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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL FLORES, Defendant and Appellant.	D051215 (Super. Ct. No. SCD196460)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed as modified.

David Blair-Loy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I and II of the Discussion.

A jury convicted Miguel Flores of possession of a firearm by a person prohibited from possessing a firearm (Pen. Code, § 12021, subd. (c)(1)),[1] carrying a concealed firearm (§ 12025, subd. (a)(2)), carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)), and resisting a peace officer (§ 148, subd. (a)(1)). The trial court sentenced him to three years of probation.

Flores appeals, contending that his convictions must be reversed because: (i) the trial court failed to instruct the jury on the defenses of necessity and duress; (ii) the trial court erroneously instructed the jury regarding the criminal intent required for the offense of carrying a loaded firearm; and (iii) the firearm convictions violate his federal constitutional right to bear arms. As discussed below, we find these contentions to be without merit.

Flores also argues that the trial court erred in requiring payment of probation costs and attorney fees as a condition of probation. We agree, as does the Attorney General, that the trial court's probation order must be modified to delete the requirement that Flores pay probation costs and attorney fees as a condition of probation. In all other respects, we affirm.

FACTS

On January 22, 2006, at around 10:00 p.m., San Diego Police Officers Joel Tien and Arnie Ambito were riding in a marked patrol car. They observed a small white car briefly driving in the wrong direction on a one-way street. The officers followed the car

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

and activated their lights and sirens. The car did not stop and the officers gave chase. The white car slowed as it passed Grant Hill Park. Flores then opened the passenger side door and fled into the park as the car drove off.

Officers Tien and Ambito chased Flores on foot while a police helicopter hovered overhead. During the chase, Officer Tien yelled, "San Diego Police, stop, don't move!" Flores continued to run, while reaching with his right hand toward his waistband. When they reached a crest of a hill, Tien was able to tackle Flores. Tien handcuffed Flores and rolled him over. Tien pulled up Flores's shirt and found a .38-caliber handgun in Flores's waistband. The gun was loaded with six live rounds.

DISCUSSION

Flores raises a number of challenges to his convictions. We address each challenge separately below.

I.

The Trial Court Did Not Err in Failing to Sua Sponte Instruct on Duress and Necessity

Flores contends that the trial court erred by failing to instruct the jury sua sponte on the defenses of duress and necessity. We disagree.

A trial court has a sua sponte duty to instruct on a defense "'if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Barton* (1995) 12 Cal.4th 186, 195; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 ["The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case"].) "In determining whether the

evidence is sufficient to warrant a jury instruction," the courts do 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 . . . .'" (See *People v. Salas* (2006) 37 Cal.4th 967, 982.) As we will explain, here there was insufficient evidence to support either a defense of duress or necessity and therefore the trial court did not err in failing to instruct on those defenses.[2]

Flores contends that his own testimony provided the requisite substantial evidence for both defenses. Flores's testimony, as pertinent to this contention, was as follows. Flores testified that he was riding in a car driven by Armando Perez, who was the brother of a friend. When the police pulled behind the car, Perez told Flores that he was on parole and had a gun in the car and did not intend to stop. Perez, while driving around the Grant Hill Park area, took out the gun "pointed it toward [Flores] and told [him] to get out of the car and take the gun." Flores testified that he "felt threatened in a way" and that agreeing to the request was his "only way out of the car." Perez stopped the car, "handed [Flores] the gun" and told him "to get out and run." Flores grabbed the gun (and his jacket) and exited the car through the passenger side door. As he exited, Flores pushed the gun into the waistband of his pants.

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[2] The jury was instructed, at Flores's request, on an analogous, but not identical, "momentary possession" defense with respect to the charge of unlawful possession of a firearm. (See CALCRIM No. 2511.) As we conclude that the trial court did not err, we need not resolve whether, as the Attorney General contends, the trial court's instruction on this defense, along with other factors, rendered any instructional error harmless.

Flores testified that he then ran from the police because he was afraid of how they might react to his possession of the gun. Flores claimed that after running away from the car, he slowed to allow the police to catch up to him.

The defense of duress is available to defendants who commit a charged crime "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (§ 26; *People v. Wilson* (2005) 36 Cal.4th 309, 331; CALCRIM No. 3402.) Here, even if Flores's testimony is credited, there was insufficient evidence to support a duress defense.

While Flores reasonably may have felt endangered when Perez pointed the gun "toward" him, the danger vanished when Perez *handed Flores the gun*. Despite the absence of any continuing threat, Flores then took possession of the gun, placed it in his waistband, jumped out of the car and fled from police. These actions, which occurred *after the expiration of the purported threat*, were the basis for the weapon possession charges. Consequently, Flores was not entitled to an instruction on duress. (See *People v. Evans* (1969) 2 Cal.App.3d 877, 882 [no instruction required based on defendant's claimed need to possess knife in prison due to threat of imminent assault because even if defendant initially obtained knife to protect himself, he continued to possess the knife after any "immediate danger ceased"].)

The defense of necessity also is inapplicable on the facts of the case. A necessity defense requires, among other things, that the defendant violated a law "to prevent a significant evil" with "a good faith belief in [the] necessity" of his acts and "with no adequate alternative." (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 (*Pepper*);

see CALCRIM No. 3403.) In the instant case, even if, as Flores contends, he had to feign acceptance of the gun to get out of Perez's car (thus preventing the significant evil of his continued presence in a car recklessly fleeing from police), a necessity defense no longer applied once Perez slowed to let him out. At that time, it is indisputable that Flores had an "adequate alternative" to the unlawful possession of the gun; he could have simply left the gun in the car as he exited. Instead, Flores tucked the gun into his waistband and ran from the police. These actions constituted the basis for the charges and could not be excused by a necessity defense. (See *United States v. Bailey* (1980) 444 U.S. 394, 410 ["Under any definition of these defenses [duress or necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail"].)

Our conclusion is unaltered by Flores's attempt to highlight the pursuing police officers as an alternative significant evil to be avoided. Specifically, Flores contends that a necessity instruction was warranted even with respect to his possession of the gun after exiting the car because "he was afraid that if he tried to surrender the firearm to the officers, they would misunderstand his actions and mistakenly shoot him." Flores, however, points to no authority that would suggest that necessity can be invoked to excuse the evasion of lawful authorities based on a generic fear that the authorities may engage in excessive force. Indeed, we are skeptical, given the grounding of the necessity defense in "public policy," that any court would condone such a defense, absent some particularized facts supporting a defendant's belief in the likelihood of improper police

conduct. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 (*Heath*) ["Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime"]; *People v. Slack* (1989) 210 Cal.App.3d 937, 943 [holding that trial court did not err in declining to instruct on necessity defense where defendant drove drunk to border crossing and claimed he did not stop for pursuing Tijuana police officer because "he believed if he had stopped for the police he would have been assaulted"]; cf. *People v. Beach* (1987) 194 Cal.App.3d 955, 971 [recognizing that "[t]he necessity defense is very limited [and] excuses criminal conduct if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such resort would be futile"].)

In any event, even if we were to accept the potential police overreaction as the significant evil to be avoided (which we do not), the facts still would not support a necessity defense because Flores possessed adequate lawful alternatives to *handing* the pursuing officers the gun. As we have noted, Flores could have left the gun in the car when he exited the vehicle. Instead, Flores took the gun, hid it in the waistband of his pants and ran. (Cf. *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135 [noting additional requirement of necessity defense that the defendant's violation of the law did not "creat[e] a greater danger than the one avoided"].) On the facts of this case, that choice cannot be excused by the defense of necessity.

Flores cites *Heath* in support of his contention that a necessity or duress instruction was required in this case. (See *Heath*, *supra*, 207 Cal.App.3d at p. 902.) In *Heath*, the defendant testified that he owed a drug dealer $400, and the dealer drove him

to a house, "pointed a loaded gun at [him], and threatened to kill him and throw his body into a ditch if he refused to commit [a] burglary." (*Id.* at p. 896.) The defendant exited the car and, while the drug dealer and an associate watched, broke into a residence. The *Heath* court held that the trial court did not err in instructing on defense and necessity, in part, because the defendant's "testimony present[ed] sufficient justification to warrant instructions on both the duress and necessity defenses." (*Id.* at p. 902.)

The instant case is distinguishable from *Heath*. In *Heath*, the defendant was (purportedly) ordered, on pain of death, to commit a burglary, and the threatening party remained at the scene with a loaded firearm to compel compliance. Here, there was at most a momentary threat communicated by Perez in pointing the gun toward Flores, which expired when Perez subsequently gave Flores the gun.

We believe the instant case is significantly closer to *Pepper, supra*, 41 Cal.App.4th 1029, where the Third District held that a defense of necessity was unavailable in a prosecution for possession of a firearm by a felon. (*Id*. at pp. 1035-1036.) In that case, the defendant claimed that he picked a firearm up off of the floor solely to move it out of the reach of a nearby toddler. (*Ibid.*) The court held that this claim did not trigger a necessity defense because there was no evidence that the toddler was about to touch the rifle and, in any event, "an adequate alternative was available to address the problem; defendant could have taken the child[] from the room and then had his sister move the weapon to a place of safety." (*Id.* at p. 1036.) Similar reasoning applies here. As in *Pepper*, the presence of a lawful alternative to Flores's unlawful act defeated any defense of necessity (or duress).

II.

The Trial Court Did Not Err in Instructing the Jury on the Elements of the Loaded Firearm Offense

Flores argues that trial court also erred in instructing the jury on the offense of carrying a loaded firearm (§ 12031, subd. (a)) because its instruction did not require the jury to determine — as an element of the offense — whether Flores knew or should have known that the firearm was loaded. We disagree.

The trial court has a sua sponte duty to instruct the jury on the elements of a charged offense. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Here, the trial court instructed the jury with the standard instruction on the offense of carrying a loaded firearm as follows:

> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> "1. The defendant carried a loaded firearm on his person;
>
> "2. The defendant knew that he was carrying a firearm; AND
>
> "3. At that time, the defendant was in a public place or on a public street. [¶] . . . [¶]
>
> "As used here, a firearm is loaded if there is an unexpended cartridge or shell in the firing chamber or in either a magazine or clip attached to the firearm." (See CALCRIM No. 2530.)

As Flores correctly notes, the trial court's instruction did not require the prosecution to establish that Flores "knew or should have known the firearm was loaded."

The nature of the knowledge requirement for a conviction under section 12031 is primarily a question of statutory intent. (See *In re Jorge M.* (2000) 23 Cal.4th 866, 873

(*Jorge M.*); *People v. Dillard* (1984) 154 Cal.App.3d 261, 265 (*Dillard*).) Consequently, we turn first to the statutory language itself. Under section 12031, "[a] person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place . . . ." (§ 12031, subd. (a)(1).) As recognized by our colleagues in the Second District, "the statute prohibits the carrying of a loaded firearm and does not specify knowledge it is loaded as an element of the crime." (*People v. Harrison* (1969) 1 Cal.App.3d 115, 120 (*Harrison*).)

Accepting that there is no knowledge requirement explicit in the statutory text, Flores argues, relying on *Jorge M.*, that we should read such an element into the statute. (See *Jorge M.*, *supra*, 23 Cal.4th at p. 887.)

In *Jorge M.*, our Supreme Court recognized that generally a specific knowledge requirement, or mens rea, "'is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence.'" (*Jorge M.*, *supra*, 23 Cal.4th at p. 872 ["the requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it"].) The court noted, however, that it was "[e]qually well recognized" that for "certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that any proof of scienter or wrongful intent be necessary for conviction." (*Ibid.*) The court explained that "'[s]uch offenses generally are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public.'" (*Ibid.*)

The *Jorge M*. court then highlighted several considerations from LaFave and Scott's well-respected criminal law treatise that it deemed useful for determining "whether a statute should be construed as a public welfare offense: (1) the legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime . . . ; (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts . . . ; (6) the difficulty prosecutors would have in proving a mental state for the crime . . . ; and (7) the number of prosecutions to be expected under the statute . . . ." (*Jorge M., supra*, 23 Cal.4th at p. 873.) Applying these factors to the assault weapons ban at issue in that case (§ 12280, subd. (b)), the court concluded that a conviction under that statute required proof that "the defendant *knew or reasonably should have known*" that a firearm he or she possessed had "the characteristics bringing it within the [Assault Weapons Control Act]." (*Jorge M.*, at p. 887.)

We do not believe that *Jorge M.*'s analysis of a completely different statute (i.e., § 12280) warrants reversal of Flores's section 12031 conviction. Instead, we find guidance in the opinion of our colleagues in the First District who rejected essentially the same challenge to a section 12031 conviction 16 years prior to *Jorge M.* (See *Dillard*, *supra*, 154 Cal.App.3d at p. 266.)

In *Dillard*, *supra*, 154 Cal.App.3d 261, after reviewing the statutory text, legislative history and public policy rationales of the prohibition of carrying a loaded firearm in a public place, the First District stated: "In light of th[e] clear expression of

legislative concern for the public safety as against the presence of armed individuals in public places, we conclude that section 12031, subdivision (a), by necessary implication excludes knowledge or criminal intent as an element of the offense." (*Id.* at p. 266.) The *Dillard* court pointed out that knowledge of whether a firearm knowingly carried by a defendant is loaded is a burden properly assumed by any person carrying such a weapon in a public place. Indeed, the court noted, "one who carries such a weapon in ignorance of the fact that it is loaded could in some circumstances pose a greater threat to the public safety than one who wilfully violates the law by carrying the weapon with knowledge that it is loaded." (*Id.* at p. 267.)

We believe that *Dillard*'s analysis is both faithful to the suggested analytical framework laid out in *Jorge M.* and persuasive. We therefore join the *Dillard* court in holding that there is no requirement that a defendant know that a firearm is loaded for a conviction under section 12031.

Flores attempts to distinguish *Dillard* (and *Harrison*, *supra*, 1 Cal.App.3d 115, which reached the same conclusion) on the ground that those cases "decided only that knowledge of whether the firearm is loaded" is not required and "say nothing about negligence." Flores emphasizes that he does not contend that a defendant must know that a firearm is loaded, but only that a (properly convicted) defendant must have been at least criminally negligent in failing to determine that fact. We find this distinction unpersuasive.

Dillard is unambiguous in its holding that section 12031 "excludes knowledge or criminal intent as an element of the offense." (*Dillard*, *supra*, 154 Cal.App.3d at p. 266.)

This statement, and the balance of *Dillard*'s analysis, leaves no room for Flores's suggestion that even in the absence of a knowledge requirement, some type of negligence requirement should be read into the statute. Rather, *Dillard* holds, and we agree, that for reasons of the public welfare, "the burden of acting at hazard is placed upon a person who, albeit innocent of criminal intent, is in a position to avert the public danger"; in other words, the law imposes a "'"duty o[n] the defendant to know"'" whether a firearm carried in a public place is loaded. (*Ibid.*)[3]

In sum, we conclude that a conviction under section 12031 for possession of a loaded firearm is proper regardless of whether a defendant knows or should have known that the firearm he possessed was loaded. While an exception for non-negligent possessors of loaded firearms may (or may not) be wise public policy, there is nothing in the statute or case law that authorizes us to create such an exception. Consequently, the trial court's instruction was not erroneous.

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3 Flores argues that the use of the term "duty" in *Dillard* — "a negligence element" — demonstrates *Dillard*'s recognition of the propriety of a duty of reasonable inquiry, rather than a strict liability standard. However, a fair reading of *Dillard* is that it imposes the duty on every defendant regardless of the facts of the case. As the *Dillard* court explained, quoting *Morissette v. United States* (1952) 342 U.S. 246, 256, section 12031 falls within the category of public welfare offenses where "'whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity.'" (*Dillard*, *supra*, 154 Cal.App.3d at p. 265.)

III.

Flores's Convictions Do Not Violate His Federal Constitutional Rights

In a supplemental brief, Flores contends that his convictions are invalid in light of the United States Supreme Court's recent decision in *District of Columbia v. Heller* (2008) ___ U.S. ___ [128 S.Ct. 2783, 171 L.Ed.2d 637] (*Heller*), which held that the Second Amendment protects an "individual['s] right to possess and carry weapons in case of confrontation." (*Heller*, at p. 2797.) We disagree.

Prior to the decision in *Heller*, it was well settled in our courts that state laws regulating the possession of firearms were not vulnerable to constitutional challenge. (See *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481 ["[i]t is long since settled in this state that regulation of firearms is a proper police function"]; *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 866 ["The claim that legislation regulating weapons violates the Second Amendment has been rejected by every court which has ruled on the question"]; *In re Rameriz* (1924) 193 Cal. 633, 652 (*Rameriz*) [stating that the Legislature is "entirely free to deal with the subject" of firearm regulation].)[4]

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4 In addition, our Supreme Court has held that the Second Amendment does not apply to the states. (See *Rameriz, supra*, 193 Cal. at pp. 651-652 ["this amendment offers no protection against the . . . state governments but applies only to the . . . federal government"].) Despite the fact that this 80-year-old holding has been significantly undermined by modern developments in federal constitutional law (see *People v. Rappard* (1972) 28 Cal.App.3d 302, 306; cf. *Heller*, *supra*, 128 S.Ct. at p. 2816 [recognizing that "[f]or most of our history, the Bill of Rights was not thought applicable to the States"]), the Attorney General urges us to include the Second Amendment's purported non-application to the states as a basis of our ruling. We need not decide the issue, however, because we conclude that even if the Second Amendment does apply to

In *Heller*, the United States Supreme Court ruled that the District of Columbia's "absolute prohibition of handguns held and used for self-defense in the home" as well as its "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense" violated the Second Amendment to the federal Constitution. (*Heller*, *supra*, 128 S.Ct. at p. 2822.) In reaching its conclusions, the court repeatedly stressed the broad sweep of the local prohibitions at issue in the case. For example, the court emphasized that the District of Columbia's "handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. (*Id.* at p. 2817.) "The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute." (*Ibid.*) Given these circumstances the court concluded, "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family'" violated the Second Amendment. (*Ibid.*, fn. omitted.)

The firearm statutes that Flores challenges in the instant case have nowhere near the broad sweep of the statutes at issue in *Heller*. Flores was convicted of violating three firearms laws: (i) possession of a firearm by a person prohibited from possessing a firearm (§ 12021, subd. (c)(1)); (ii) carrying a concealed firearm (§ 12025, subd. (a)(2)); and (iii) carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)). Flores fails to

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the states, it would not invalidate the statutes at issue here. We also note that Flores does not contend that his convictions violate any provision of the California Constitution.

point to any authority in the state or federal courts interpreting *Heller* as invalidating statutes analogous to these, and our reading of *Heller* convinces us that nothing in that opinion requires such a result.

In *Heller*, the court emphasized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." (*Heller*, *supra*, 128 S.Ct. at p. 2816; see also *People v. Bland* (1995) 10 Cal.4th 991, 1004, fn. 6 [recognizing that even if the Second Amendment protects an individual's right to keep and bear arms, "the United States Supreme Court has not treated that right as absolute"].) The court then provided a nonexhaustive list of "presumptively lawful regulatory measures" under the Second Amendment, including "longstanding prohibitions on the possession of firearms by felons." (*Heller*, at pp. 2816-2817 & fn. 26.) The first of Flores's convictions for possession of a firearm by a prohibited person falls into this category. Section 12021 prohibits "[a]ny person who has been convicted of a felony" from possessing a firearm. The statute expands this prohibition as well to persons who have committed certain misdemeanor offenses. (§ 12021, subds. (a)-(c).) Flores's possession of a firearm contravened this statute by virtue of his prior conviction for violating section 245, subdivision (a)(1), which prohibits "an assault upon the person of another . . . by any means of force likely to produce great bodily injury." (§ 245, subd. (a)(1).)

Flores emphasizes that the *Heller* opinion carves out an exception to the Second Amendment's protections for *felons* in possession of a firearm, but "says nothing about a ban based on a mere misdemeanor." We find this argument unconvincing. If, as *Heller* emphasizes, the Second Amendment permits the government to proscribe the possession

of a firearm by any felon (including non-violent offenders), we can see no principled argument that the government cannot also add certain misdemeanants, particularly those who have committed an assault by "means of force likely to produce great bodily injury." (§ 245, subd. (a)(1).) The public interest in a prohibition on firearms possession is at its apex in circumstances, as here, where a statute disarms persons who have proven unable to control violent criminal impulses. (See *United States v. Chester* (S.D.W.Va., Oct. 7, 2008, No. CR 2:08-00105) 2008 U.S. Dist. Lexis 80138 [upholding federal statute criminalizing possession of firearm by misdemeanants found guilty of domestic violence]; *United States v. Bonner* (N.D.Cal., Sept. 23, 2008, No. CR 08-00389 SBA) 2008 U.S. Dist. Lexis 80765 [recognizing that courts continue, after *Heller*, to reject claims by felons and others who have previously committed crimes of violence that they possess an absolute right to possess firearms].) Consequently, we do not read *Heller* to undermine the constitutionality of Flores's section 12031 conviction.

Heller also contains guidance with respect to Flores's conviction for violating section 12025, which prohibits any person from carrying "concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person." (§ 12025, subd. (a)(2).)

In addition to the list of "presumptively lawful regulatory measures" noted in our earlier discussion, the *Heller* opinion emphasizes, with apparent approval, that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." (*Heller, supra*, 128 S.Ct. at pp. 2816-2817, fn. 26; see also *id.* at p. 2851

(dis. opn. of Breyer, J.) [noting that "the majority implicitly, and appropriately, . . . broadly approv[es] a set of laws" restricting firearm use, including "prohibitions on concealed weapons [and] forfeiture by criminals of the Second Amendment right"].) Given this implicit approval of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts' longstanding understanding that such prohibitions are constitutional. (See also *Robertson v. Baldwin* (1897) 165 U.S. 275, 281-282 [stating in dicta, "the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons"].) Consequently, we conclude *Heller* does not invalidate Flores's section 12025 conviction. (See *People v. Yarbrough* (Dec. 17, 2008, A120721) ___ Cal.App.4th ___ [2008 Cal.App. Lexis 2431] [concluding that Heller does not invalidate § 12025 conviction].)

Finally, *Heller* does not require reversal of Flores's conviction under section 12031 for carrying a loaded firearm in a public place. (§ 12031, subd. (a)(1).) Although *Heller* does not explicitly discuss such a prohibition, we believe section 12031 is so far removed from the blanket restrictions at issue in *Heller* that its constitutional validity remains undisturbed by the Supreme Court's opinion.

Section 12031 prohibits a person from "carr[ying] a loaded firearm on his or her person . . . while in any public place or on any public street." (§ 12031, subd. (a)(1).) The statute contains numerous exceptions. There are exceptions for security guards (*id.*, subd. (d)), police officers and retired police officers (*id.*, subd. (b)(1) & (2)), private investigators (*id.*, subd. (d)(3)), members of the military (*id.*, subd. (b)(4)), hunters (*id.*, subd. (i)), target shooters (*id.*, subd. (b)(5)), persons engaged in "lawful business" who

possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property (*id.*, subd. (h)). A person otherwise authorized to carry a firearm is also permitted to carry a loaded firearm in a public place if the person "reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." (*Id.*, subd. (j)(1).) Another exception is made for a person who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety." (*Id.*, subd. (j)(2).) Finally, the statute makes clear that "[n]othing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite." (*Id.*, subd. (*l*).)

This wealth of exceptions creates a stark contrast between section 12031 and the District of Columbia statutes at issue in *Heller*. In particular, given the exceptions for self-defense (both inside and outside the home), there can be no claim that section 12031 in any way precludes the use "of handguns held and used for self-defense in the home." (*Heller*, *supra*, 128 S.Ct. at p. 2822.) Instead, section 12031 is narrowly tailored to reduce the incidence of unlawful *public* shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes, including self-defense. (See *People v. Foley* (1983) 149 Cal.App.3d Supp. 33, 39 ["The primary purpose of the Weapons Control Law is to control the threat to public safety in the indiscriminate possession and carrying about of concealed and loaded weapons"].) Consequently,

section 12031 does not burden the core Second Amendment right announced in *Heller* — "'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'" — to any significant degree.[5] (*Heller, supra*, 128 S.Ct. at p. 2831.) We,

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[5] The majority opinion in *Heller* provides little guidance with respect to how courts are to determine whether the numerous firearm restrictions not explicitly addressed in the opinion should be evaluated in light of the Second Amendment right recognized in that case. (*Heller, supra*, 128 S.Ct. at p. 2821 [explaining that the court cannot be expected in its "first in-depth examination of the Second Amendment" to "clarify the entire field"].) The parties in the instant case provide little assistance. Flores politely asks this court to "address the question" of *Heller*'s applicability without proposing any analytical framework for doing so. The Attorney General demurs as well, while incorrectly asserting that Flores's convictions were each based on his being "a prohibited person" and thus all fall within *Heller*'s explicit felon in possession exception.

One of the dissenting opinions in *Heller* criticizes the majority for sidestepping this difficult issue and notes that "adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible" due to the ever-present compelling interest in public safety in this context and the limited ability of courts to determine the efficacy of a particular firearm restriction to address that interest. (*Heller, supra*, 128 S.Ct. at p. 2851 (dis. opn., Breyer, J.); see also Winkler, *Scrutinizing the Second Amendment* (2007) 105 Mich. L. Rev. 683 [explaining the difficulties of applying strict scrutiny to gun control regulations and cataloguing the ways in which courts have and are likely to continue to scrutinize gun laws after adoption of an individual rights approach to the Second Amendment].) Further, as the dissent notes, it is "far from clear" that the firearm prohibitions approved in *Heller* itself (e.g., felon in possession of a firearm) would survive strict scrutiny analysis. (*Heller*, at p. 2851 (dis. opn., Breyer, J.).)

The *Heller* majority itself acknowledged that rational basis scrutiny is inapposite, as the laws struck down in *Heller* itself would have met that lenient standard. (*Heller, supra*, 128 S.Ct. at p. 2818, fn. 27.) Consequently, it appears that a mid-level standard of scrutiny analogous to the "undue burden" standard (see *Planned Parenthood of Southeastern PA v. Casey* (1992) 505 U.S. 833, 874 (plurality)) will ultimately prevail in this context. (See Reynolds & Denning, *Heller's Future In The Lower Courts* (2008) 102 N.W.U. L.Rev. Colloquy 406, 414, fn. 29 [suggesting that Justice Breyer's dissent in *Heller, supra*, 128 S.Ct. 2847, 2863, addressing this question implies "some sort of 'undue burden'" or "'undue-burden-lite' standard" for firearm regulation].) We do not attempt to set forth a definitive statement of the applicable standard here, but conclude only that section 12031 does not violate the Second Amendment under any conceivable articulation of such a standard.

therefore, conclude that *Heller* does not require reversal of Flores's section 12031 conviction.

In sum, the United States Supreme Court's *Heller* decision does not warrant invalidation of Flores's firearms convictions.

IV.

The Order Imposing Costs as a Condition of Probation Is Erroneous

Flores contends that the trial court erred in requiring him to pay $99 a month for probation supervision, $1,127 in presentence investigation costs, and $570 in attorney fees "to the extent [its] order makes [such payments] a condition of probation." The Attorney General agrees, suggesting that "[t]he conditions of appellant's probation should be modified to delete any requirement that appellant pay the costs of probation or attorney's fees." (See *People v. Bradus* (2007) 149 Cal.App.4th 636, 641 ["Although the trial court is statutorily authorized to make respective orders for the payment of appointed attorney fees and for the costs of probation, depending on a defendant's ability to pay, such costs and fees cannot legally be imposed as conditions of probation"]; *People v. Hart* (1998) 65 Cal.App.4th 902, 907 (*Hart*).) The parties also agree on the remedy — that "this court should modify the order granting probation to clarify that payment of those costs and fees is not a condition of probation but rather an order of the court entered at judgment." (See *Hart*, at p. 907 ["the trial court may order defendant to pay for costs of probation and attorney fees, but may not condition defendant's grant of probation upon payment thereof"].) As we agree that the trial court's orders could be construed to require

the payment of probation costs and attorney fees *as a condition* of probation, and that such a condition would be improper, we grant Flores's request.

Flores also asks this court to strike the portion of the trial court's written standard form "Order Granting Probation," which states: "If it is determined that you have the present ability to repay the county [for various costs], the county will request that a judgment be issued . . . ." We decline this request. While, as explained in *Hart*, there is no need or authorization for a separate money judgment to enforce the trial court's orders, there has been no separate money judgment entered in this case. (*Hart*, *supra*, 65 Cal.App.4th at p. 906.) Consequently, Flores's request that we strike language from the trial court's order is based on mere speculation that an improper judgment will follow. We see no basis to make such an assumption. The County is permitted under the Penal Code to enforce the trial court's order and we presume it will do so properly. (See *ibid.*) If, in fact, the County does attempt to obtain or enforce an improper money judgment against Flores, he may raise his objection at that time.

DISPOSITION

The trial court's probation order is modified to eliminate any requirement that Flores pay the costs of probation or attorney fees *as a condition of* probation; however, the trial court's order that defendant pay such costs and fees is affirmed. In all other respects the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.