trial court imposed the \$75 per month probation supervision fee because it was imposing the same fee on Hernandez and because Roman required a high level of supervision due to the gang conditions.

On this record, we cannot say that the trial court failed to consider Roman’s ability to pay the probation supervision fee when imposing the \$75 per month fee. The trial court reduced the fee from the recommended \$110 per month to \$75 per month after Roman’s trial counsel argued that she lacked the ability to pay the recommended fee based on her monthly income and expenses.

The record also does not support Roman's assertion that the trial court imposed a \$75 per month probation supervision fee because it had imposed the same fee on Hernandez. Rather, the record shows that the trial court reduced the fee to \$75 for Hernandez in light of his claim that he did not have the ability to pay a \$110 per month fee, and that it likewise reduced the fee for Roman based on her ability to pay. And, although the trial court referenced the higher degree of supervision necessary when a person has gang conditions, the record does not support Roman's claim that the trial court improperly based the fee amount on this factor instead of the ability to pay factors listed in section 1203.1b, subdivision (e). The trial court could consider the "reasonable cost of probation supervision" when imposing the fee, based on "the actual average cost thereof." (*Id.*, subd. (a).) The record indicates the trial court considered the reasonable cost of supervising a probationer with gang terms and determined that Roman had the ability to pay \$75 per month of that cost.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Hernandez
H042275