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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO SALGADO, Defendant and Appellant.	B282368 (Los Angeles County Super. Ct. No. BA450829)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part and remanded.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After defendant Eduardo Salgado lightly hit the back of another car at a stoplight, he was confronted by the other driver. Remaining seated in his car, defendant picked up and cocked or racked his handgun and asked the other driver, "Is there any damage?" The jury convicted defendant of one count of making criminal threats and one count of possession of a concealed firearm. On appeal, defendant contends his criminal threats conviction was based on his nonverbal conduct and therefore cannot stand pursuant to *People v. Gonzalez* (2017) 2 Cal.5th 1138 (*Gonzalez*). He also argues that the trial court erred in failing to give a self-defense instruction. In addition, he raises a constitutional challenge to his conviction on the concealed firearm count. We affirm the convictions on both counts. We also conclude that defendant has forfeited his right to challenge the conditions of his probation.

Finally, defendant argues that we must remand to allow the trial court to exercise its discretion under the recent amendment to the firearm enhancement statute (Pen. Code, § 12022.5[1]). We agree and remand the case for that purpose.

FACTUAL AND PROCEDURAL HISTORY

I. *Procedural Background*

The Los Angeles County District Attorney (the People) filed an amended information on April 17, 2017 charging defendant with one count of criminal threats, a felony (§ 422, subd. (a); count one), and one count of carrying a concealed firearm in a vehicle, a misdemeanor (§ 25400, subd. (a)(1); count two). As to

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

count one, the information also alleged that defendant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)).

Defendant pled not guilty and denied the special allegation. At the conclusion of trial, the jury found defendant guilty on both counts and found true the firearm allegation. The court sentenced defendant to a total term of six years in state prison. The court suspended the execution of defendant's sentence and placed him on formal probation for five years pursuant to specified terms and conditions. Defendant timely appealed.

II. *Evidence at Trial*

The prosecution presented evidence that on October 6, 2016 around 9:00 p.m., Marvin[2] was stopped at a red light at an intersection. He was driving his Dodge Durango; his seven-year-old son was sitting in the back seat and his mother-in-law was in the passenger seat. While they were waiting at the light, he felt a "minor tap" on the rear end of his car. Marvin testified that he was concerned about his car because he had "just purchased it new," so he "hopped out" of the vehicle. He saw a black sedan directly behind his car. Marvin glanced at the rear of his car, but could not tell whether there was any damage because it was dark.

Marvin testified that he was "a little upset." He walked toward the driver's window of the car behind him and said, "What the hell? You just hit my car."[3] Defendant was seated in the driver's seat of the black sedan. Marvin saw defendant lean

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[2] Pursuant to California Rules of Court, rule 8.90 (b)(4), we refer to the victim in this case by his first name to protect his personal privacy interests. No disrespect is intended.

[3] During cross-examination, Marvin admitted that he was angry when he got out of his car, and that he might have said "What the fuck, man?" instead of "What the hell?"

forward and lean back; he then saw defendant was holding a gun. Marvin heard defendant make a racking sound with the gun; immediately afterward, defendant looked at Marvin and said, "Is there any damage?" Marvin testified that when he saw the gun, he thought defendant "was in a threatening manner threatening me to go back to my vehicle." Marvin responded, "no," and walked back toward his car. At the time, he was thinking defendant could have killed him, and he was worried that his son "would have seen the whole thing and he would have been traumatized."

After Marvin got back into his car, the traffic light turned green and he drove through the intersection. Prior to the incident, he had seen a police car a short distance in front of him, so he sped up and honked at the officers. When one of the officers rolled down the window, Marvin told them that "someone just pulled out a gun on me." Marvin then identified defendant's car.

The two police detectives turned on their lights and siren and initiated a traffic stop of defendant's vehicle. Defendant immediately pulled over and complied with their instructions. Defendant was the only person in the car.

Police officers recovered several hollow-point bullets from inside defendant's vehicle and a 10 millimeter Glock handgun from under the front passenger seat. The gun was not loaded. The gun had been legally purchased by and was registered to defendant.

Defendant did not testify or present other evidence at trial.

DISCUSSION

I. *Criminal Threats*

Defendant contends there is insufficient evidence that he made a verbal "statement" to support his conviction for criminal threats. We disagree.

In reviewing the sufficiency of the evidence, we determine whether after viewing "'the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) We do not weigh the evidence or decide the credibility of the witnesses. We draw all reasonable inferences in favor of the judgment. "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Under section 422, subdivision (a), it is a crime to "willfully threaten" infliction of "death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, . . . which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety. . . ."

Based on this statutory language, courts have required a threat charged under section 422 to include some words or sound

to qualify as a "statement, made verbally." Most recently, in *Gonzalez, supra*, 2 Cal.5th 1138, the Supreme Court reversed a threat conviction where the defendant communicated the threat by making a gang hand sign and "manually simulated a pistol pointed upward." (*Id.* at p. 1140.)

To determine whether nonverbal conduct fell within the scope of section 422, the *Gonzalez* court first reviewed the legislative history of the statute. (*Gonzalez, supra*, 2 Cal.5th at pp. 1142-1146.) The prior version of section 422 applied to a threat made "with the specific intent that the statement is to be taken as a threat. . . ." (Stats. 1988, ch. 1256, § 4, pp. 4184-4185.) The statute did not otherwise define "statement." However, the Court in *Gonzalez* noted that Evidence Code section 225 defines "statement" to include both verbal and nonverbal conduct.[4] (*Gonzalez, supra*, 2 Cal.5th at p. 1143.)

The current language of section 422, requiring a threatening statement to be "made verbally, in writing, or by means of an electronic communication device" was inserted in 1998 as "part of a bill intended to combat 'cyberstalking.'" (*Gonzalez, supra*, 2 Cal.5th at p. 1143.) As such, the Court reasoned that while "the Legislature's 1998 amendment was primarily focused on expanding the reach of [ ] section 422 to include electronic communications . . . the Legislature's choice to explicitly describe a threat 'made verbally' must be given significance." (*Id.* at p. 1144.) Indeed, in 2002, four years after amending section 422, the Legislature amended another criminal

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[4] Specifically, Evidence Code section 225 defines "statement" as "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."

threat statute to expressly include a reference to Evidence Code section 225. (See *id*. at pp. 1144-1145, citing section 11418.5.)[5] Conversely, the Court also noted that in 2000, the Legislature had considered but failed to pass an amendment of section 422 to add a reference to Evidence Code section 225. (*Id*. at p. 1145.)

In light of this legislative history, the *Gonzalez* court concluded that the Legislature "(a) was aware that the 'made verbally' language excluded nonverbal conduct, and (b) intended that nonverbal conduct may qualify as a statement under section 11418.5 but not section 422." (*Gonzalez, supra*, 2 Cal.5th at pp. 1145-1146.) Accordingly, "a threat made through nonverbal conduct falls outside the scope of section 422." (*Id*. at p. 1147.)[6]

Here, defendant contends that the evidence at trial established only that he made a threat through nonverbal conduct—displaying and manipulating his gun. This conduct communicated to the victim that he might be harmed if he did not retreat from defendant's car. Defendant argues that without the use of the gun, his query to Marvin, "Is there any damage?" did not convey a threat.

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[5] Section 11418.5, subdivision (a) previously contained identical language to section 422, requiring "the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat. . . ." (Stats. 1999, ch. 563, § 1, pp. 3938-3939.) As amended, section 11418.5, subdivision (a) states: "Any person who knowingly threatens to use a weapon of mass destruction, with the specific intent that the statement as defined in Section 225 of the Evidence Code or a statement made by means of an electronic communication device, is to be taken as a threat. . . ."

[6] We note that the trial court here did not have the benefit of *Gonzalez, supra*, 2 Cal.5th 1138, as it was decided after the proceedings in this case.

We reject defendant's suggestion that the nonverbal conduct must be "excised from the incident" in order to determine the nature of the threat. This approach is not supported by *Gonzalez, supra*, 2 Cal.5th at p. 1147, which did not involve *any* verbal conduct. Nor is it consistent with the numerous cases holding that the determination of a threat "can be based on all the surrounding circumstances and not just on the words alone." (*People v. Mendoza*, *supra*, 59 Cal.App.4th at p. 1340; see also *Franz, supra*, 88 Cal.App.4th at p. 1446; *People v. Butler* (2000) 85 Cal.App.4th 745, 753 (*Butler*).)

Indeed, courts have repeatedly upheld convictions for threats under section 422 based on a defendant's verbal and nonverbal conduct taken together. (See, e.g., *People v. Wilson* (2010) 186 Cal.App.4th 789, 814 [finding a threat where defendant said he had killed officers in the past, said he would "blast" the victim officer, and simulated pulling a trigger with his fingers]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218, 1220 [defendant's statements to victim, including "I'm going to get you," and "I'll get you," were sufficient to convey a threat where defendant also approached the victim "quickly, he yelled and cursed at him, he got within very close proximity to his face, and he displayed very angry behavior"].) In *People v. Franz* (2001) 88 Cal.App.4th 1426, 1436 (*Franz*), cited by the Attorney General, Franz stood behind a police officer as the officer interviewed an eyewitness. Franz looked at the witness, held an index finger in front of his lips with a shushing noise, then ran his thumb across his throat. (*Ibid.*) The court agreed with Franz that "section 422 required in this case proof that defendant's threat to be quiet was 'made verbally,' i.e., that defendant orally made some noise or sound that was capable of conveying

meaning." (*Id.* at p. 1442.) The court affirmed the conviction, concluding that the testimony "that at least one victim heard defendant make a 'shushing' noise constitutes substantial evidence of a verbal 'statement,' the import of which was amplified by the throat-slashing gesture to constitute a threat to kill if the victim talked to the police." (*Id.* at p. 1446.)[7]

As such, "the meaning of the threat by defendant must be gleaned from the words and all of the surrounding circumstances. . . . Thus, it is the circumstances under which the threat is made that give meaning to the actual words used." (*Butler, supra*, 85 Cal.App.4th at p. 749, 753 [finding a threat based on defendant's statement to the victim that she needed to mind her own business or she "was going to get hurt," coupled with his conduct]; see also, e.g., *Franz, supra*, 88 Cal.App.4th at p. 1446; *People v. Martinez, supra,* 53 Cal.App.4th at pp. 1218, 1220.) Accordingly, in this case, we view defendant's verbal statement-"Is there any damage?"- together with his nearly-simultaneous nonverbal conduct with the gun. Together, those actions communicated to Marvin that if he did not stop asking about his car and withdraw, defendant would shoot him. As such, there was sufficient evidence to allow the jury to find a threat under section 422 based on the entirety of defendant's conduct, both verbal and nonverbal.

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[7] We note that the court in *Gonzalez*, discussing the holding in *Franz*, expressly declined to decide "whether 'made verbally' requires the making of a sound or use of words," as the defendant's conduct in *Gonzalez* involved neither. (*Gonzalez, supra*, 2 Cal.5th at p. 1147, fn. 8.)

II. *Self-Defense Instruction*

Defendant contends his criminal threats conviction also should be reversed due to the trial court's failure to instruct the jury on self-defense. We find no error.

"A trial court has a sua sponte duty to instruct regarding a defense if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case. [Citation.]" (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567 (*Saavedra*).) In determining whether there is substantial evidence, "the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt. . . .'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

There is no dispute that a self-defense theory was consistent with defendant's theory of the case at trial. Defendant further argues that there was substantial evidence to support the defense. The elements of self-defense, as set forth in CALCRIM No. 3470, the self-defense jury instruction, are: "1. The defendant reasonably believed that [he] was in imminent danger of suffering bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger.'" (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49–50.)

The evidence at trial did not support a self-defense instruction. After a minor collision, Marvin exited his vehicle and walked toward defendant's car, yelling, "What the fuck, man? You just hit my car!" or something to that effect. There is no evidence that Marvin was holding a weapon, or anything that could be mistaken for one, or that he made any overt threats or

threatening gestures. Defendant remained in his car and had pulled out his gun while Marvin was still some distance away. After Marvin saw the gun, he retreated. Under these circumstances, there was no evidence from which a jury could find that defendant reasonably believed he was in imminent danger of bodily injury such that the immediate use of force was necessary to defend himself.

Tellingly, the cases cited by defendant demonstrate the difference between this case and one in which a self-defense instruction was supported by the evidence. In *Saavedra*, for example, a prison inmate was searched after he had been severely beaten by two other inmates in a fight. Authorities found a knife inside his shoe and charged him with possession of a weapon. The defendant testified that he had picked up the weapon from one of his assailants during the fight, intending to use it to defend himself. (*Saavedra, supra*, 156 Cal.App.4th at pp. 565-566.) The defendant was therefore entitled to an instruction on self-defense because there was substantial evidence that he "temporarily seized the weapon because of a fear of immediate harm." (*Id*. at p. 569.) Similarly, in *People v. Lemus* (1988) 203 Cal.App.3d 470, the defendant testified that while he was in a bar, the victim threatened him, saying "I'm going to fuck you up," and started hitting the defendant's face and body. The victim also threatened to kill the defendant and tried to stab him. The defendant then pulled out his own knife and stabbed the victim. (*Id*. at p. 477.) The trial court refused to give a self-defense instruction based on its determination that the defendant was not credible and therefore the evidence was not "'substantial.'" (*Ibid*.) This was error, as "assessing the credibility of a witness is an exclusive function of the jury and is not to be usurped by the

court." (*Ibid.*; see also *People v. White* (1980) 101 Cal.App.3d 161, 167-168 [self-defense instruction warranted where defendant testified police officer tried to subdue her using a "sleeper hold," causing her to panic and bite the officer when she could not breathe].) Here, by contrast, there was no evidence of an actual or imminent physical attack against defendant, nor did the court make any credibility determinations in error. As such, the trial court was not required to instruct on self-defense.

III. *Possession of Concealed Handgun*

Defendant also contends that his conviction on count two for possession of a concealed firearm in a vehicle violates the Second Amendment. We are not persuaded.

Section 25400(a)(1) makes it a crime for one to carry "concealed within any vehicle that is under the person's control or direction any pistol, revolver, or other firearm capable of being concealed upon the person." California law also generally prohibits open carry of firearms outside the home. (§§ 25850, 26350.) However, there are numerous exceptions to these general prohibitions. For example, the prohibitions of sections 25400 and 25850 do not apply to active and retired "peace officers." (§§ 25450, 25900.) The prohibition of section 25400 also does not apply to carrying a gun within a locked container (§ 25610), to and from a licensed target range (§ 25540), or by an individual engaged in licensed hunting or fishing (§ 25640), among other exceptions. (See *Peruta v. County of San Diego* (9th Cir. 2016) 824 F.3d 919, 925 (*Peruta*) [listing exceptions].) In addition, individuals with a license to carry a concealed firearm are expressly exempt. (§ 25655.)

The Penal Code authorizes the county sheriff or chief of a municipal police department to issue a concealed carry license to

a person upon proof of certain requirements, including that "Good cause exists for issuance of the license." (§§ 26150(a), 26155(a).) Pursuant to the policy published by the Los Angeles County Sheriff's Department, a finding of good cause requires a showing of "convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm." The policy published by the Los Angeles Police Department contains a similar requirement.

Defendant asserts that the exemption under section 25655 is "largely illusory" because the "heightened requirement for good cause" under these policies "makes it virtually impossible for a law-abiding citizen to obtain a license to carry a concealed firearm." He therefore challenges the policies governing concealed carry, asserting that absent these unconstitutional restrictions, he would have been able to lawfully carry his concealed handgun in his vehicle. We review questions of constitutional law de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893-894.)

Defendant acknowledges that the Ninth Circuit considered and rejected the same arguments challenging similar policies in two other California counties in *Peruta, supra,* 824 F.3d 919, 925 (*Peruta*). He notes, however, that the majority opinion in *Peruta* was criticized by the four dissenting judges, as well as by Justice Thomas in his dissent from the denial of certiorari. (See *Peruta v. California* (2017) 137 S.Ct. 1995, 1996 (Thomas, J., dissenting from denial of certiorari); *Peruta, supra,* 824 F.3d at p. 954

(Callahan, J., dissenting).) He concludes that the dissenting judges "had the better argument." We disagree.

In *Peruta*, an en banc panel considered whether the protection of the Second Amendment extends to carrying "concealed firearms in public by members of the general public." (*Peruta, supra*, 824 F.3d at p. 927.) The court declined to reach the broader question of "whether the Second Amendment protects some ability to carry firearms in public, such as open carry," as the plaintiffs challenged only the "good cause" requirements for concealed carry permits. (*Ibid*.) After an analysis of historical sources and prior case law, the majority of the court concluded "that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public." (*Id*. at p. 939.) The *Peruta* court also noted decisions by several other circuits "that have upheld the authority of states to prohibit entirely or to limit substantially the carrying of concealed or concealable firearms." (*Ibid*., citing *Peterson v. Martinez* (10th Cir. 2013) 707 F.3d 1197 [no Second Amendment right to carry concealed weapons]; *Woollard v. Gallagher* (4th Cir. 2013) 712 F.3d 865 [Maryland requirement that handgun permits be issued only to individuals with "good and substantial reason" to wear, carry, or transport a handgun does not violate Second Amendment]; *Drake v. Filko* (3d Cir. 2013) 724 F.3d 426, 429–30 [New Jersey "justifiable need" restriction on carrying handguns in public "does not burden conduct within the scope of the Second Amendment's guarantee"]; *Kachalsky v. Cty. of Westchester* (2d Cir. 2012) 701 F.3d 81 [New York "proper cause" restriction on concealed carry does not violate Second Amendment].)

We agree with the analysis and conclusions reached by the court in *Peruta, supra*, 824 F.3d at p. 939. Here, as in that case, defendant challenges the "heightened" good cause requirements to obtain a license to carry a concealed firearm. But because "the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of 'good cause,' however defined—is necessarily allowed by the Amendment." (*Ibid.*; see also *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 313-314 ["[C]arrying a firearm concealed on the person or in a vehicle . . . is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in [*District of Columbia v.*] *Heller* [(2008) 554 U.S. 570]."].)

Defendant's argument that the licensing requirements fail to meet intermediate constitutional scrutiny is therefore moot, as he has not established that the "challenged law burdens conduct protected by the Second Amendment." (*United States v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1136.)

IV. *Probation Condition*

Next, we turn to defendant's challenge to his probation condition requiring him to "maintain a residence as approved by the probation officer." He contends this condition is unconstitutionally overbroad, in violation of his rights to travel and to freedom of association.

We conclude that defendant has forfeited his constitutional challenge by failing to object below. In general, a defendant's failure to object to probation conditions at the sentencing hearing waives the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.) "A timely objection allows the court to modify or

delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]" (*Ibid*.)

However, there is an exception to this forfeiture rule where a defendant raises a facial constitutional challenge to a probation condition that presents "'pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.' [Citation]." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*); see also *People v. Stapleton* (2017) 9 Cal.App.5th 989, 994 (*Stapleton*) ["[W]here a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a pure question of law, which is not forfeited by failure to raise it in the trial court. [Citations.]"].) In *Sheena K., supra*, 40 Cal.4th at p. 878, the Supreme Court applied this exception to a condition that the defendant "not associate with anyone disapproved of by probation." The Court concluded that defendant's challenge to this condition as facially vague and overbroad presented an error that was "easily remediable on appeal by modification of the condition," adding a knowledge element, and without reference to the underlying record. (*Id*. at p. 888.) The Court cautioned, however, that this exception would "not apply in every case in which a probation condition is challenged on a constitutional ground." (*Id*. at p. 889.)

We find the forfeiture exception inapplicable here. To determine whether an otherwise valid condition is

unconstitutionally overbroad, we consider whether "it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; see also *Stapleton, supra*, 9 Cal.App.5th at p. 993.)

Unlike in *Sheena K.*, the error defendant asserts here is not capable of correction without reference to the underlying sentencing record. (*Sheena K., supra*, 40 Cal.4th at p. 887.) Whether this particular case warranted a need for broad restrictions on defendant's place of residence cannot be analyzed without reference to the facts. (See, e.g., *People v. Arevalo* (Cal. Ct. App., Jan. 17, 2018, G054483) ___ Cal.Rptr.3d___ [2018 WL 456917, at *3] [affirming probation condition "because the nature of her crime suggests a need for oversight"]; *People v. Bauer* (1989) 211 Cal.App.3d 937, 944 [striking residence approval condition after review of sentencing record and defendant's history].) As such, by failing to object to this condition in the trial court, defendant has forfeited his right to raise it on appeal.

V. *Recent Amendment to Section 12022.5*

Defendant's suspended sentence included the midterm of two years on the criminal threat count, plus the midterm of four years for the personal use of a firearm enhancement under section 12022.5, subdivision (a). At the time of sentencing, that section provided no discretion to the trial court to strike a firearm

use enhancement. Effective January 1, 2018, section 12022.5 was amended by the passage of Senate Bill No. 620; the statute now allows the trial court, in its discretion, to strike a firearm use enhancement. (§ 12022.5, subd. (c).)

Defendant requests remand so that the trial court may consider whether to strike the firearm enhancement under the amended section 12022.5. The Attorney General concedes that the amendment applies retroactively to defendant, as the judgment in this case was not final as of January 1, 2018. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) However, the Attorney General suggests that remand is unwarranted, because the trial court's imposition of midterm sentences indicates that it would not have exercised its discretion to strike the enhancement and thereby decrease defendant's sentence. (See, e.g., *People v. Gamble* (2008) 164 Cal.App.4th 891, 901 ["'[i]f the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required'"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand is required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike"].)

Criminal defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Here, remand is necessary to allow the court to exercise its discretion under the amended version of the statute. Moreover, it is not for this court to speculate how the trial court would exercise its discretion following the opportunity to hear defendant's arguments in favor of striking the firearm enhancement. It is more prudent to remand unless no reasonable

court could exercise discretion in the defendant's favor. We cannot say that remand would be futile in this case.

DISPOSITION

The case is remanded for the trial court to exercise its discretion under section 12022.5. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.