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

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS FRANKLIN DUNN,

Defendant and Appellant.

H037322

(San Benito County

Super. Ct. No. CR964927

A person convicted of specified sex offenses is required under the Sex Offender Registration Act (Act) to register as a sex offender for the remainder of his or her life while residing in California pursuant to Penal Code section 290, subdivision (b).<sup>1</sup> In addition, the court in its discretion may require sex offender registration for anyone convicted of any offense not specified in section 290, subdivision (c), if the court specifically finds that the offense was committed “as a result of sexual compulsion or for purposes of sexual gratification” and states on the record its “reasons for its findings and the reasons for requiring registration.” (§ 290.006.)

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

Defendant Curtis Franklin Dunn pleaded no contest in 1997 to furnishing methamphetamine to a minor and oral copulation with a minor under 16. He received probation and was ordered to register as a sex offender under the mandatory provisions of section 290. In January 2011, defendant sought an order terminating the registration requirement on the ground that it was unconstitutional. The court agreed with defendant, but entered a discretionary order under section 290.006 requiring defendant to register as a sex offender.

On appeal, defendant claims that the court abused its discretion in ordering him to register. Finding no abuse of discretion, we will affirm the order.

### FACTS<sup>2</sup>

For a three-month period between April and July 1995, defendant lived with his girlfriend, Kathi, and her 15-year daughter, A., in Hollister. A. reported to the police that she had smoked methamphetamine supplied by defendant and had engaged in sexual acts with him over the course of those three months. She stated that from the day defendant moved into the home until approximately one week before he moved out, they continuously smoked methamphetamine together that he provided. A. told the police that she orally copulated defendant at his request approximately every two days; he orally copulated her several times; and they had unprotected sexual intercourse at least five times. “The victim stated that the sexual acts were consensual, but that she was not thinking clearly because of all the methamphetamine the defendant and [she] were smoking prior to the acts.” Defendant instructed A. not to tell anyone what they were doing “because he would ‘get put away forever.’ ”<sup>3</sup>

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<sup>2</sup> Our summary of facts is taken from the probation officer’s report from 1997.

<sup>3</sup> Kathi spoke with the police on the same day that the victim was interviewed. She said that A. had told her that defendant and she frequently  
(continued)

In his statement to the probation officer, defendant denied ever having had a sexual relationship with A. He also denied ever either using drugs with A. or using them in her presence.

### PROCEDURAL BACKGROUND

Defendant was charged by a 22-count third amended information filed January 7, 1997, with four counts of furnishing a controlled substance to a minor (Health & Saf. Code, § 11353); four counts of oral copulation of a person under 16 (§ 288a, subd. (b)(2)); five counts of the commission of a lewd act on a child (§ 288, subd. (c)); four counts of oral copulation upon a victim who was prevented from resisting because of the administration of a controlled substance (§ 288a, subd. (i)); and five counts of rape accomplished upon a victim by use of a controlled substance (§ 261, subd. (a)(3)). It was further alleged in the information that conviction of each of the 18 sex offense counts would result in defendant's being required to register as a sex offender pursuant to section 290.

Defendant pleaded no contest to one count of furnishing a controlled substance to a minor and one count of oral copulation of a person under 16. In May 1997, the court imposed a prison sentence of six years, eight months, suspended the sentence, and granted three years' probation. He was ordered by the court to register as a sex offender under section 290. Approximately one year later, the court found that the terms of defendant's parole had been violated, revoked probation, and ordered the previously suspended sentence to be executed.

On January 21, 2011, defendant filed a petition for alternative writ of mandate. He argued, citing *People v. Hofsheier* (2006) 37 Cal.4th 1185

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smoked methamphetamine (which he furnished), and they had sexual intercourse at least five times. Kathi also reported to the police that her daughter had said that defendant "would bring home pornographic movies and they would watch them together."

(*Hofsheier*), that the previous 1997 order requiring him to register as a sex offender under section 290 violated his right to equal protection under the United States and California Constitutions. Defendant asserted further in the petition that the court should not order sex offender registration under section 290.006. Following the court's direction to file an informal response to the petition, the People indicated that under *Hofsheier, supra*, as later applied in *People v. Garcia* (2006) 161 Cal.App.4th 475, 482 (*Garcia*), disapproved on other grounds in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4, the imposition of mandatory sex offender registration in defendant's case violated equal protection. The People argued, however, that the court should nonetheless order defendant to register as a sex offender under the discretionary provisions of section 290.006. After striking the mandatory registration order as unconstitutional and ordering a report from a professional, the court exercised its discretion in ordering defendant to register as a sex offender under section 290.006.

Defendant filed a timely notice of appeal. We deem the order appealed from to be a proper subject of appeal. (See *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409 [order denying petition for writ of mandate is appealable]; cf. *People v. Cavallaro* (2009) 178 Cal.App.4th 103, 108 [People's challenge of order denying mandatory sex offender registration cognizable on appeal].)

## DISCUSSION

### I. *Order Requiring Sex Offender Registration*

#### A. *Background and Contentions*

The court considered the legal memoranda submitted by the parties, the 1997 probation report, a psychological evaluation prepared by Thomas Reidy, Ph.D., referred to in the probation report, and the arguments of counsel. At the conclusion of the first hearing, the court deferred decision on discretionary

registration and appointed Elaine Finnberg, Ph.D., to conduct an evaluation and prepare a report under section 288.1.<sup>4</sup> After submission of Dr. Finnberg's report and further argument of counsel, the court exercised its discretion in ordering registration under section 290.006. It found that the underlying offense was committed for defendant's sexual gratification. Based upon its review of various considerations, including the psychologists' reports, the court reasoned that because there was a moderate risk that defendant would reoffend, registration under section 290.006 was appropriate.

Defendant contends that the court committed an abuse of discretion in ordering him to register as a sex offender. He argues that the evidence before the court did not support the registration requirement, citing *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70 (*Lewis*). He asserts: "The court did not find that it was likely that [defendant] would reoffend, and the evidence before the court was that it was very unlikely he would do so. Thus, the court abused its discretion in imposing registration. [Citation.]"

The Attorney General argues that defendant overstates the holding in *Lewis, supra*, 169 Cal.App.4th 70, and that the case does "not hold that the likelihood of reoffense is a necessary precondition to a court's imposition of discretionary registration." She argues further that the court, contrary to defendant's assertion, did assess whether there was a likelihood he would reoffend and concluded based upon a number of factors, including the circumstances of the 1995 offense, that there was a likelihood defendant would reoffend. The Attorney

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<sup>4</sup> Although the psychologist's report was not for the purpose of determining whether sentence should be suspended for a person convicted of the commission of a lewd act on a child under 14, as provided in section 288.1, the court ordered a report of such a nature in determining whether to order registration under section 290.006.

General concludes that the court did not abuse its discretion in ordering registration under section 290.006.<sup>5</sup>

B. *Applicable Law*

Lifetime sex offender registration under section 290, subdivision (b) is mandatory where a person is convicted of one or more sex crimes enumerated in subdivision (c) of that statute.<sup>6</sup> “ ‘The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]’ ” (*In re Alva* (2004) 33 Cal.4th 254, 264, quoting *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Another purpose is to notify the public of convicted sex offenders’ existence and location so that persons may take protective action. (*Hofsheier, supra*, 37 Cal.4th 1196.)

In addition to section 290 mandatory registration, section 290.006 provides that a court in its discretion may order a defendant, throughout the course of his or her life while residing in California, to register as a sex offender. Section 290.006

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<sup>5</sup> The Attorney General does not contest the court’s conclusion that the prior mandatory registration order based upon defendant’s conviction of violating 288a, subdivision (b)(2) violated equal protection under *Hofsheier, supra*, 37 Cal.4th 1185.

<sup>6</sup> “Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, . . . , shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.” (§ 290, subd. (b).)

states: “Any person ordered by any court to register pursuant to the [Sex Offender Registration] 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.”<sup>7</sup> As explained by the high court, in exercising its discretion to order registration under section 290.006; “[T]he 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.” (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) In determining whether to exercise its discretion in requiring registration under section 290.006, the court may consider all relevant available information. (*Garcia, supra*, 161 Cal.App.4th at p. 483.)

The decision to impose registration pursuant to section 290.006 lies within the trial court’s discretion. “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377; see also *People v. Jordan* (1986)

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<sup>7</sup> The discretionary registration provisions were previously contained in former section 290, subdivision (a)(2)(E). It was renumbered as section 290.006 without substantive change. (*Lewis, supra*, 169 Cal.App.4th at p. 76, fn. 4.)

42 Cal.3d 308, 316 [trial court’s ruling under abuse of discretion standard will not be overruled unless it is “arbitrary, capricious or patently absurd”].)

C. *Whether Order Constituted an Abuse of Discretion*

Defendant’s challenge to the order is based upon the claim that it was unsupported by the evidence. It is therefore clear that his challenge is not that the court failed to state its reasons for requiring registration as required by statute. (§ 290.006.) Rather, his contention is that those reasons for imposing registration were not supported by the evidence and the court thus abused its discretion.<sup>8</sup> We disagree.

The court properly considered various circumstances in exercising its discretion under section 290.006. (See *Garcia, supra*, 161 Cal.App.4th at p. 483.) One such factor was the nature of the prior offense. The court observed: “Here in this situation we have kind of competing issues, the circumstances of the offense, I think that if you look at it from a very common sense standpoint of what society looks at in terms of expectations of people, the offense circumstances are certainly egregious and would give rise to a reasonable person of ordinary prudence being greatly concerned about reoffense.” The court also considered the substance of Dr. Finnberg’s report, including her findings that (1) under the Static-99R<sup>9</sup> and Static-2002R tests under which defendant’s scores reflected “in the Low-Moderate

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<sup>8</sup> The statute also requires the court to make a finding that the underlying offense was committed by the defendant based upon sexual compulsion or gratification and state the reasons for that finding. (§ 290.006.) The court made a finding here that defendant committed the offense for the purpose of sexual gratification and defendant does not challenge that finding here.

<sup>9</sup> “The Static–99[R] is a 10–item actuarial assessment instrument created for use with adult male sexual offenders, which is designed to estimate the probability of sexual and violent recidivism. (See *People v. Allen* (2008) 44 Cal.4th 843, 853.)” (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1410, fn. 5.)

range of risk of sexual reoffense”; (2) defendant “does not fulfill the diagnostic criteria for [p]edophilia”; (3) defendant “has an extensive history of antisocial behavior in which he has frequently violated the mores of society”; and (4) defendant has an “Antisocial Personality Disorder.”<sup>10</sup>

Defendant takes issue with the court’s finding that there was a moderate risk of defendant’s reoffending. He argues that, based upon the results of the Static-99R and Static-2002R evaluations performed by Dr. Finnberg, “the assessment result that the court described as documenting a ‘moderate’ risk, and a ‘substantial risk,’ was a probable reoffense rate that was quite low, and certainly did not suggest that it was ‘likely’ that [defendant] would reoffend.” (Fn. omitted.)<sup>11</sup> Defendant’s argument fails to acknowledge that while the court gave consideration to these evaluations presented by Dr. Finnberg, they were not relied upon as the sole data for its conclusion regarding the likelihood that defendant would reoffend. The court twice highlighted specifically the circumstances of defendant’s prior offense—describing them as being “certainly egregious”—as factoring into its conclusion that there was a moderate risk that defendant would reoffend. And defendant’s claim suggests that the court must accept the uncontradicted opinion of an expert (here, Dr. Finnberg), a false proposition. “A trial court is not required to accept even unanimous expert opinion at face value.

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<sup>10</sup> Dr. Finnberg also noted in her report submitted to the court that “[defendant’s] behavior displayed reckless disregard for the safety of himself or others, consistent irresponsibility, manipulateness, and complete lack of remorse for his behavior and the effect his conduct had on the victim.”

<sup>11</sup> Defendant notes further that according to Dr. Finnberg’s report, the low risk category in which defendant was placed for the Static-99R test showed a sexual reoffense rate of 3.8 percent in five years; and the low-moderate risk category in which defendant was placed for the Static-2002R test showed a sexual reoffense rate of 2.8 percent in five years.

[Citation.] As long as the decision to reject such testimony is not ‘arbitrary,’ the trial court may reject the conclusion of an expert. [Citation.]” (*In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.)

As he did below, defendant relies significantly on *Lewis, supra*, 169 Cal.App.4th 70. This court concluded in *Lewis* that there was no factual support for a discretionary registration order under section 290.006. (*Id.* at p. 79.) Although there, as here, there was a successful constitutional challenge resulting in the striking of mandatory registration many years after the commission of the underlying sex offense—approximately 15 years here, and 20 years in *Lewis* (*id.* at p. 73)—the factual similarity between the two cases ends there. In *Lewis*, the age difference between the defendant and the victim was five years (22 and 17 years old, respectively),<sup>12</sup> the acts of oral copulation occurred following a holiday party over the course of one night, and the defendant did not know the victim’s age. (*Id.* at pp. 73–74.) Here, in contrast to *Lewis*, the victim was only 14; the age difference between defendant and the victim was 18 years (32 and 14 years old, respectively), a fact known to defendant; the sexual offense was not the result of a single encounter after a party, but was connected with defendant’s having lived with the victim and her mother for three months; defendant, as the live-in boyfriend of the victim’s mother, was in a position of trust and authority over the victim; and defendant furnished methamphetamine to the victim, which, according to A.’s report to the police, clouded her judgment in her dealings with defendant. Given these important differences, *Lewis* is distinguishable and does not compel a finding that the court abused its discretion here in imposing a registration requirement under section 290.006.

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<sup>12</sup> The victim in *Lewis* testified that her regular boyfriend was the same age as the defendant. (*Lewis, supra*, 169 Cal.App.4th at p. 74.)

Defendant also cites *Lewis, supra*, 169 Cal.App.4th 70, as well as *Garcia, supra*, 161 Cal.App.4th 475, as holding that the court in ordering discretionary registration is required to make a finding that the defendant is likely to reoffend. Neither case contains such a holding. In *Garcia*, the court—after holding that “the trial court logically should be able to consider all relevant information available to it at the time it” decides whether to impose a registration requirement (*Garcia*, at p. 483)—simply concluded that the likelihood of the defendant’s reoffending is “one consideration,” among others, that the court should address (*id.* at p. 485). We reached the same conclusion, citing *Garcia*. (*Lewis*, at p. 78.) Neither case held that the court is required to make a specific finding concerning the likelihood of the defendant’s reoffending in exercising its discretion in ordering registration, and any attempt to so construe the cases is without foundation.<sup>13</sup> Section 290.006 does not provide that the court must make an express finding that a defendant is likely to reoffend in requiring registration. Furthermore, despite its enunciation of the dual purposes of section 290—to allow the police to keep track of persons convicted of certain crimes and to provide notification to the public—the court in *Hofsheier, supra*, 37 Cal.4th 1185 did not enunciate an extra-statutory requirement that courts make an explicit finding regarding an offender’s potential to reoffend when ordering discretionary registration.

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<sup>13</sup> In both *Garcia, supra*, 161 Cal.App.4th at page 485 and *Lewis, supra*, 169 Cal.App.4th at page 78, it is noted that one consideration in deciding whether to order registration under section 290.006 “must be” the likelihood of the defendant’s reoffending. Defendant here seizes on that language as suggesting that *Garcia* and *Lewis* held that the court is required to make a finding that the defendant is likely to reoffend when ordering registration. He takes that language out of context. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2: “Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court.”)

There was substantial evidence supporting the court's decision to impose sex offender registration under section 290.006. Accordingly, in applying a deferential review standard with respect to the trial court's conclusion that registration was appropriate under the particular facts of this case, we find no abuse of discretion and affirm the lower court's decision.

DISPOSITION

The order denying defendant's petition for writ of mandamus and ordering sex offender registration pursuant to section 290.006 is affirmed.

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Duffy, J.\*

WE CONCUR:

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Rushing, P.J.

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Premo, J.

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.