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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL HIEN ARTZ,

Defendant and Appellant.

C068429

(Super. Ct. No. 09-2856)

When he was 18 years old and a senior in high school, defendant Michael Artz invited a 16-year-old classmate (YM) to his house, where YM orally copulated him. Although the prosecution charged defendant in count 1 with forcible oral copulation pursuant to Penal Code section 288a, subdivision (c)(2), for this incident, the jury acquitted defendant of forcible oral copulation, and found instead that he was guilty in count 2 of violating Penal Code section 288a, subdivision (b)(1), non-forcible oral copulation with a person under 18 years of age.<sup>1</sup>

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

Defendant took photographs of YM orally copulating him. Several months later, he contacted YM and threatened to post the pictures unless she agreed to have sex with him. For this the jury convicted defendant of contacting or communicating with a minor in violation of section 288.3, subdivision (a) (count 3).

The trial court granted probation for a period of five years following a jail confinement for a period of 270 days. Defendant was required to comply with mandatory registration as a sex offender pursuant to section 290. The trial court also imposed various fines, fees, and assessments.

Defendant argues his equal protection rights were violated because section 288.3 makes it a crime to contact a minor with the intent to commit non-forcible oral copulation, but does not make it a crime to contact a minor with the intent to commit non-forcible unlawful sexual intercourse. The People concede this argument, and we shall accept the concession. The equal protection violation also affects defendant's mandatory sex offender registration requirement for count 2, non-forcible oral copulation with a minor. We shall remand for the trial court to determine whether to exercise its discretion to order registration pursuant to section 290.006.

Defendant argues his equal protection rights were violated because he was convicted of felony non-forcible oral copulation with a minor, but non-forcible sexual intercourse with a minor is a misdemeanor. The People concede and we accept the concession.

Finally, defendant argues the case must be remanded for the trial court to set forth the bases of the fines, fees, and assessments imposed. The People concede and we accept the concession.

#### FACTUAL AND PROCEDURAL BACKGROUND

In August 2008, defendant, who was 18 years old, invited the 16-year-old victim, YM, to a party at his house. When YM arrived, no one else was there, and YM eventually orally copulated defendant while he took photos. On May 18, 2009, defendant

contacted YM on Facebook and told her he would keep her secret that she had a girlfriend if she would orally copulate him again. Defendant contacted YM a couple of days later and wanted to know if she had thought about the deal he had proposed. He continued to text and call YM, threatening to release the pictures he had taken if she did not agree to meet him. YM went to the police.

With the help of police, YM made two pretext phone calls to defendant. YM asked to buy the photos from defendant, but he said he wanted her to do “what we did last time.” When YM pressed him to specify exactly what he wanted he said, “Sex.” Defendant wanted to drive over right then so YM could “give [him] a little bit in the park” but YM told him she could not leave the house so late at night. He told her she would get plenty of practice orally copulating him, and to “[h]ate me all you want[, but] [u]ntil I go off to college, you’re mine.”

In the second call, YM told defendant she did not want to have sex with him and asked if there were any other way to get the pictures he had of her. He told her he could not think of any other way. They arranged that he would pick her up at her house after school the next day (May 27, 2009). Defendant was apprehended as he neared YM’s house.

The jury acquitted defendant of the charge of oral copulation by force or duress for the first incident, but found him guilty of oral copulation with a person under 18 years. It also found him guilty of contacting or communicating with a minor with intent to commit rape and/or oral copulation.

The trial court granted probation for five years. Defendant was ordered to register as a sex offender per section 290.

## DISCUSSION

### I

The Count 3 Conviction was a Violation of Defendant's Right to Equal Protection

Defendant was convicted in count 3 of violating section 288.3, subdivision (a). Subdivision (a) provides in pertinent part: "Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section . . . 261, . . . [or] 288a, . . . involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense."

The information against defendant alleged that his intent with respect to the violation of section 288.3, subdivision (a), was to commit rape (§ 261) and oral copulation (§ 288a). Section 288a contains several subdivisions, but none were specifically set forth in the amended information or the verdict form.

The jury was instructed that defendant was guilty of violating section 288.3, subdivision (a), if the prosecution proved that defendant intended to commit rape or oral copulation. The court instructed that oral copulation was oral copulation with a person under the age of 18, whether or not the other person consented to the act. In the instructions, however, the trial court indicated that the section 288a offense applicable to this case was the non-forcible oral copulation of a minor set forth in subdivision (b)(1) of section 288a. The jury was also instructed that it must agree that defendant committed at least one act constituting the crime and that it must agree on which act defendant committed. However, the jury was not instructed to specify whether it agreed defendant intended to commit rape or oral copulation, or both.

Defendant argues, and the People concede, that defendant's equal protection rights were violated to the extent the conviction for violating section 288.3, subdivision (a), was based on his intent to commit non-forcible oral copulation. We accept the concession.

Defendant's argument is based on the Supreme Court's holding in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). In *Hofsheier*, the defendant, who was 22, pleaded guilty to oral copulation with a person under the age of 18. (*Id.* at p. 1192.) He challenged the requirement that he register as a sex offender, claiming it violated equal protection because he would not have been subject to mandatory registration had he been convicted of unlawful sexual intercourse with a minor under section 261.5. (*Ibid.*) *Hofsheier* observed: "Apart from the mandatory lifetime registration requirement, voluntary sexual acts between a 22-year-old and a 16-year-old -- whether oral copulation or sexual intercourse -- are treated identically." (*Id.* at p. 1196.) "The only difference between the two offenses is the nature of the sexual act. Thus, persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors 'are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.' " (*Id.* at p. 1200.) *Hofsheier* concluded there was no rational basis for treating the two sexual crimes differently, and that the registration requirement violated the equal protection clauses of the federal and state Constitutions. (*Id.* at p. 1207.)

Defendant argues that notwithstanding the Supreme Court's determination that there is no rational basis to distinguish between persons "convicted of voluntary oral copulation with a minor of the age of 16 or 17, but not someone convicted of voluntary sexual intercourse with a minor of the same age," (*Hofsheier, supra*, 37 Cal.4th at p. 1207) section 288.3 does distinguish between these groups because it makes it a crime to contact a minor with the intent to participate in an act of oral copulation whether or not the act is accomplished against the victim's will (§ 288a), but does not make it a crime to contact a minor with the intent of having unlawful, but non-forcible, sexual intercourse with a minor (§ 261.5). Consequently, section 288.3 is unconstitutional as applied to a defendant who contacts a minor with the intent of accomplishing non-forcible oral copulation.

*Hofsheier* concluded that even under a rational relationship test, requiring lifetime registration as a sex offender from someone convicted of voluntary oral copulation with a minor, but not of someone convicted of voluntary sexual intercourse with a minor violated the equal protection clauses of the federal and state Constitutions. (*Hofsheier, supra*, 37 Cal.4th at p. 1207.) By the same reasoning, we must conclude that section 288.3 also violates equal protection to the extent that it makes contacting a minor for the purpose of non-forcible oral sex a crime, but not make the same act criminal if the intent is non-forcible sexual intercourse.

In this case, it is impossible to tell whether the jury convicted defendant on count 3 because it found he contacted the victim with the intent to commit rape or with the intent to engage in oral copulation. In the pretext phone calls, defendant told YM both that he wanted her to do “what we did last time[,]” i.e., non-forcible oral copulation and to have sex. As indicated, the jury was not instructed to specify defendant’s intent in committing the crime, and it did not do so.

Because it is unclear which theory the jury used to convict defendant, we must reverse. “[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.” (*People v. Green* (1980) 27 Cal.3d 1, 69, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) This rule holds true where, as here, the Constitution forbids conviction on a particular ground, and a general verdict may have rested on that ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1123-1125; *Griffin v. United States* (1991) 502 U.S. 46, 53 [116 L.Ed.2d 371, 378-379].)

In a case such as this we cannot affirm the conviction unless we conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*People v. Chun* (2009) 45 Cal.4th 1172, 1203.) That means that we can sustain the conviction only

if the verdict rested on the theory that defendant contacted YM with the intent to rape her. Because we cannot conclude beyond a reasonable doubt that the jury relied on that valid theory in finding defendant guilty, the conviction in count 3 must be reversed.<sup>2</sup>

Also relying on *Hofsheier, supra*, 37 Cal.4th 1185, defendant argues he should not be subject to mandatory registration for his count 2 conviction pursuant to section 288a, subdivision (b)(1), non-forcible oral copulation with a minor. The People concede that the mandatory registration requirement cannot stand, but argue this court should adopt the remedy employed in *Hofsheier* and remand the case to the trial court to determine whether defendant is subject to discretionary registration pursuant to section 290.006 (formerly § 290, subd. (a)(2)(E), repealed by Stats. 2007, ch. 579, § 7). We shall follow the direction of *Hofsheier* and remand for the court to decide in its discretion whether to impose a registration requirement on defendant for count 2. (*Hofsheier, supra*, 37 Cal.4th at p. 1209.)

A fine of \$300 plus a penalty assessment of \$840, plus a processing fee of \$20 was imposed on defendant pursuant to section 290.3. That section provides in part: “Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent

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<sup>2</sup> Defendant argues and the People concede that the trial court erred in not instructing the jury to specify which of the target crimes, i.e., rape or oral copulation, defendant intended to commit when he contacted YM. Defendant’s argument is premised again on the claim that the jury found his intent with respect to the violation of section 288.3 (contacting a minor with the intent to commit a sexual offense) was either rape or non-forcible oral copulation with a minor. The penalty for violating section 288.3 is imprisonment for the term prescribed for an attempt to commit the intended offense. (§ 288.3, subd. (a).) We need not reach this issue since we are reversing count 3.

conviction, unless the court determines that the defendant does not have the ability to pay the fine.” (§ 290.3, subd. (a).)

Defendant argues that the fines and fees imposed pursuant to condition 32 of the probation order arose out of the mandatory duty to register as a sex offender, and that since the mandatory duty to register must be stricken, the fines must also be vacated. We disagree.

Section 290.3 provides that a fine of \$300 be imposed on every person convicted of an offense specified in section 290, subdivision (c). Defendant was convicted of violating section 288a (a conviction this court is not reversing) and section 288a is an offense specified in section 290, subdivision (c). The fine is therefore applicable whether or not defendant is required to register as a sex offender under the mandatory registration requirements. The probation order does not explain the basis of the \$840 penalty assessment or the \$20 processing fee, and in section III, *post*, we determine the case must be remanded to the trial court to specify the authorization for these assessments. Should either of these be based upon the mandatory registration requirement, they should be vacated.

## II

### Count 2 Felony Punishment was a Violation of Equal Protection

Defendant also argues that his felony punishment for the convictions in counts 2 and 3 violated equal protection. The People concede the issue. We agree as to count 2, and need not address the argument as to count 3 because we are reversing that count.

Defendant was convicted in count 2 of non-forcible oral copulation of a minor, a violation of code section 288a, subdivision (b)(1). This subdivision calls for punishment by imprisonment in state prison or in a county jail for no more than a year. Defendant’s conviction was treated as a felony. By contrast, non-forcible sexual intercourse with a minor in violation section 261.5 where, as here, the perpetrator is no more than three years older than the minor is a misdemeanor. (§ 261.5, subd. (b).)

We again rely on the reasoning set forth in *Hofsheier, supra*, 37 Cal.4th 1185. The only difference between a section 288a, subdivision (b)(1), offense and a section 261.5 offense is the nature of the sexual act. (*Hofsheier, supra*, 37 Cal.4th at p. 1200.) *Hofsheier*, teaches that persons convicted of violating section 288a, subdivision (b)(1), are similarly situated to persons convicted of violating section 261.5 for purposes of the mandatory registration requirement. (*Ibid.*) The offenses are also similarly situated for purposes of punishment, because the only difference between the two offenses is the nature of the sexual act.

Length of incarceration impacts a fundamental interest. (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 717.) A classification that impacts a fundamental interest is subject to strict scrutiny review. (*Ibid.*) Thus, a classification that subjects one group to misdemeanor punishment while subjecting a similarly situated group to felony punishment is subject to strict scrutiny because it affects a fundamental interest.

“[O]nce it is determined that the classification scheme affects a fundamental interest or right the burden shifts; thereafter *the state* must first establish that it has a *compelling* interest which justifies the law and then demonstrate that the distinctions drawn by the law are *necessary* to further that purpose.” (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) The People have suggested no compelling interest that would justify punishing one group as felons and the other as misdemeanants. Thus, defendant’s conviction for count 2, non-forcible oral copulation with a person under 18 years of age, should be reduced to a misdemeanor.

### III

#### Remand to Allow Trial Court to State Statutory Bases for Fines

All fines, fees, and penalties imposed must be separately listed in the abstract of judgment with the statutory basis for such amounts set forth. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200-1201.) Where the defendant is placed on probation and no abstract of judgment is issued, the trial court must prepare an order specifying the

statutory bases of all fees, fines, and penalties imposed. (*People v. Eddards* (2008) 162 Cal.App.4th 712, 718.)

Defendant points to the following fines and fees which are unexplained in the order of probation: (1) condition 7 of the order, “\$500 as a fine plus \$1,500 penalty assessment; plus a processing fee of \$35;” (2) condition 8 of the order, “a processing fee of \$20 for each felony case and a \$10 processing fee for each misdemeanor case;” and (3) condition 32, “a penalty assessment of \$840[,] plus a processing fee of \$20 . . . .”

The people concede, and we agree, that the case should be remanded with directions to set forth the statutory bases for the fines, fees, and assessments.

#### DISPOSITION

Count 3, the conviction for violating section 288.3, subdivision (a), of the Penal Code, is reversed and the mandatory registration requirement based on count 2 is stricken. The case is remanded with directions to determine whether defendant is subject to discretionary registration pursuant to section 290.006, and to set forth the statutory bases for the fines, fees, and assessments imposed. Any such fines, fees, or assessments based on the mandatory registration requirement of section 290 must be vacated. The trial court is further directed to amend the probation order and disposition of arrest to specify that defendant’s conviction for count 2, violation of section 288a, subdivision (b)(1), is a misdemeanor. In all other respects the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.