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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re E.D. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

AMBER H. et al.,

Defendants and Appellants.

D061638

(Super. Ct. No. EJ3498A-B)

APPEALS from a judgment of the Superior Court of San Diego County, Gary M. Bubis, Judge. Affirmed.

Amber H. and James D. (together, the parents) appeal following the jurisdictional and dispositional hearing in the dependency case of their daughters, E.D. and L.D. (together, the children). The parents contend the jurisdictional findings are unsupported

by substantial evidence, and the court erred by ordering the children removed from their custody. We affirm.

## BACKGROUND

In December 2011, a San Diego County deputy sheriff went to the family home in response to a report of an argument between the parents, with yelling and items being thrown. On January 1, 2012, San Diego County Deputy Sheriff Aloha Bona went to the home in response to a report of a fight between Amber and paternal uncle Jaime D., who was intoxicated. Bona asked Jaime to leave. The children reported an earlier incident during which Jaime punched a hole in a closet door, but Amber did not call the police.

On January 2, 2012, the San Diego County Health and Human Services Agency (the Agency) received a referral alleging seven-year-old E.D. and four-year-old L.D. were constantly hungry and asking neighbors for food, water and milk. The children went to a neighbor's home as late as 10:00 or 11:00 p.m., and Amber did not come looking for them. E.D. told a neighbor that paternal uncle Corey D. had sexually abused her a few times. The neighbor confronted Amber, who said the children "are liars" and "make stuff up like that all the time." Corey left the parents' home, but returned a week later.

Social worker Ammie Blatchley and Bona investigated. In the home they found the children, the parents, Corey, Jaime and the paternal grandmother. There was "minimal food." Corey said he had been released from prison in July 2011; he lived in the home; and the parents' address was on file with the parole office as his address.

Blatchley interviewed E.D. in the bedroom that was formerly hers and now Corey's. E.D. said while she was watching a movie, "Corey put a blanket over me[,] . . . unbuttoned my pants [and] touched [my] crotch." The touching was under E.D.'s underwear, and she felt Corey's hand move. Amber entered the room during the molestation and told Corey not to touch E.D., but did not get mad at him. E.D. told Blatchley she had seen Corey in bed with his girlfriend, and Corey had no pants on. E.D. was concerned that Blatchley might repeat their conversation to Amber.

L.D. knew that "Corey pulled down [E.D.'s] pants and touched [her]." The children told Blatchley that Corey sprayed them with water when they tried to watch him have sex with a girl in the shower. The children witnessed many fights in the home. Jaime came home drunk and hit them, and they told Amber. The children said they were often without food, and James and Corey drank.

The father, James, slammed doors and refused to speak with Blatchley. Amber explained James suffered from bipolar disorder but no longer took medication. She was concerned that Corey might be arrested. She said he had been staying in the home for a couple of days, then said he was not staying there. She did not believe E.D. had been molested. Amber said she had "lived with [Corey] for 10 years" and he "would never do that." She said Corey and E.D. "play around a lot and he tickles her a lot around her abdomen," but they were never alone together. Amber denied she had witnessed the molestation and that E.D. had told her about it. Amber said E.D. alleged sexual abuse

because she was exposed to adult movies and might have seen Corey being intimate with his girlfriend in the home.

Blatchley offered Amber a safety plan, under which Amber would leave the home with the children. Amber said she did not understand why she had to leave her own home. The Agency therefore detained the children in Polinsky Children's Center. There, examinations revealed the children suffered from extensive, untreated tooth decay and E.D. was underweight. L.D.'s hygiene was poor.

On January 3, 2012, the children were moved to the home of a maternal aunt. During an evidentiary interview that day, E.D. said Corey touched her crotch for a long time and it burned and hurt. He threatened to "sock her in the face if she told anybody." In explicit detail, E.D. described seeing Corey's sexual activity with his girlfriend. E.D. also described drug use in the home and said there was a bong in the closet. She said Jaime had scratched her across the chest, and James had thumped her on the head with his knuckle.

On January 4, 2012, Blatchley told Amber about E.D.'s statements during the evidentiary interview. Amber still denied Corey had molested E.D., but admitted that in October 2011, a neighbor told her E.D. had disclosed sexual abuse.

On January 5, 2012, the Agency filed dependency petitions. The petitions alleged that between October 31 and November 24, 2011, Corey, a member of the household, sexually abused E.D., including unbuttoning her pants and rubbing her vagina until it hurt and burned. He threatened to punch her if she disclosed the abuse. E.D. told Amber,

who did not believe or protect her. (Welf. & Inst. Code, § 300, subds. (d) [sexual abuse], (j) [abuse of a sibling].)<sup>1</sup> The parents allowed a family member to live in the home, and he exposed the children to his sexual activity with his girlfriend and "R" rated movies. The parents allowed paternal uncles free access to the home, where the uncles engaged in domestic violence, abused alcohol and exposed the children to drug paraphernalia. The children were seen outside at night, begging neighbors for food and complaining they were always hungry. The children were dirty and unkempt.<sup>2</sup> (§ 300, subd. (b) [failure to protect].)

At the January 5, 2012, detention hearing, the court ordered the Agency to provide services including crisis intervention, counseling and transportation. At a meeting that day, James said E.D. was lying about Corey. Amber said "Corey is innocent" and the sexual abuse "is only an allegation." She admitted neglecting the children and said she felt guilty because she did not believe E.D. The parents refused to drug test, but underwent tests one week later. The results were positive for marijuana.

On January 10, 2012, social worker Neda Rivera interviewed the parents. Amber said she worked, and James and the paternal grandmother stayed home with the children. Amber claimed there was "no way" Corey could have molested E.D., and "[E.D.] is a storyteller and it is all about her." Amber said, "it is funny, after I was talking to her

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> At the jurisdictional hearing, the court dismissed an allegation the parents exposed the children to excessive cigarette smoke and the children had chronic coughs.

about pedophiles, she disclosed." Amber believed the molestation had occurred, but Corey was not the culprit. Amber reported E.D. "was obsessed with watching [a] Hot Chicks movie" with "X-rated scenes." James characterized E.D.'s report of Corey's sexual abuse as "[t]otally false" and said "[E.D.] lies a lot and we do not believe her . . . ." James said Corey had been staying in the home "on and off" from around "July to November," and Amber asserted she had asked Corey to leave in November "because he is on parole and fought a lot with [his girlfriend]." James claimed Corey and Jaime were no longer in the home. The parents said they smoked marijuana twice a day; they had medical marijuana cards; and they had used methamphetamine.<sup>3</sup> They agreed to participate in counseling and in-home parenting classes, and the Agency gave them referrals. The parents objected to the children receiving psychotherapy from any provider the Agency recommended.

On January 13, 2012, E.D. told Rivera she would not feel safe in the parents' home. E.D. said she had seen the parents smoking marijuana from a bong. She described seeing Corey and his girlfriend "have sex in the bedroom." E.D. said she "walked in on them, he was naked with his dick out and she was laying on the bed." During her interview with Rivera, E.D. "touched her private area at least three times."

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<sup>3</sup> James began using marijuana and methamphetamine in 2000 or 2001. Amber began using methamphetamine in 2001. She claimed they stopped using methamphetamine in 2002.

On January 7, 2012, Amber obtained a new medical marijuana card, valid for one year. She explained she had hip and leg pain and restless leg syndrome and had undergone two Cesarean sections. James obtained his card because he "had previous broken bones in [his] hand" and "smoking problems."

In January 2012, the parents' neighbor told Blatchley there were "always people coming in and out of [the parents'] apartment in all hours of the night"; he had seen people smoke marijuana there; and the children ran around the apartment complex unsupervised. The neighbor said that after the children's detention, the parents continued to fight and had threatened to kill a different neighbor. Two neighbors said Jaime still frequented the parents' home, and one said Corey was still staying there. Rivera reported the parents continued their relationship with Corey, as demonstrated by their knowledge that he was refusing to speak with a detective and provide the results of a polygraph examination. By January 24, the Agency had given the parents referrals to services.

The jurisdictional and dispositional hearing took place on March 8, 2012.

#### TESTIMONY

##### *Social Worker Karen Lowrimore*

Social worker Karen Lowrimore, assigned to the case in February 2012, interviewed the parents twice. They continued to deny that Corey had molested E.D. They now believed E.D. was molested, and the perpetrator was a 13-year-old neighbor boy. Amber explained she had seen the boy kiss his mother on the cheek a number of times when saying goodbye, and Amber believed this was inappropriate. James explained he had heard E.D. had a secret about the boy's mother, and he believed the secret was that one of her teenage sons had committed sexual abuse.

Corey and Jaime were no longer in the parents' home. James had a March 9, 2012, intake appointment for a parenting course, but had not made an appointment with a

therapist. Amber had an intake appointment with a group for nonprotecting parents the week after the hearing.

*Amber*

E.D. never told Amber that Corey had sexually abused her. After the neighbor told Amber of E.D.'s disclosure, Amber did not call the police because she did not believe Corey had sexually abused E.D. Amber did not believe E.D. had told the social workers or the evidentiary interviewer that Corey had molested her, because Amber had never heard E.D. use the explicit language those persons repeated. Amber claimed E.D.'s "story had changed" concerning who was in the home at the time of the abuse. Amber believed "something had to have happened to" E.D., but because the children were always with either Amber or James, there was no possibility a household member had done anything to E.D. E.D. was never alone with Corey; she was always with L.D., the parents or the paternal grandmother. When E.D. was home, she was "not necessarily being supervised" by the parents and they were not "watching over her every single move." While Amber was at work and James was in another room, the children found the adult film among the paternal grandmother's possessions and watched it for 15 to 20 minutes.

Except for "several occasions" when E.D. "snuck out her bedroom window" and went to a neighbor's apartment, the children were always with the parents. A member of the neighbor's household might have molested E.D. because the neighbor had two sons and a husband; the 13-year-old son kissed his mother on the cheek; and the older son was

"always cooped up [in] his bedroom" which was "very odd for an 18-year-old boy." Nevertheless, E.D. had never lost her eagerness to spend time in the neighbor's apartment.

Regarding E.D.'s report she had seen sexual activity in the home between Corey and his girlfriend, Amber testified E.D. "says she sees things that she doesn't see that aren't there that didn't happen." Amber did not allow such activity in her home, and Corey and his girlfriend showered separately. E.D. might have seen Corey and his girlfriend kissing and holding hands, or Corey tickling his girlfriend.

Before January 2, 2012, Corey "[stayed] periodically" in the parents' home for "about three to four hours" at a time. He left on January 2 and did not return because the Agency asked him not to. After he left, he lived in a motel, then in his mother's home, where Amber saw him the day before the hearing. Amber would continue to see him "on a regular basis," as long as E.D. was not with her, because they were "a close family." Only the parents were living in their home; this would be better for the children. Jaime had left on January 5, and Amber believed he was staying with her sister-in-law while he waited for a bed at a recovery center and attended Alcoholics Anonymous meetings.

Although Amber did not believe Corey was the molester, she would be able to keep the children away from him. She had cooperated with the Agency "since day one," was willing to participate in all services and had made arrangements for services.

### *James*

James believed E.D. had been molested, but "not under my care." He was in the home "24/7," and there was no possibility Corey was the molester and "no way possible that anything like that could happen in my house." James would keep Cory and Jaime out of the house if the Agency asked him to do so. After January 5, 2012, Jaime returned to the parents' home a couple of times to pick up belongings, then left "right away." James was willing to participate in all services, had made arrangements and was waiting for a return call from a therapist. James's medical marijuana card had expired in February, and he did not plan to renew it.

### THE COURT'S FINDINGS AND ORDERS

The court entered true findings on the petitions and ordered the children's custody removed from the parents (§ 361, subd. (c)(1), (4)). The court ordered relative placement and reunification services.

### DISCUSSION

#### *The Jurisdictional Findings*

The purpose of section 300 "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.) Section 300, subdivision (b) allows a dependency when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result

of . . . the willful or negligent failure of the [child's] parent . . . to provide the child with adequate food, clothing, shelter, or medical treatment . . ." Section 300, subdivision (d) allows a dependency when "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by . . . a member of his or her household . . ." Section 300, subdivision (j) allows a dependency for a child whose sibling has been abused or neglected if there is a substantial risk the child will be abused or neglected. Section 300 requires proof the child is subject to the defined risk of harm at the time of the jurisdictional hearing. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) A parent's "[p]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) The child need not have been actually harmed for the court to assume jurisdiction. (See *In re James R.* (2009) 176 Cal.App.4th 129, 135.)

In the juvenile court, the Agency has the burden of proof by a preponderance of the evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; § 355, subd. (a).) The parents now have the burden of showing the jurisdictional findings are unsupported by substantial evidence. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) We view the record in the light most favorable to the juvenile court's ruling. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140.)

As to the section 300, subdivision (b) findings, the circumstances in the home were synonymous with neglect. Sheriff's deputies came to the home in response to

disputes between the parents, and between Amber and Jaime, who was intoxicated. A deputy asked Jaime to leave, but he was in the home the next day when Blatchley and Bona arrived. Jaime came home drunk and hit the children; they reported this to Amber. He punched a hole in a closet door; Amber did not call the police. James thumped E.D. on the head. E.D. saw the parents smoking marijuana. The children roamed the apartment complex unsupervised, and they were not properly supervised in the home. They watched an adult film that was left within their reach. When Corey and his girlfriend were having sex in the shower, the children were close enough for him to spray them with water. E.D. saw Corey and his girlfriend engage in sexual relations in bed. Amber claimed she asked Corey to leave the home in 2011, but not because he presented a risk to the children. He returned, left only when the Agency intervened, and was later seen in the home. Jaime left after the Agency intervened, but returned to the home for short periods. Amber continued her relationship with Corey and was familiar with Jaime's activities. There is no evidence James asked Corey or Jaime to leave the home. The parents continued to fight. There was minimal food, and the children were often hungry. E.D. was under weight and L.D.'s hygiene was poor. The children had severe tooth decay. In short, the children were living in a home rife with substance abuse and violence, lacking in supervision and nourishment, and those circumstances continued. Substantial evidence supports the section 300, subdivision (b) true findings.

As to section 300, subdivisions (d) and (j), the parents argue Corey was not "a member of [E.D.'s] household" (§ 300, subd. (d)) because he was in the home only

occasionally. " 'Member of the household[]' . . . means any person continually or frequently found in the same household as the child." (Cal. Rules of Court, rule 5.502(20).) Substantial evidence supports the conclusion Corey fit this definition. E.D. said he slept in the bedroom that used to be hers. Corey said he lived in the home and listed the parents' address with his parole officer. James said Corey stayed in the home "on and off" and Amber made varying statements, including that Corey stayed there periodically.

The parents argue Corey had left the home and no longer presented a risk. Substantial evidence demonstrates otherwise. Despite E.D.'s detailed, repeated and consistent statements that he had sexually abused her, the parents refused to admit that was a possibility and accused her of lying. Amber asserted a neighbor's son might have molested E.D., although E.D. was still eager to spend time in the neighbor's home. Amber falsely insisted the children were always supervised. The parents did not ask Corey to move out after E.D.'s disclosure; the Agency did. After Corey reportedly left, a neighbor reported he was still in the home. Amber continued her relationship with Corey and considered him a close family member. The parents had not begun services and objected to the Agency's proposal of psychotherapy for the children.

### *Removal*

The juvenile court was required to return the children to the parents unless the Agency proved, by clear and convincing evidence, one of two circumstances. First, "[t]here is or would be a substantial danger to the [children's] physical health, safety,

protection, or physical or emotional well-being if the [children] were returned" and removal was the only reasonable means of protecting their physical health. (§ 361, subd. (c)(1).) Second, removal was the only reasonable means of protecting them from further sexual abuse or a substantial risk of sexual abuse, or the children did not wish to return to the parents.<sup>4</sup> (§ 361, subd. (c)(4).) "The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus . . . is on averting harm to the child." (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136.) The court was entitled to consider the parents' past conduct and current situation and gauge whether they had progressed sufficiently to eliminate any risk. (*In re S.O.*, *supra*, 103 Cal.App.4th at p. 461; cf. *In re Jonathan R.* (1989) 211 Cal.App.3d 1214, 1221.)

On appeal, the parents have the burden of showing there is no substantial evidence justifying removal. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1135; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.) " "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine . . . ." [Citations.] [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Sheila S. v. Superior Court* (2000) 84

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<sup>4</sup> E.D. said "she [did] not feel safe going home," an indication she did not wish to return. In addition, as explained below, there is substantial evidence there were no reasonable means of protecting her short of removal.

Cal.App.4th 872, 880-881, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.)

"We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Amber asserts after she became aware of the molestation, "she made sure Corey was never alone with [the children]." Amber admitted a neighbor told her about the molestation in October 2011,<sup>5</sup> yet Amber did not report it to the police or the Agency, and Corey continued living in the home. During the home visit months later, Blatchley observed the children "were both all wet," and the children explained "they were trying to look at . . . Corey and a girl having sex in the shower," and "every time they went in there they would get sprayed with the shower by Corey." James claims although he and Amber "mentally struggled with the veracity of the allegations against Corey, they showed they were willing and able to protect the children as both paternal uncles were removed from the home." As noted above, the uncles left the home only after the Agency intervened, and even after Corey purportedly left, a neighbor reported he was still living in the home. After the "allegations" became true findings, the parents still denied their veracity.

Little had changed since the children's detention. The parents still did not believe Corey had sexually abused E.D., and still believed E.D. was lying. Two neighbors reported Jaime still frequented the parents' home, and one said Corey was still staying

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<sup>5</sup> Although E.D. was unable to say exactly when the sexual abuse occurred, she disclosed it to the neighbor sometime between October and November 2011, and Amber learned of the sexual abuse the same day as the disclosure, at the latest.

there. The parents had not begun services. Although James's medical marijuana card had expired, and he testified he did not plan to obtain a new one, Amber had renewed hers. Substantial evidence supports the conclusion there would have been a substantial danger to the children if they were returned.

Substantial evidence also supports the conclusion there were no reasonable alternatives to removal. Before the Agency detained the children, it offered a reasonable alternative: the children's relocation, with Amber, to a place of safety. Amber immediately and categorically rejected the offer. Three days later, the Agency told the parents that to reunify, they had to address the sexual abuse and substance abuse issues. The Agency gave the parents referrals, but more than two months later the parents had not begun services, aside from drug tests with positive results.

Substantial evidence supports the removal order. (§ 361, subd. (c)(1), (4).)

#### DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.