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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MICHAEL LAVIS,

Defendant and Appellant.

F062668

(Super. Ct. No. BF130937A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J., and Detjen, J.

Appellant, Anthony Michael Lavis, pled no contest to three counts of assault by an officer under color of authority (counts 1, 4, & 6/Pen. Code, § 149).¹ On appeal, Lavis contends the court abused its discretion when it: 1) denied him probation; and 2) ordered him to register as a sex offender. We affirm.

FACTS²

Lavis worked as a detentions deputy for the Kern County Sheriff's Department. On October 15, 2009, Kern County Sheriff's Deputy Vincent Martinez was guarding inmate Karen F. at the Kern Medical Facility when Karen told him that she had some information about "a dirty cop," whom she identified as Lavis. Karen told Martinez that on October 13, 2009, at the infirmary at the Lerdo pretrial facility, Lavis removed her from her cell so she could take a shower. While showering, Karen noticed Lavis looking at her through a small window in the shower area. At another point, Lavis opened a door to the shower area, looked inside, and told Karen that she had a "pretty p****." A short time later, Lavis motioned for Karen to move closer to him. Karen complied and Lavis began rubbing his bare hand on her vaginal area. Lavis attempted to digitally penetrate Karen but she stepped back. During the encounter, Lavis spoke to Karen about her allowing Lavis to look at her in exchange for getting some unspecified benefit in return.

Karen also told Deputy Martinez that on another occasion in October 2009, she was being moved from her cell to the infirmary on a gurney when Lavis approached her and asked where it hurt. When she replied that it hurt in her stomach area, Lavis began touching her stomach with his bare hand. He then slid his hand under her shirt and began rubbing her breast through her bra. Karen did not consent on either occasion to Lavis touching her.

¹ All further statutory references are to the Penal Code.

² The facts are taken from the transcript of Lavis's preliminary hearing.

On Sunday, October 18, 2009, Deputy Martinez had Karen removed from her cell so she could be outfitted with a hidden microphone. Karen was brought into the room where Martinez was waiting and immediately stated that earlier that day, Lavis walked into her cell while she was sleeping. After Lavis woke her and told her that he had missed her all weekend, Lavis digitally penetrated Karen's vagina and anus, without her consent. Karen was fitted with a hidden microphone and taken back to her cell and a video camera was hidden there in a partially hollowed out bible. Later that day, Lavis entered the cell, touched her skin to skin on her breast and vaginal area, and made vulgar comments to her. When Deputy Martinez reviewed the audio and video recordings, he heard Lavis make several lewd comments to Karen that included telling her that he wanted to perform oral sex on her and asking her if she "squirted" when she had an orgasm.

Deputy Martinez interviewed Lavis later the same day. Lavis initially denied all of Karen's allegations, but eventually admitted some of them including that he placed his hand down Karen's pants and "fingered her." He denied digitally penetrating Karen.

During the investigation, Deputy Martinez also interviewed Toni J., J. P., and Eva B. Toni reported that sometime between July 30 and September 14, 2009, she was working as an inmate laborer in the infirmary when Lavis came up behind her and began grabbing her breasts through her clothes. Toni also stated that on several occasions between September 21 and September 24, 2009, while Toni was on suicide watch in the infirmary, Lavis entered her cell, kissed her, and rubbed her breasts and vaginal area through her clothes. Toni did not consent to any touching by Lavis.

J. P. reported that on October 12, 2009, while Lavis was supervising her in the laundry area, Lavis came up behind her and rubbed his crotch against her buttocks.³ J. did not consent to the touching and immediately moved away from Lavis.

Eva B. reported that sometime in September 2009, after psychiatric staff cleared her to be transferred from suicide watch to her regular cell, she was not returned there for four hours even though the process normally takes only a few minutes. Eva asked Lavis when she was going to be returned to her cell and Lavis replied that he was not going to allow her to go back to her cell until she showed him something. Eva stripped nude and Lavis returned her to her cell approximately 15 minutes later.⁴

During an interview with a district attorney investigator, J. stated that on several occasions at the pretrial detention facility, Lavis rubbed his crotch against her body, kissed her, or asked her to expose her breasts to him. Additionally, on one occasion, he inserted his finger in her vagina; on two occasions, he had her rub his erect penis through his clothes; and on two occasions, Lavis exposed his penis to her. These incidents happened sometime after she was taken into custody in August 2009.

On August 10, 2010, the district attorney filed an information charging Lavis with six counts of assault by an officer under color of authority (counts 1, 2, 4, 5, 6 &

³ During the execution of a search warrant on Lavis's property and vehicle, Deputy Martinez found a money order slip for \$50 that had been deposited into J.'s financial account at the jail.

⁴ There were approximately eight surveillance cameras in the infirmary, where many of the incidents occurred. The cameras were used to monitor suicidal inmates and did not record. The cameras, however, did not cover certain locations in the infirmary. The infirmary was staffed with anywhere from one to five people at a time.

8/§ 149), two counts of misdemeanor sexual conduct with a public health patient (counts 3 & 7/§ 289.6, subd. (a)(2)), and felony false imprisonment (count 9/§ 236).⁵

On May 10, 2011, Lavis pled no contest to counts 1, 4, and 6 in exchange for the dismissal of the remaining counts with a *Harvey*⁶ waiver and a bid of four years four months with the court indicating that it would sentence him to no more than a three-year prison term. Lavis agreed that the court could rely on the offense reports and the preliminary hearing transcript as the factual basis of the plea.

On June 9, 2011, in imposing sentence, the court stated:

“... in reviewing this particular matter, the court took into great consideration Mr. Lavis’ prior lack of criminal history, his prior service to our country.

“But the court is concerned about the violation of the position of trust that is involved with each of these offenses.

“As to that, the court would find that the analysis of probation places great weight on the single circumstance in aggravation that the victims were particularly vulnerable and that several incidents the victims were confined.

“And the court will note a single circumstance in mitigation that the defendant has no prior record of any criminal conduct.

“Then, based on the argument and the analysis of counsel, in this particular case, as to Count 1, 4, and 6, probation is denied.

“I will sentence him to the Department of Corrections ... and probation will be denied....”

⁵ Karen was the victim alleged in counts 1, 2, and 3; Toni was the victim alleged in counts 4 and 5; J. was the victim alleged in counts 7 and 8; and Eva was the victim alleged in count 9.

⁶ *People v. Harvey* (1979) 25 Cal.3d 754, 758.

The court then sentenced Lavis to an aggregate term of three years four months, consisting of the middle term of two years on count 1, a consecutive eight-month term on count 4 (one-third the middle term of two years), and a consecutive eight-month term on count 6. The court also ordered Lavis to register as a sex offender.

DISCUSSION

The Denial of Probation

Lavis contends that the court abused its discretion when it denied him probation because: 1) the conduct underlying the charges fell in the lower part of the spectrum for the offenses he committed because it consisted mainly of looking and groping; 2) in many published cases involving more egregious conduct the defendant received probation; 3) the safety of the public would be well served by a grant of probation because Lavis has been removed from a position of trust and would be supervised for a number of years; 4) Lavis could be severely punished by a local term of incarceration; 5) his needs would better be served by a probationary term rather than a prison term; and 6) the court improperly relied on Lavis having violated a position of trust because it is inherent in the offenses he committed and on the vulnerability of the victims because their incarceration, which made them vulnerable, also provided them “certain safety.” We disagree.

“The grant or denial of probation is within the trial court’s discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]” (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) “In reviewing [a trial court’s determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court’s order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825.)

Turning to the facts of the instant case, we cannot say that the trial court abused its discretion when it denied Lavis probation. Lavis's contrary assertion is based on a gross minimization of his conduct in this matter. Lavis used his position of authority to commit numerous sexual assaults on at least three different victims and falsely imprisoned a fourth. Lavis's victims were particularly vulnerable because they were under his supervision, they were incarcerated in small quarters that severely limited their ability to resist his unlawful conduct, and some of them apparently suffered from mental problems that required them to be placed on suicide watch. Further, Lavis's contention that his conduct involved only lewd comments and groping ignores victim J.'s statement that Lavis digitally penetrated her vagina on one occasion, and victim Karen's statement that Lavis rubbed her vaginal area and attempted to digitally penetrate her on one occasion and digitally penetrated her anus and vagina on another occasion. Although the prosecutor chose to charge Lavis with consensual conduct against victims Karen and J. in the two misdemeanor counts, the court could reasonably have found from the preliminary hearing evidence that the underlying conduct was not consensual.

Moreover, neither Lavis's citation to reported cases in which probation was granted to defendants who engaged in conduct allegedly more egregious than Lavis's conduct nor his claim that certain factors favored a grant of probation compel a conclusion that the trial court here acted arbitrarily in denying Lavis probation. "Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citation], and may balance them against each other in qualitative as well as quantitative terms. [Citation.]" (*People v. Roe* (1983) 148 Cal.App.3d 112, 119.) Further, to the extent Lavis contends that the trial court did not consider other factors that favored a grant of probation or that it erred in relying on certain factors, Lavis forfeited these claims by his failure to object. (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*) [defendant forfeits claim that sentence imposed in procedurally flawed way by failure to

object].) Thus, we conclude that the court did not abuse its discretion when it denied Lavis probation.

The Registration Requirement

Sex offender registration is mandatory for certain offenses enumerated in section 290, subdivision (c). For other offenses, the court has discretion to require registration, under certain circumstances, pursuant to section 290.006, which provides:

“Any person ordered by any court to register pursuant to the Act 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.”

In *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), the Supreme Court held that in order to impose a discretionary registration requirement, 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.” (*Id.* at p. 1197.)

In ordering Lavis to register pursuant to section 290.006, the court stated:

“I am going to order that he register pursuant to Penal Code Section 290.

“It appears that the sole purpose -- one of the major purposes of the commission of the offense on the assault under color of authority in this particular case was as a result for the purpose of sexual gratification.

“The court will find that 290 registration is appropriate.”

Lavis contends that the registration requirement should be stricken because the court did not engage in the requisite weighing process or state reasons for requiring him to register as a sex offender. Lavis forfeited these claims by his failure to raise them below. (*Scott, supra*, 9 Cal.4th at p. 353.)

Alternatively, Lavis cites *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70 (*Lewis*) to contend that the court abused its discretion in ordering him to register because the record does not support a finding that he is likely to commit one of the offenses listed in section 290, subdivision (c).⁷ Lavis is wrong.

Section 290.006 does not expressly require the court to make a specific determination as to whether a defendant is likely to commit one of the offenses listed in section 290, subdivision (c). In making a discretionary registration decision, however, the court must consider all relevant information, including “the likelihood that the defendant will reoffend.” (*People v. Garcia* (2008) 161 Cal.App.4th 475, 483, 485; *People v. Thompson* (2009) 177 Cal.App.4th 1424, 1431.) Here, Lavis abused his position of trust and authority to sexually exploit four victims who were particularly vulnerable and he engaged in repeated, substantial sexual conduct with three of them. These circumstances amply support the court’s decision to require Lavis to register as a sex offender pursuant to section 290.006.

Further, Lavis misplaces his reliance on *Lewis* to argue otherwise. In *Lewis*, the defendant was convicted of oral copulation with a minor and ordered to register under section 290. Many years later, the defendant sought and obtained *Hofsheier*⁸ relief from

⁷ The court in *Lewis* characterized these offenses generally as “sexual offenses committed by means of force or violence, violent offenses committed for sexual purposes, sexual offenses committed against minors, or offenses that involve the sexual exploitation of minors.” (*Lewis, supra*, 169 Cal.App.4th at p. 78.)

⁸ *Hofsheier, supra*, 37 Cal.4th 1185.

the mandatory registration requirement. The appellate court held that there was no basis for requiring registration under the discretionary provisions of section 290.006. The court found nothing in the record to suggest that the defendant was likely to reoffend, even in 1987, when he was originally sentenced. His victim was 17 years old at the time, only five years his junior. (*Lewis, supra*, 169 Cal.App.4th at p. 73.) The victim had not told him how old she was, and she had a boyfriend who was the same age as the defendant. (*Id.* at p. 74.) There was no evidence that the defendant had used force or threats, “or that [the victim’s] age and relationship to the defendant was such that she was coerced into doing something she would not otherwise have done.” (*Id.* at p. 79.) “[I]n the 20 plus years since his conviction,” moreover, the defendant had committed “no offenses requiring him to register as a sex offender and no offenses similar to those requiring registration.” (*Ibid.*) “Thus, the only possible basis for imposing a discretionary registration requirement in 2008 would be a finding that it is likely [the defendant] will *start* committing such offenses now.” (*Ibid.*) There was “nothing in the record to support such a finding.” (*Ibid.*)

It is unclear whether *Lewis* intended to condition discretionary registration in all cases on an express finding that the defendant is likely to reoffend or whether it merely concluded that, based on the facts in the record, there was insufficient evidence to support any grounds for registration. Although it is clear from *Lewis* that likelihood of recidivism is an important consideration in deciding whether to impose sex offender registration, *Lewis* did not expressly hold that likelihood of reoffense is a necessary precondition to imposing registration pursuant to section 290.006.

Additionally, the interpretation Lavis urges ignores the plain language of section 290.006, which gives courts discretion to order registration “for any offense not included specifically in subdivision (c) of Section 290” (§ 290.006.) It similarly ignores our high court’s teaching, in *Hofsheier*, that “discretionary registration does not depend on

the specific crime of which a defendant was convicted. Instead, the trial court may require a defendant to register under [the predecessor to section 290.006] even if the defendant was not convicted of a sexual offense” “*if it finds the crime to have a sexual purpose.*” (*Hofsheier, supra*, 37 Cal.4th at pp. 1197-1198, italics added.)

In any event, the record here contains evidence from which the court could reasonably conclude that Lavis was likely to commit one of the offenses enumerated in section 290, subdivision (c). Lavis agreed that the factual basis of the plea was contained in the preliminary hearing transcript and offense reports. Additionally, the evidence adduced at Lavis’s preliminary hearing indicated, at a minimum, that Lavis committed sexual battery (§ 243), one of the offenses listed in section 290, subdivision (c), against three of the four victims when he rubbed their breasts and/or digitally penetrated two of them.

Further, we disagree with Lavis’s assertion that registration should not be required because he is not likely to reoffend now that he has been “removed from his position of trust.” Lavis risked his career, reputation, and freedom by committing the underlying offenses. He also committed his offenses in a jail environment, which by its nature is closely monitored by other officers, and he committed many of them in the infirmary, which was monitored with several surveillance cameras. The court could reasonably conclude from these circumstances that if Lavis was willing to risk so much to sexually assault several women in a closely monitored jail environment, he will be more likely to do so when he is no longer in such a closely monitored environment, irrespective of the consequences to himself if he is caught. Accordingly, we reject Lavis’s contention that the court abused its discretion when it ordered Lavis to register as a sex offender pursuant to section 290.006.

DISPOSITION

The judgment is affirmed.