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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.E., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.E.,

Defendant and Appellant.

E059182

(Super.Ct.No. J243788)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, Jamila Bayati, Deputy County Counsel, for
Plaintiff and Respondent.

No appearance for Minor.

This case addresses a dependency matter involving a minor, K.E., and her father, K.E.2 (Father). In a prior case, this court addressed the dependency matter involving K.E., her mother (Mother), and her seven half-siblings. (*In re A.H. et al.* (July 16, 2013, E056869) [nonpub. opn.]) K.E. was removed from Mother's physical custody and placed in Father's home. After approximately 10 months in Father's home, the case involving K.E. and Father was initiated.

The juvenile court found true the allegation that Father failed to protect K.E. (Welf. & Inst. Code, § 300, subd. (b).)¹ Father raises two issues on appeal. First, Father asserts the jurisdictional findings are not supported by substantial evidence. Second, Father contends the juvenile court violated his rights to effective assistance of counsel and a fair hearing by denying his counsel's request for a continuance due to counsel being unprepared. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND

Mother had eight children in her custody: J.J., J.B., K.H., S.H., K.E., L.H.1, L.H.2, and A.H. K.E. is female and was born in 2004. In the dependency case involving Mother, the Department detained seven of the children. J.B. was residing with her baby at her boyfriend's home; she was not detained. The seven children were placed in three separate foster homes. The jurisdiction and disposition hearing in Mother's case took place on July 31, 2012. J.J. was placed in her father's custody.

¹ All subsequent statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

K.H. was placed in her father's custody. K.E. was placed in Father's custody. J.B. remained at the home of a non-related extended family member. S.H., L.H.1, L.H.2, and A.H. were placed in foster care.

Father is K.E.'s presumed father. Mother and Father share a second daughter, A.E., who is K.E.'s older sister. A.E. is approximately one year older than K.E. Father has had sole legal and physical custody of A.E. since she was one month old. Father's girlfriend is S.J. (Stepmother). Father's household consisted of himself, Stepmother, Stepmother's two children, and A.E.

A social worker from the San Bernardino County Children and Family Services (the Department) interviewed K.E. as part of Mother's case. K.E. said she did not want to live with Father. K.E. wanted to stay in foster care because (1) A.E. is "mean" to K.E., and (2) K.E. did not want to be separated from her half-siblings. K.E. said she preferred to live with L.H.1, who is her "favorite sister." K.E. was "very emotional" due to having to leave her foster home and move into Father's home.

B. DETENTION

On May 6, 2013, the Department received a referral alleging K.E. "was seen at school with scratches around her mouth, a welt on her temple, and a scratch on her ankle." K.E. said Stepmother had hit her with items, punched her, smacked her, and held her on the floor with her foot. K.E. said she was afraid to live with Stepmother, and Father was unaware of the abuse.

On the evening of May 6, sheriff's deputies arrested Stepmother. When contacted by the Department, Father agreed he would not allow Stepmother to return to

the home without the Department's consent. A.E. told the social worker she believed K.E. was lying about the abuse. Father also said he believed K.E. was "lying and manipulating because she wants to be with her mother." Neither Father nor A.E. could explain how K.E. was injured, but speculated that she was injured at school.

K.E. said Stepmother punched her face with a closed fist, grabbed her hair, stepped on her foot, pushed her down, and then held K.E. down using her foot. On May 10, K.E. said Stepmother had been released, and K.E. saw Stepmother at her uncle's house. K.E. said Father told her he may let Stepmother return to their house, which caused K.E. to be afraid to return to the home. Father told the Department he wanted Stepmother to live in his house, but he would be K.E.'s "main caretaker."

On May 16, the Department filed subsequent (§ 342) and supplemental petitions (§ 387) alleging Father failed to protect K.E. (§ 300, subd. (b)), and therefore, K.E.'s placement was no longer effective. Specifically, the Department asserted that, while in Father's care, K.E. "sustained injuries to her face and body as a result of alleged physical abuse by her stepmother." The juvenile court found the Department established a prima facie case. The court ordered K.E. be placed in foster care with her half-sibling(s); however, it was not clear with which half-sibling(s) K.E. would be placed.

C. JURISDICTION/DISPOSITION

Father continued to assert K.E. lied about Stepmother's abuse. K.E. told consistent stories about the abuse to school staff, law enforcement, a Department social worker, and an interviewer at the Children's Assessment Center. K.E. told law

enforcement that Stepmother “hits her a lot,” but Father was unaware of it because he was usually asleep or out of the house when the abuse occurred. K.E. said A.E. is often present when K.E. is abused and sometimes joins in physically assaulting K.E. A medical exam reflected K.E. had “numerous” scars and abrasions on her face, neck, arms, and thighs “consistent with inflicted injuries.” The doctor concluded the scars on K.E.’s neck “support prior grabbing/attempted strangulation.”

K.E. was placed in a foster home with L.H.1. Father refused to travel to San Bernardino to visit K.E.; Father wanted the visits to take place in Victorville. Due to lack of transportation to Victorville, K.E. and Father had only one visit.

Father testified at the jurisdiction hearing. Father explained that K.E. suffers anxiety and rashes on her neck, which cause her to scratch her neck. Father said K.E. scratches her neck “all the time.” Father testified that K.E.’s face was scratched when K.E. and Stepmother both reached for an item that fell, and Stepmother accidentally scratched K.E. with a ring. Father said there are “constantly” problems with K.E. lying.

The court asked Father if he saw K.E. scratching herself or bruising herself prior to the Children’s Assessment Center interview. Father responded, “No.” The court said, “So she didn’t beat herself up to get the bruises That is the answer.”

In regard to K.E. seeing Stepmother after Father agreed to no contact between the two, Father explained that K.E. and Stepmother “passed each other,” when Father dropped-off Stepmother and picked-up K.E. at K.E.’s uncle’s house. Father then said that Stepmother and K.E. hugged each other during the drop-off and pick-up.

The social worker also testified at the hearing. The social worker said the only explanation for K.E.'s injuries were K.E.'s allegations of abuse. The social worker was not aware that K.E. was scratching herself and leaving marks. The social worker was also not aware of any abuse happening in the home prior to May. The social worker also "guessed" Father was unaware of the abuse in the home.

DISCUSSION

A. SUBSTANTIAL EVIDENCE

Father asserts the jurisdictional findings are not supported by substantial evidence. We disagree.

"Under section 387, [the Department] may bring a supplemental petition for an order changing or modifying a previous order by removing a child from the physical custody of a parent. [Citation.] 'A section 387 petition is ordinarily required when the petitioner . . . seeks to modify a dispositional order by establishing the need for a "more restrictive level" of custody.' [Citation.] [The Department] 'has the burden to show by a preponderance of the evidence that the factual allegations alleged in the petition are true. If the court finds the factual allegations are true, then the court determines whether the previous disposition is no longer effective in protecting the child. . . .' [Citation.]" (*In re A.O.* (2010) 185 Cal.App.4th 103, 109-110.) "We review an order sustaining a section 387 petition for substantial evidence. [Citation.]" (*Id.* at p. 109.)

The Department alleged a more restrictive placement was needed because K.E. "sustained injuries to her face and body as a result of alleged physical abuse by her stepmother," while in Father's care and custody. K.E. was seen at school with

“scratches around her mouth, a welt on her temple, and a scratch on her ankle.” K.E. said she sustained the injuries when Stepmother punched her in the head with a closed fist, grabbed her by the hair, threw her to the ground, stepped on K.E.’s foot, and pushed her toward the bed causing K.E. to hit her head on the headboard. K.E. told consistent stories about the abuse to school staff, law enforcement, a Department social worker, and an interviewer at the Children’s Assessment Center. Initially, neither Father nor A.E. could explain how K.E. was injured, but they speculated that she was injured at school. At trial, Father said K.E.’s face was accidentally scratched by Stepmother’s ring, when K.E. and Stepmother reached for the same object.

K.E. told law enforcement Stepmother “hits her a lot.” A medical exam reflected K.E. had “numerous” scars and abrasions on her face, neck, arms, and thighs “consistent with inflicted injuries.” The doctor concluded the scars on K.E.’s neck “support prior grabbing/attempted strangulation.”

Given that K.E. consistently told the same story of abuse to a variety of people, and had injuries on her face and body, there is substantial evidence supporting the finding that she was abused by Stepmother. This finding is further supported by the evidence that K.E. said she was hit on a variety of occasions, and had scars on her body consistent with inflicted injuries. In sum, the injuries and scars reflect repeated abuse, and K.E.’s reiterations of the same abuse story support the finding that Stepmother was the person who inflicted the injuries. Accordingly, we conclude substantial evidence supports the juvenile court’s findings.

Father raises five arguments. First, Father asserts the “exten[t] of the physical abuse” described by K.E. was “impossible and inherently improbable” because the social worker would have noticed the injuries when visiting K.E. We disagree. K.E. said Stepmother “hits her a lot,” but that could be single blows on multiple occasions. For example, Stepmother could have struck K.E.’s leg on one occasion. The social worker might have disregarded a single bruise on the child. On a different occasion, Stepmother could have again struck K.E. This inference is supported by the evidence that Father noticed K.E. had scratches on her neck, but he dismissed them as self-inflicted. Accordingly, the record does not support a finding that K.E.’s version of events is impossible and inherently improbable.

Second, Father asserts that if K.E. were abused for 10 months, then there should have been evidence of K.E. asking or screaming for help. K.E. told law enforcement that Father was unaware of the abuse because he was usually asleep or out of the house when the abuse occurred. K.E. said A.E. is often present when K.E. is abused and sometimes joins in physically assaulting K.E. K.E. said Stepmother warned her the abuse would be more severe if K.E. reported it. Additionally, prior to being placed with Father, K.E. told the social worker she did not want to live with Father because A.E. is “mean” to her. K.E. was “very emotional” about the prospect of living with Father.

Given (1) A.E. participated in the abuse, (2) the social worker placed K.E. in Father’s house despite her protests, and (3) Stepmother warned the abuse would be more severe if it were reported, it would have been understandable for K.E., who was eight years old, to have believed she had no one to whom she could report the abuse.

Thus, we are not persuaded that K.E.'s failure to cry for help equates with a lack of substantial evidence.

Third, Father contends there is insufficient evidence because it is "incredible" to believe K.E. would have willingly hugged Stepmother "only days after the alleged monstrous abuse." To the contrary, if K.E. was accustomed to being hit by Stepmother, then she could have adjusted to being hit and then having to act lovingly toward Stepmother. Thus, we find Father's argument to be unpersuasive.

Fourth, Father asserts the Department must have known K.E. falsified the abuse story, because otherwise the Department would have removed A.E. due to A.E. being exposed to the abuse. Father also notes Stepmother was never charged with child abuse. Father contends the Department and law enforcement officers must not have believed K.E.'s story or they would have taken further actions. This court cannot reweigh the evidence and we cannot judge a witness's credibility. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) The fact that other governmental agencies did not take further action in this matter does not mean there is a lack of substantial evidence or that the juvenile court erred in finding K.E.'s story credible. Accordingly, we find Father's argument to be unpersuasive.

Fifth, Father offers various explanations as to how K.E. could have sustained her injuries. Father points out that the ankle injury was bleeding at approximately noon, which indicates the injury likely happened at school. Father also asserts Mother could have caused the injuries that left scars on K.E.'s body. As explained *ante*, we cannot reweigh evidence. It is also not important if the evidence is contradicted. (*In re Shelley*

J., supra, 68 Cal.App.4th at p. 329.) As set forth *ante*, there is credible evidence supporting the juvenile court’s finding. Thus, we find Father’s argument to be unpersuasive.

B. EFFECTIVE ASSISTANCE

1. *PROCEDURAL HISTORY*

Father’s attorney at the juvenile court was Mr. Harold Lai (Lai). The jurisdiction/disposition hearing was originally scheduled for June 6, 2013. On that day, Lai informed the juvenile court that a six-month review was scheduled in Mother’s case for June 17. Lai said Father was not in court on June 6, and asked if the hearing could be trailed to June 17. Lai said he spoke to Father on June 5, and asserted Father would be asking for the court to follow the Department’s recommendation and place K.E. with a sibling in foster care. The Department requested the juvenile court schedule the June 17 hearing as a contested matter, because if Father “might be disputing the allegations,” then the Department did not “want him to show up and continue it.” The Department explained Father was “very uncooperative with regard to the allegations,” so it believed a contested hearing might occur. The court scheduled the hearing for June 17 at 8:30 a.m., as a contested matter.

On the morning of June 17, the juvenile court asked Lai if he had evidence to present. Lai responded, “[Father] has given me a bunch of paperwork this morning regarding this matter.” Lai said Father would be contesting the Department’s recommendation, and that Father was requesting family maintenance. The following exchange occurred:

The Court: “You said you were ready to proceed?”

“Mr. Lai: I was saying that my client gave me a bunch of information this morning, so I’m still processing that.

“The Court: You’re still processing it?”

“Mr. Lai: Yes.

“The Court: Second call. We’ll recall you at 11:15. [¶] . . . Make sure you share the information with all counsel so we can move ahead.”

At 11:15 Mother’s attorney was not present. The hearing resumed at 11:50. Lai said to the court, “Before we get going, on behalf of my client, he indicated to me this morning that he is contesting the allegations, and he provided me some information, which I didn’t make copies of, but I gave them to Minor’s counsel and County Counsel so they could look at that during the break. . . . [¶] . . . [¶] . . . I need the minor with regards to foundation. My client is raising issues as to how the injuries happened, and there have been problems in the past with her being truthful, and he made a request of the school to find out exactly what time this incident happened. [¶] He indicated that the school’s never gotten back to him regarding when the injuries that were noticed by the school [*sic*]. He indicated she has got bruises or scratches at school in the past besides going elsewhere.”

The Department’s attorney and minor’s counsel asserted they would be objecting to the documents provided by Father on the basis of hearsay, relevance, and lack of foundation. The juvenile court said, “Reports having been admitted, the request for continuance is denied. This is the time and date set for hearing. You’ve had plenty of

notice. [June 6] was when it was set. Everybody was ready to go today. You never asked for the child to be transported. That request, based on that, is also denied.”

Lai said, “I wasn’t aware I was going to need it until this morning when [Father] told me.” The court responded, “Your client could have advised you. That’s not your fault.” Lai called Father to testify, and the hearing proceeded.

2. ANALYSIS

Father contends the juvenile court violated his rights of effective assistance of counsel and a fair hearing by proceeding with the hearing when Lai was unprepared. We disagree.

“Although continuances are discouraged in dependency cases [citation], the juvenile court has discretion to grant a continuance upon a showing of good cause if it is not contrary to the best interest of the child. (§ 352, subd. (a).) We review the court’s ruling on a continuance request for an abuse of discretion. [Citation.]” (*In re Mary N.B.* (2013) 218 Cal.App.4th 1474, 1481.)

At the June 6 hearing, Lai said he spoke to Father on June 5 and Father “would ask that the Court follow the recommendation that the minor be placed with a sibling” in foster care. It appears that between June 5 and June 17, Father changed his position regarding the allegations and disposition, but failed to inform Lai until the morning of June 17 as evinced by Lai’s comment, “I wasn’t aware I was going to need it until this morning when [Father] told me.” The record reflects Father was given proper notice about the June 6 hearing, wherein the matter was trailed to June 17.

It appears from the record that Father changed his mind about wanting to contest the allegations and disposition, and that he failed to inform Lai of that change of heart until the day of the June 17 hearing. Father also waited until the day of the June 17 hearing to give Lai the paperwork related to the case.² Thus, it appears Father was the reason for Lai being unprepared. Given this record, it was within reason for the juvenile court to conclude good cause did not exist for continuing the hearing, since Father was notified of the hearing but failed to properly inform his attorney of his new evidence and change of heart regarding the allegations and disposition.

Father contends this case is similar to *In re Julian L.* (1998) 67 Cal.App.4th 204, wherein the appellate court reversed the juvenile court's denial of a requested continuance because (1) the mother was not notified of the hearing, (2) the court waited over three months to appoint substitute counsel for the mother, (3) the substituted attorney had only been working on the case for one week at the time of the request for a continuance, and (4) the substituted attorney had not yet "ascertain[ed] mother's wishes." (*Id.* at pp. 208-209.)

The instant case is distinguishable from *Julian L.* because Father had notice of the hearing and had communicated with Lai. Father failed to inform Lai that he changed his mind about contesting the matter. Father's failure is not the same as having an attorney who has only been assigned to the case for one week and who has been unable to speak to the client about her desires. Father could have prevented the problem

² The paperwork is not included in the record. We are assuming the paperwork bore some relevance to the case.

in this case by communicating with Lai in a timely fashion. The mother in *Julian L.* did not have notice of the hearing, so she could not have been expected to communicate with her attorney of one week about the hearing. In the instant case, Father had notice of the June 6 hearing, which was trailed to June 17. In sum, we find Father's reliance on *Julian L.* to be unpersuasive.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

KING
Acting P. J.

CODRINGTON
J.