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

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JAMES RICHARDSON,

Defendant and Appellant.

C074870

(Super. Ct. No. CM037158)

On January 24, 2013, pursuant to a plea bargain, defendant Michael James Richardson pleaded no contest to two felony counts of unlawful sexual intercourse with S.R., a minor (Pen. Code, § 261.5, subd. (d)—counts 1, 2) (references to undesignated statutes are to the Penal Code), and to one count of unlawful sexual intercourse with minor A.J., a misdemeanor (§ 261.5, subd. (c)—count 4), in exchange for the dismissal of count 3 (§ 261.5, subd. (d)) with a *Harvey* waiver<sup>1</sup> and reducing count 4 to a misdemeanor.<sup>2</sup>

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<sup>1</sup> Referring to *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*), which permits the trial court to consider the facts of the dismissed charge in determining sentencing.

<sup>2</sup> Unlawful sexual intercourse with a minor is defined under section 261.5, subdivision (d) as: “Any person 21 years of age or older who engages in an act of

On September 13, 2013, the court sentenced defendant to state prison for five years, discretionarily ordered him to register as a sex offender pursuant to section 290.006, issued a 10-year protective order as to the victims, and imposed restitution fines of \$280 in accordance with sections 1202.4, subdivision (b) and 1202.45.<sup>3</sup>

On appeal, defendant contends (1) the sex offender registration order should be stricken because the trial court misunderstood its discretion and failed to make the findings required to impose the order under section 290.006;<sup>4</sup> (2) the trial court's imposition of a 10-year protective order, purportedly imposed under section 136.2, was unauthorized; and (3) the \$280 dollar restitution fines imposed by the court should be stricken because neither the court nor counsel for the parties recognized that the minimum fine actually was \$200. Defendant's first and third contentions lack merit. We agree with his second contention and shall strike the protective order and remand the case to the trial court for reconsideration and clarification.

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unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished . . . .”

Unlawful sexual intercourse with a minor is defined under section 261.5, subdivision (c) as: “Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished . . . .”

<sup>3</sup> The court also sentenced defendant in other cases that are not germane to any issue in the present appeal.

<sup>4</sup> Defendant also argues that if we find the contention has been forfeited because of his counsel's failure to object, then he received ineffective assistance of counsel. Since we address the contention, we need not consider his ineffective assistance of counsel argument.

## **Statement of Facts<sup>5</sup>**

In April 2010, when defendant was 20 years old, he attended a high school party where he met 14-year-old A.J., with whom he smoked marijuana, drank alcohol, and had sexual intercourse.

In September 2011, when defendant was 21 years old, he began dating 14-year-old S.R. and engaged in three acts of sexual intercourse with her at a motel. S.R.'s mother became suspicious of the relationship, went to the motel with her sister (S.R.'s aunt), and took pictures of defendant. S.R. finally admitted to her aunt that she was having intercourse with defendant. S.R.'s mother reported the matter to the police, resulting in the present charges.

## **Discussion**

### **I**

Defendant was ordered by the court to register for life as a sex offender pursuant to section 290.006 and now seeks to have the sex registration requirement stricken on the grounds the trial court misunderstood the section and failed to comply with the section's sex registration requirements. We reject the contention.

Section 290.006 provides: "Any person ordered by any court to register pursuant to the [Sex Offender Registration] Act [(§ 290 et seq.)] for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."

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<sup>5</sup> Because this case is based upon a plea bargain, it was stipulated that the factual basis for the plea could be found in the probation officer's report.

Unlawful sexual intercourse with a minor as described in section 261.5 is not an offense enumerated in section 290, subdivision (c); accordingly, to impose a registration requirement, the trial court must make the findings required by section 290.006.

In making the findings required under section 290.006, the trial court must engage in a two-step process: “(1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 875.)

In the present case, after imposing sentence, the prosecutor asked the trial court if it would “make a [section] 290 finding.” The court replied that it would and stated as follows: “So I am imposing a registration requirement to register as a sex offender under Penal Code section 290. And that’s a lifetime requirement. I have reviewed the Penal Code section . . . 290.006. [¶] . . . [¶] And because of the manner of the offenses, the age of the victims, the number of victims, the number of sexual offenses that the Defendant has demonstrated, that he committed the sexual acts as a result of sexual compulsion or for the purposes of sexual gratification.”

Defendant contends the registration requirement should be stricken and the matter remanded for a new hearing because all of the trial court’s reasons went to establishing that the offenses were committed because of sexual compulsion or for sexual gratification, but the court did not provide “a separate statement of reasons for imposing a registration requirement.” Although the court’s statement was inartful, the findings were sufficient to support section 290.006’s requirements.

Section 290.006 does not require any particular format for the court’s findings, which need be proven only by a preponderance of the evidence. (*People v. Mosley* (2015) 60 Cal.4th 1044, 1052, fn. 4.) All that is required is that the court make the required findings and state on the record the reasons for those findings. Here, the court’s statement regarding “the manner of the offenses” was a clear reference to their being sexual intercourse, conduct which in the absence of any evidence to the contrary virtually compels a finding of sexual compulsion and/or sexual gratification. The findings regarding the “age of the victims” (14 and 15), “the number of victims [two], and the number of sexual offenses [at least four], make it obvious that defendant frequently and predatorily targets vulnerable children to satisfy his sexual needs.” Since “[t]he Legislature has found and declared that sex offenders pose a high risk of recidivism, and keeping track of their whereabouts is necessary to protect the public” (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1509), and because the trial court’s findings demonstrate that defendant has a history of seeking out underage girls to satisfy his sexual needs, the trial court appropriately ordered him to register as a sex offender.

Accordingly, the court’s findings constitute sufficient compliance with the requirements of section 290.006.<sup>6</sup>

## II

At sentencing, as the court was imposing various conditions on defendant, the following colloquy occurred between the prosecutor and the court: “[The Prosecutor]: Your Honor, is there a 136.2 order in this? I think there is.

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<sup>6</sup> Because we have found the court fulfilled its duty in stating the requirements for discretionary registration under section 290.006, we need not address his claim regarding what the court should consider at the rehearing because there will not be one. Additionally, because we have addressed the discretionary registration issue, we need not address his claim that he received ineffective assistance of counsel if we were to find the issue forfeited by his counsel’s failure to object.

“The Court: Which case are you?”

“[The Prosecutor]: 37158 [this case]. Says [S.R.] and [J.C]. There is a provision in the Penal Code that allows for a ten-year stay-away order post judgment at the time of sentencing. I would ask the Court to impose that. I think it’s 136.1(f), but I’m not positive of the section.

“The Court: It may be. I’m not aware of the exact code section. But I have heard many times in various conferences that the ten-year post judgment order is available. . . . [¶] . . . [¶]

“The Court: All right. Then I’ll order that the Defendant comply with that ten-year stay-away order. And I’ll sign those now.” The court then proceeded with imposing attorney fees and awarding credits.

The protective orders, dated September 13, 2012, and citing section 136.2, prohibit defendant from engaging in various conduct against S.R. and A.J., such as harassment, stalking, molesting, etc. The orders also contain a no-contact provision, which essentially prohibits defendant from having any form of contact with the victims.

At the time of sentencing, September 13, 2013, section 136.2 was applicable only to domestic violence cases. Thus, in relevant part, the section read: “In all cases in which a criminal defendant has been convicted of a crime of domestic violence as defined in Section 13700, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court.” (§ 136.2, former subd. (i)(1).)<sup>7</sup>

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<sup>7</sup> Operative January 1, 2014, section 136.2, subdivision (i)(1) was amended by adding to the crimes of domestic violence the crimes defined in “Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290.” (Stats. 2013, ch. 76, § 145 (Assem. Bill No. 383 (2013-2014 Reg. Sess.).)

Recognizing that section 136.2, at the time of sentencing, had no application to defendant's violations of section 261.5, the parties proffer to this court various solutions for this statutory gap. However, it is not up to this court to determine the scope of victim protective orders, particularly in the absence of a hearing before the parties. Since it is clear from the record that in requesting the protective orders the People were mystified as to the authorizing statute and neither the court nor defense counsel was more enlightened on the subject, we shall remand the matter to the trial court for reconsideration.

### III

When defendant committed his offenses in 2010 and 2011, the statutory minimum for the restitution fines was \$200. (Former § 1202.4, § 1202.45.) At the time of sentencing in 2013, the minimum amount for these fines had risen to \$280.<sup>8</sup> During sentencing, when the court began addressing the fines and fees, defense counsel interrupted the court, stating, "Your Honor, based on the prison commitment, can the Court, to the extent possible, find no ability," meaning no ability to pay the restitution fine. The court responded, "All right. Thank you, Mr. Lamb [defense counsel]." The prosecutor then asked the court to "make a [section] 290 finding" and it did so. The court returned to the imposition of the restitution fines under sections 1202.4, subdivision (b) and 1202.45. The court stated that it was "imposing \$280 instead of what I could impose," and imposed the same amount under section 1202.45 but suspended it. No more was said by the parties about the matter.

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<sup>8</sup> In relevant part, section 1202.4, subdivision (b)(1), amended in 2011, provided: "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014 . . . ." (See Stats. 2011, ch. 358, § 1.)

Defendant contends the \$280 restitution fine should be stricken and the matter remanded to permit the trial court to exercise its intention, as he believes is shown by the record, to impose the minimum permissible fine of \$200. We reject the contention.

Defendant bears the burden of providing a record affirmatively showing that it was the trial court's intention to impose the minimum restitution fine, and such a showing will not be presumed from a silent record. (See *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527 [“[I]n light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of that discretion. [Citations.]”].)

We reject as unsound defendant's argument that the trial court's answer of “All right” to his counsel's request that the court “to the extent possible, find [that defendant had] no ability” to pay means that the court was granting the request. The answer is ambiguous—the court could have meant it intended to reduce the fine to the minimum, as defendant asserts, or it could have meant that the court merely understood defendant's position. An ambiguous answer does not establish error. Accordingly, defendant has not met his burden of proof and we reject his contention.

### **DISPOSITION**

The protective order is stricken. The matter is remanded to the trial court for reconsideration of the order and with directions to make a record adequate for review. In all other respects, the judgment is affirmed.

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RAYE, P. J.

We concur:

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BLEASE, J.

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NICHOLSON, J.