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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re FERNANDO H., JR. et al., Persons
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

FERNANDO H.,

Defendant and Appellant.

D060952

(Super. Ct. No. NJ14469)

APPEAL from judgments of the Superior Court of San Diego County, Cynthia
Bashant, Judge. Affirmed.

Fernando H. appeals following the juvenile court's adjudication and disposition of
petitions filed under Welfare and Institutions Code section 300, subdivision (j),¹ alleging

¹ Further statutory references are also to the Welfare and Institutions Code unless
otherwise specified.

he sexually molested his stepdaughter, and his own three children were at substantial risk of sexual molestation unless removed from his custody. Fernando challenges the sufficiency of the evidence to support the court's findings. We affirm the judgments.

PROCEDURAL AND FACTUAL BACKGROUND

Fernando and his wife Y.H. have three children together: sons Fernando H., Jr., born in 2003, and R.H., born in 2005; and daughter F.H., born in 2007. Y.H. also has an older daughter, A.L., born in 2000.

In September 2011, the San Diego County Health and Human Services Agency (the Agency) filed petitions on behalf of Fernando's children under section 300, subdivision (j). The children were detained with Y.H. The petitions alleged that from 2009 to the present, Fernando sexually abused A.L., and the "abuse consisted of fondling [her] breasts, buttocks, and vagina, digitally penetrating the child, attempting to have intercourse with the child, masturbating in front of the child and telling the child he wanted to show her his sperm."

In November 2011, the Agency filed amended petitions under section 300, subdivision (j) to add a second count. Count two repeats some of the allegations of count 1, and it also alleges other incidents of Fernando's sexual abuse of A.L. from 2009 to the present, including observing her in the shower; lying on top of her while telling her, "I love you"; and "attempting to have penile-vaginal intercourse." Further, count two alleges Fernando threatened A.L. with corporal punishment if she disclosed the abuse.

At the jurisdiction and disposition hearing on November 16, 2011, the Agency submitted reports by the social worker, which we discuss below. The parents neither cross-examined the social worker nor put on any affirmative evidence. Fernando argued the Agency did not meet its burden of showing a substantial risk of future sexual abuse of his children. Further, A.L. was not credible because she admitted to the social worker that she lied about some details of abuse, and she had a motive to lie because she wanted to have a relationship with her "real dad." The Agency argued A.L. "recanted because she felt this anxiety and this nervousness about what was happening to her family. She has been detained with her mother throughout this period of time, and certainly her mother has gone through a lot of stress during this time. And children do feel that stress in the home." The children's appointed attorney agreed with the Agency's position.

The court found A.L.'s recantation not credible. The court made true findings on the amended petitions, removed the children from Fernando's custody and placed them with Y.H. The court ordered family maintenance services for Y.H. and reunification services for Fernando, including a sex offender program and supervised visitation.

DISCUSSION

I

Standard of Review

Fernando challenges the sufficiency of the evidence to support the court's findings that he sexually abused A.L., the abuse put his children at substantial risk of sexual abuse and their removal from his custody was required to protect them.²

" [T]he appropriate standard of review is for this court to determine whether the trial court's order was supported by substantial evidence. Substantial evidence is evidence that is "reasonable, credible, and of solid value"; such that a reasonable trier of fact could make such findings.' " (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 194.)

"[W]e presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) It is the trial court's role "to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) "The appellant has the

² Contrary to the Agency's assertion, Fernando is not attempting to appeal the judgment on the dependency petition filed on behalf of A.L. He only appeals the judgments on the petitions filed on behalf of Fernando, Jr., R.H. and F.H. His appeal, however, necessarily includes the issue of sexual abuse of A.L., because that is the basis of the judgments under review.

burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved of on another point in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 749, fn. 6.)

II

True Findings

A

Sexual Abuse of A.L.

Subdivision (j) of section 300 applies when the "child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." Subdivision (d) of section 300 applies when the "child has been sexually abused, or there is a substantial risk that the child will be sexually abused."

The court received into evidence the Agency's detention report and joint jurisdiction and disposition report. The detention report states that in September 2001, A.L. told Y.H. that Fernando sexually molested her. Y.H. sent A.L. to live with relatives and allowed Fernando to remain at home with his children. The Agency was concerned because Fernando had not been interviewed, and "the reported abuse occurred when the mother was in and out of the home."

A forensic specialist interviewed A.L. A.L. disclosed that Fernando had touched her buttocks and breasts, shown her his genitals and said he wanted to show her his sperm. When she was nine years old, the family went to a friend's home. Fernando had her sit on his lap in the Jacuzzi. He pushed her bathing suit bottom to the side and took his penis out of his bathing suit. He stopped when the friend came out of the house.

When A.L. was 10 years old, and Y.H. was in Mexico, Fernando put his penis inside her vagina, but not all the way. He wanted her to touch his penis, and he attempted to guide her hand to do so. He took off his and her pants and underwear, and pushed her onto a bed.

Another time, after Y.H. returned from Mexico, Fernando inserted his penis into A.L.'s vagina. During the summer he began showing her his penis and saying he wanted her to see his sperm. When she said she did not feel comfortable with that, he "wanted to hit her and told her to 'shut up.' " He would also flash her his penis when he was in the hall or when she was playing with her siblings. He would grab his penis and move his hand up and down while holding it.

On another occasion, when the family was in Tijuana, Fernando got on top of A.L. Fernando, Jr., was present, and he commented that they were having sex. A.L. asked Fernando, Jr., for help, but he left after Fernando said he and A.L. were just playing.

The most recent incident occurred when A.L. was 11 years old. One morning A.L. was on the couch watching television, with F.H. present, when Fernando got on top of A.L. and moved back and forth. A.L. asked if Y.H. was asleep, and he said yes. He told A.L. he loved her. Y.H. came into the room, and Fernando jumped to another couch.

Y.H. admitted she saw Fernando on top of A.L. Y.H. touched Fernando's penis to see if it was erect, and it was not.

A.L. also stated Fernando would watch her and F.H. in the shower, and once Y.H. caught him doing so and told him to get out. Y.H. confirmed this statement. When asked what Fernando did to her most often, A.L. said he put his fingers all the way inside her vagina and put his hand on her vagina. When A.L. would tell Fernando to stop, he would say, "I do not know what is wrong with my mind." He told her he would stop the abuse, but it continued. He said her mother would hit her if she revealed the abuse.

Fernando does not dispute that this evidence, if credible, is sufficient to support a finding he sexually abused A.L. Fernando asserts, however, that we must reject A.L.'s testimony as not credible because the jurisdiction and disposition report states she told the social worker she had lied. The social worker asked A.L. what she lied about, and she said, "I don't know, the touching is true but the Mexico and Jacuzzi is a lie, he never tried putting his thing in me."³ She explained, "I lied because he does not let me see my real dad." The report states A.L. told the social worker Fernando "has 'touched me' as she ran her open hands over her chest, and then she closed her knees and squeezed her right hand between her thighs rubbing her [v]agina area."

The juvenile court, however, rejected A.L.'s recantation. The forensic specialist reported that A.L. "was a high risk child for recanting." A.L. told the social worker "she felt sad because she was afraid that because she made disclosures her stepfather would

³ It is unclear what A.L. meant when she referred to Mexico. She reported abuse both when her mother was in Mexico and when the family was on a trip to Mexico.

end up in jail, or she would be taken away and be sent to foster care." Also, A.L. "said that her mother and other family members act as though they are mad at her." The court specifically addressed the recantation issue, finding that "recanting, particularly when they have had suffered severe consequences, is not uncommon for a victim of sexual abuse." It was the court's province to assess the credibility of the evidence, and we will not second guess its ruling.

Moreover, even if, as Fernando claims, A.L. recanted the most serious sexual abuse allegations, her recantation was only partial. Sexual abuse includes the "intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification." (Pen. Code, § 11165.1, subd. (b)(4).) Sexual abuse also includes the "intentional masturbation of the perpetrator's genitals in the presence of a child." (Pen. Code, § (b)(5).) A.L. did not recant claims of abuse that fall within these definitions. At a therapy session shortly before the hearing, A.L. "talked about the sexual abuse by her stepfather. . . . [A.L.] reported that her 'stepfather got on top of her and grabbed her hand to put it on his penis and she . . . told him . . . no your [*sic*] crazy." Substantial evidence supports the court's finding that Fernando sexually abused A.L.

B

Substantial Risk of Sexual Abuse to Fernando, Jr., R.H. and F.H.

Additionally, the evidence amply supports a finding that because of Fernando's sexual abuse of A.L., Fernando, Jr., R.H. and F.H. were at substantial risk of sexual abuse.

The Agency assessed the three younger children at risk of harm. Its jurisdiction and disposition report states, "There is major concern for the younger children . . . [because] they are prepubescent just as [A.L.] [and] they are also younger with less self[-]protecting capacities."

Fernando asserts that the molestation of a stepdaughter does not suggest he would molest his biological children. That theory is belied, however, by his admission to the social worker "that he sees [A.L.] as his daughter, has been involved in her life since she was an infant, has never treated her differently than other children, and does not see her different than the other children." As the social worker found, Fernando's molestation of a girl he considered to be his daughter did not bode well for his biological children.

Further, Fernando's claim "there [is] no evidence that any of the children had witnessed any physical abuse by their father" is erroneous. A.L. revealed that during the latest incident in September 2011, Fernando got on top of A.L. on the couch and moved back and forth when F.H. was present. F.H. stared at A.L. and heard A.L. tell Fernando to stop. Previously, Fernando got on top of A.L. when Fernando, Jr., was present. Fernando, Jr., commented that Fernando and A.L. were having sex. A.L. asked

Fernando, Jr., for help, but Fernando said they were just playing. Also, Fernando exposed his penis to A.L. when she was playing with the other children.

Additionally, Fernando asserts that his molestation of A.L. does not show any threat of harm to his sons. In *In re Maria P.* (2010) 185 Cal.App.4th 48, 68, this court rejected the notion that brothers could be found at substantial risk of sexual abuse based *solely* on the sexual abuse of a sister. Again, however, Fernando directly exposed Fernando Jr. to sexual activity. It appears that Fernando was gratified by involving his own children in the incidents. Given Fernando's disturbing behavior, the court could reasonably find he posed a risk of sexual abuse to all the children in the home.⁴

III

Removal from Custody

We are also unpersuaded by Fernando's challenge to the sufficiency of the evidence to support the court's finding that removal of the children from his custody was the only reasonable means of protecting them. Under section 361, subdivision (c)(4), a child may be removed from the physical custody of a parent when the "minor or a sibling of the minor has been sexually abused, or is deemed to be at substantial risk of being sexually abused, by a parent, guardian, or member of his or her household, . . . and there are no other reasonable means by which the minor can be protected from further sexual abuse."

⁴ In its detention report, the Agency relied in part on an undated article on the letterhead of Veronique N. Valliere, Psy.D., from Fogelsville, Pennsylvania, titled *Why keep perpetrators away from children that are not their victims (including their own)*. No foundation was offered for the article and we do not consider it.

"The juvenile court has broad discretion in crafting a disposition to a child's best interest." (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.) "The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home. (§ 361, subd. (c)(1).) The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child." (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.)

The evidence discussed above on the issue of risk of sexual abuse to the three younger children also supports the court's finding that their removal from Fernando's custody was the only reasonable means of protecting them. Further, the Agency learned shortly before the hearing that Fernando "had decided not to attend the sexual offender group because he spoke to his attorney and he didn't feel comfortable starting the group right now." Notably, Fernando did not object to the removal of the children from his custody. To the contrary, his attorney asked the court to continue keeping the children with Y.H. The attorney stated, "We are in support of the children remaining there and for visitation to [be] allowed to father."

DISPOSITION

The judgments are affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.