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

In re N.D., a Person Coming Under the Juvenile
Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

R.D.,

Defendant and Appellant.

F064583

(Super. Ct. No. JD127183)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Louie L. Vega,
Judge.

Caitlin U. Christian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa Goldner, County Counsel, Jennifer E. Feige, Deputy County Counsel for
Plaintiff and Respondent.

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

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N.D. was removed from his parents' home after a county social worker found that the parents were smoking marijuana continually, including in front of their children and in their car, and were growing marijuana in their back yard. N.D.'s mother also was found to have physically abused his half-sister. In this appeal, N.D.'s mother argues that the court erred when it refused to return N.D. to the parents' custody at the disposition hearing. She contends there was insufficient evidence to support findings that there would be a substantial risk of harm to N.D. if he returned home and that there were no reasonable means of protecting N.D. without continuing his removal. We disagree and affirm the juvenile court's order.

FACTUAL AND PROCEDURAL HISTORIES

N.D. is eight years old. His mother is R.D. (mother). His father, N.D. (father), has three other children by J.H.: E.D., who is 18, N.D., Jr. (Junior), 16, and D.D., 13. N.D. is mother's only child. Father and mother have been married since 2003. J.H. has been convicted of second degree murder and is serving a term in state prison.

On August 18, 2011, E.D. called the police from the home of a friend. She told the police she had had a fight with her stepmother (mother) and had been kicked out of the house.

Miriam Orozco, a county social worker, went to the friend's house the same day and interviewed E.D. She had a scratch and some redness on her face. She told Orozco that the previous Saturday, August 13, she had been watching television when mother took the remote control away from her and changed the channel. E.D. and mother argued over this, and mother slapped E.D. on her face a number of times, pulled her hair, threw water on her, and hit her neck with a towel. Mother also tried to move a chair while E.D. was sitting in it. E.D. said she threw up in the bathroom after the incident. She did not tell father about the incident and falsely told him N.D. had made the scratch on her cheek. She said she feared father would blame her if he found out. On August 17, 2011, N.D.

told father about the incident, and father became angry at E.D., telling her to pack up and leave if she wanted to. She did, and heard father lock the door behind her. E.D. then walked to the friend's house.

E.D. also told Orozco that father and mother smoked marijuana daily, often in front of her. E.D. said father had at least five marijuana plants growing in the back yard. That July, father made brownies with marijuana in them and gave her and N.D. each one to eat. Once, before N.D. was born, father gave E.D. a sandwich made with peanut butter and marijuana.

Orozco and police officers next went to the family's house. Orozco smelled a strong odor of marijuana emanating from the house even before going inside. Father admitted he had five marijuana plants in the back yard and showed them to the social worker. They were large, visible, and accessible to the children; when they were counted, there turned out to be six, not five. Father said he had been smoking marijuana for 25 years and that he had grown up with it, as his parents welcomed it in their home. He said he and mother usually smoked it in their bedroom or the garage, but he conceded that his children had seen them smoke it. Father and mother smoked marijuana in their bedroom every night. Friends of father's came to the house to smoke with him, and the children had seen this also.

Father admitted he made marijuana brownies on the occasion to which E.D. had referred. He denied, however, that he had given them to E.D. and N.D. He made a batch of regular brownies as well, and gave those to the children. He said he told E.D. she was getting one of the marijuana brownies because she had asked for one. He believed E.D. had once eaten a marijuana brownie at his parents' house. Father confirmed that he had allowed E.D., at her request, to harvest leaves from his marijuana plants during the last few days. E.D. liked the way marijuana smelled and looked, he said.

An officer spoke with Junior. He said his father once gave him a marijuana brownie to eat. Father denied this. Junior said he had seen his father smoke marijuana.

After initially denying it, father admitted there was marijuana in the house. He allowed the officers to look around, and they found a quarter ounce on his bed. Father also confirmed that a social worker had been to the house on a prior occasion and had told him that being high in the presence of the children and exposing them to marijuana was unacceptable.

The children were removed and placed in protective custody the same day, August 18, 2011. The following day, another county social worker, Kathleen Neuman, interviewed mother, D.D., Junior, and E.D. Mother said E.D. hates her, has an anger problem, and in 2009 physically assaulted her. Mother admitted she smoked marijuana, but denied she did so in front of the children.

D.D. told Neuman that his father made marijuana brownies in July and offered him one. D.D. helped water the marijuana plants. He said his parents both smoke marijuana three times a day, and he had been aware that they did so for the last four years, since he was eight.

Junior told Neuman that father and mother smoke marijuana all day every day, and that he saw them smoke at least 15 times each month. He said they smoke in the car on the way to work, and his father smokes all day during his work as a gardener. Sometimes father and mother smoked in the car while the children were in the car. When told of mother's claim that she never smoked in front of the children, Junior said, "she's crazy."

E.D. said father and mother go to their bedroom every night after dinner to smoke marijuana. They remain there for the rest of the evening, leaving E.D. to care for the other children. She again stated that she and N.D. ate marijuana brownies made by her father in July. She said she did not know the brownies had marijuana before she ate one. The marijuana made her "feel like she was on a roller coaster," and she did not like it. Her father laughed and said she was "not a 'drugee.'" E.D. said she cut the leaves from a marijuana plant at her father's request.

The children complained to Neuman about mother. Junior confirmed E.D.'s statements that mother started the fight with E.D., that E.D. was trying to avoid a confrontation with mother, and that mother slapped and poured water on E.D. and dumped E.D. out of a chair. D.D., Junior, and E.D. each felt that mother was excessively focused on making them keep the house clean. E.D. said mother comes in her bedroom and dumps out the contents of her drawers if she disapproves of the way they are arranged, and sometimes removes clothing from her room and throws it away because she does not like it. E.D. admitted she hit mother in 2009.

Neuman spoke with M.K., father's mother. M.K. said "her son puts [mother] in front of everyone including his own children." When the family was living in Las Vegas, M.K. paid for them to move back to Bakersfield because she was concerned about the children. The family lived with M.K. when they returned, but she moved out because "things with [mother] were so bad"

Neuman spoke with father a few days later, on August 22, 2011. Father claimed it was E.D. who was abusing mother and said E.D. lies, cheats, and steals. Father also said the marijuana plants had been removed from the yard.

The Kern County Department of Human Services filed a dependency petition for N.D. in juvenile court on August 22, 2011. The removal of the other children is not at issue in this appeal. Based on the incident between E.D. and mother, the petition alleged that there was a risk of serious physical harm to N.D. and that father failed to protect N.D. from mother. The petition also alleged, based on the marijuana-related facts, that father and mother each failed to protect N.D. (Welf. & Inst. Code, § 300, subds. (a), (b).)¹

¹Subsequent statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In her report prepared for the detention hearing, Neuman described the family's history of referrals to child welfare agencies in Kern County and in Clark County, Nevada. There were seven prior referrals, three of which were substantiated. A referral received by Kern County on October 31, 2002, was substantiated against mother for physical abuse of Junior, who was then six years old.² Junior had a red bruise on the inside of one arm, extending from wrist to elbow. He had a circular purple bruise on his spine and two bruises extending from the spine toward the hip. At first, Junior said he had gotten "a 'whoopin,'" but then offered several alternative explanations involving accidents, none of which were consistent with the injuries. Junior and mother then claimed that father had inflicted the injuries. Father admitted that he sometimes hit his children with a belt, but said he never left marks; after initially saying mother was not responsible, he later blamed her. The department concluded that mother had made "increasingly dishonest statements throughout the investigation" and found she had inflicted the injuries.

The second substantiated report was received by Kern County on September 28, 2009. E.D., Junior, and D.D. separately reported "being made to feel unloved and unwanted" by mother. E.D. reported ideas of hurting herself and said mother called her a bitch. Junior and D.D. reported dreams involving mother taking the children away and robbing the house. The department found that mother had engaged in emotional abuse. A referral alleging physical abuse by mother was made at the same time, but the department did not find evidence to support it.

Kern County received the third substantiated report on May 18, 2011. Social workers went to the family's home to investigate after N.D. brought a live bullet to

²The party in question is identified in Neuman's report as R.S. and referred to as father's girlfriend. It is clear from other references in the record that this is mother. Mother is elsewhere referred to as R.S.-D., and police records show that R.S. is also known as R.D. She testified that she met father in 2000, moved in with him within a year, and has lived with him ever since.

school, saying it came from his house. The social workers found that the home smelled strongly of marijuana. The children were present. Father showed the social workers a medical marijuana card.³ He said he had been smoking in his room, but the social workers believed, based on the smell, that marijuana had been smoked throughout the house. The social workers interviewed N.D., who now said he found the bullet on the school bus. Father did not allow the social workers to interview any of the other children. The department found general neglect by father based on exposing the children to marijuana smoke. It found failure to protect on the part of mother.

The unsubstantiated referrals included three received by authorities in Clark County, Nevada, each alleging physical abuse of E.D. The county received the referrals on March 24, 2004, May 1, 2005, and May 26, 2005, when E.D. was 9 and 10 years old. In each instance, bruises were seen on E.D.'s back, legs, hips, buttocks or sides. In the first case, father admitted he hit her with a belt and said it was because he heard her talking about oral sex. Father was "advised not to leave marks or bruises" and the referral was found unsubstantiated. In the second case, father and mother said they spanked E.D. because she was "out of control and would not do her chores." The referral was found unsubstantiated and "the family was referred to counseling." In the third case, E.D. had "a black bruise on her back approximately the size of a grapefruit," which was seen by a teacher, and father admitted he hit her with a belt. Father was warned that he could face criminal charges if he continued to inflict excessive punishment. Again,

³The California Department of Public Health issues medical marijuana identification cards to patients who have obtained recommendations from their physicians for use of medical marijuana. Law enforcement personnel and others can verify the validity of identification cards by using a verification database available on the Internet. (Cal. Dept. of Public Health official web site, <<http://www.cdph.ca.gov/programs/mmp/Pages/default.aspx>> as of Dec. 17, 2012.) At the detention hearing, counsel for the children represented to the court that, according to experts whose testimony she had heard, a doctor's recommendation to use marijuana does not specify a dosage, but simply recommends that marijuana be used as needed.

however, the referral was found unsubstantiated because “the family ‘was working on the matters at hand.’”

Kern County received a marijuana-related referral on August 16, 2010, that was found unsubstantiated. The department found that the house did not smell of marijuana, and that there was no evidence the parents smoked daily in the presence of the children or used Junior to deliver marijuana to others. Father said he had a medical marijuana card and smoked marijuana for pain management. The department concluded that if the parents were using marijuana, their use did not affect their care of the children. Father was “minimally cooperative” during the investigation, and the department felt that “concerns remain for this family due to their Child Protective Services history and the father’s criminal history.” Father’s criminal history is discussed below.

There are indications in Neuman’s report for the detention hearing that, over the course of the family’s many years of contacts with child welfare authorities, the children had been taught to lie to protect father and mother. In connection with the referral in the present case, E.D. told Neuman “she never said anything to CPS because her parents prepared the children with what to say to avoid further involvement or investigation.” As already mentioned, in 2002 Junior gave various inconsistent explanations of his bruises in an attempt to make social workers believe they resulted from an accident. E.D. told Neuman she “is afraid to go home because she is now telling the truth and is afraid what her parents will do.”

Neuman’s detention report included father’s criminal history. He was charged with 16 offenses between 1995 and 2002, some with prior prison term enhancements. In 2002, father pleaded no contest to possession of more than an ounce of marijuana. In 1998, he pleaded guilty to driving with a suspended or revoked license, not wearing a safety belt while driving, driving without auto insurance, driving an unregistered vehicle, and failure to appear. In 1995, he pleaded no contest to possession of a controlled substance.

The detention hearing took place on August 23, 2011. The parents denied the allegations in the petition. The court found that a prima facie showing had been made, based on the allegations in the petition and the facts set forth in Neuman's report, that N.D. came within section 300. It found that N.D.'s continuance in his parents' home would be contrary to his welfare and that reasonable efforts had been made to avoid the need for removal. N.D. was ordered detained. The other children were ordered detained as well, but, as we have said, only N.D. is at issue in this appeal. Visitation was ordered. The parents were ordered to submit to drug testing. Mother's counsel said mother would submit to testing voluntarily.

Neuman prepared a report for the jurisdiction hearing. It stated that on August 23, 2011, after the detention hearing, Neuman again spoke to the children. E.D. and Junior said they did not want to visit with their father. They also said they heard their father refuse to submit voluntarily to drug testing.

E.D. told Neuman that from the ages of 10 to 13, when the family lived in Las Vegas, she was kept home from school to care for N.D. She had difficulty with math, reading, and writing when she entered eighth grade after the family returned to Bakersfield.

Junior said that, seven years ago, the children were given sandwiches made with peanut butter and marijuana. E.D., Junior, and D.D. said their father procured marijuana from a dispensary; the children pointed the dispensary out as they and Neuman passed it on the way to the foster care center where the children were staying. E.D. and Junior had been inside. D.D. said he always waited outside. E.D., Junior, and D.D. all said they had delivered marijuana to other people for their father, packaged in small green containers or zip lock bags. The three older children said their father also had used N.D. to make deliveries. For N.D., the marijuana packages were concealed inside green peppers "so if anyone looked inside the bag it looked like he was just carrying vegetables."

Neuman's jurisdiction report included an excerpt from a police report made on August 18, 2011, by the police officers who went to the house on the day E.D. contacted the authorities. The report stated that M.K. (father's mother) said mother had been hitting and abusing E.D. for years, and that father knew about it and did not prevent it. M.K. said father verbally abused E.D. as well. The report included the officers' description of mother's account of the altercation with E.D. Mother felt that E.D. constantly disrespected her and undermined her authority. She confirmed most of the facts E.D. described: She took the remote control away from E.D., slapped E.D., pulled E.D.'s hair, threw water on E.D., and hit E.D. with a dish towel. In mother's version, however, E.D. grabbed mother's arm before mother touched E.D., and E.D. had a bad attitude.

In her analysis, Neuman stated that N.D. had been removed because of father's marijuana abuse. Neuman noted that father had a medical marijuana card, but contrasted the alleged medical need with the actual role of marijuana in the home: The parents smoked marijuana in front of the children and exposed them to second-hand marijuana smoke daily; father fed the children food made with marijuana and used the children to help him cultivate and distribute marijuana; mother smoked marijuana in the car with the children; and mother and father left E.D. to care for the other children while mother and father smoked marijuana in their bedroom. Mother had not, up to that point, claimed a medical reason for marijuana use.

Mother testified at the jurisdiction hearing on October 4, 2011. She testified that E.D. was very disrespectful and disobedient, gave her dirty looks, and had bad posture. Mother described the fight between her and E.D. on August 13, 2011, in essentially the same way she had described it to the police. She added that when she threw water on E.D., E.D. was charging at her and pushing her against a window and had to be restrained by the boys. Mother described another incident, in February 2010, when she argued with

E.D. Mother was holding onto E.D.'s hands when E.D. got one hand free and hit mother with it.

Mother said she began smoking marijuana in 2000, when she met father. She smoked recreationally with father and his parents. Later, she began having muscle spasms in her leg. In 2009, a doctor prescribed "some medicine that started with an A," but it made her feel nauseated. Marijuana, however, made her leg feel better. She decided not to take a second medication her doctor recommended because of side effects about which she had read. When asked whether she smoked every day, she began by saying no, but then continued, "Most—sometime during the week, Monday through Fridays, maybe twice at night, and on the weekend at night, Friday, Saturday, and Sunday." In August 2011, after the children were removed from the house, she obtained a medical recommendation to use marijuana.

Mother admitted she smoked marijuana in front of the children when they were with father's parents. "When they would visit or when we were there, it was a social thing where it was around the table in front of the kids." She denied smoking in front of the children in her home except when father's parents were present. Mother also admitted that father's parents often made baked goods with marijuana and brought them to her home, but she denied they were left where the children could get them. She admitted that father made brownies with marijuana in July 2011.

Mother testified that she and father began growing marijuana in January 2011 and had been buying it at a dispensary since they removed the plants after the children were detained. Before that, they got their marijuana from father's parents, who grew it in two rooms in their house. When the children visited father's parents, they were shown the marijuana growing in the rooms and had access to the rooms.

The court found all the allegations in the petition true. N.D. was found to be a person described by section 300, subdivisions (a) and (b).

For the disposition hearing, Neuman prepared a report dated October 18, 2011. It stated that the children had been separated. The two older children, E.D. and Junior, were together in one foster placement, and the two younger children, D.D. and N.D., were together in another. The children were reported to be strongly bonded to one another. The report stated that the parents had visited N.D. regularly. The visits were reported to be of good quality.

Neuman prepared an initial case plan for each parent. The plans required both parents to receive counseling at Haven Counseling. For father, the counseling was for failure to protect. For mother, it was for physical abuse as a perpetrator. Both parents also were to enroll in substance abuse counseling with the goal of demonstrating that they could refrain from the use of illegal substances. Further, the parents were to enroll in a parent training course designed to improve their parenting skills and reduce the likelihood of future abuse or neglect.

A social worker presented the initial case plans to the parents on September 30, 2011. Both refused to sign the plans on the ground that the allegations in the petition were not true. In Neuman's opinion, the parents had made "no progress in alleviating the circumstances which led to the children's removal." She believed that out-of-home placement continued to be necessary.

Neuman prepared a supplemental disposition report dated January 24, 2012. The report stated that a social services supervisor reviewed the initial case plan with father on October 3, 2011. Father said he would not participate in the case plan because he and mother were "innocent." A social worker subsequently reviewed the initial case plan with the parents each month. The parents continued to insist that the allegations in the petition were false. The social worker reported that they "feel that participating in the initial case plan will only contribute against them with regards to their innocence." At the time of the supplemental report, both parents were still denying the allegations and refusing to participate in any counseling or submit to drug testing.

Father “refused to sign an authorization for [E.D.] to take the psychotropic drugs she needs for her anxiety unless the other children were released to him.” This refusal necessitated separate dispositional proceedings for E.D. in the juvenile court to enable her to receive her medication without father’s consent. E.D. and Junior continued to refuse to visit with the parents. E.D. and Junior had been moved to separate placements.

The disposition hearing took place on March 2, 2012. Counsel for mother explained that the parents were seeking the return of N.D. and D.D. only. According to counsel, this was because the parents did not want to make E.D. and Junior come home against their will, “not because the parents wish to express any aversion towards those children.”

Mother called Theresa Thompson-Green to testify. Thompson-Green was a social worker employed by the foster care agency and assigned to N.D. and D.D.’s case. Her job was to observe the children in the foster home and monitor their visits with the parents.

Thompson-Green testified that N.D. was having difficulty in the foster home. He was disinclined to do as he was told and had trouble completing his homework. Thompson-Green also observed N.D. at school and found he had similar difficulties there. She found it was hard to make him sit still, listen to the teacher, and complete his work.

Thompson-Green observed six to eight visits with the parents. The visits went well. At the beginning of each, N.D. ran to his parents, jumped into their arms, and said he loved them. The two boys would play basketball or soccer with the parents and then they would have a meal together. The children were responsive to the parents’ guidance. The parents and children behaved appropriately toward each other. Father helped N.D. with his homework, and N.D. sat still, listened, and appeared to make progress. At the ends of the visits, the children hugged the parents and said they loved them. Thompson-Green saw no problems in the relationship between the parents and the children. The

parents never appeared intoxicated. The children said they wanted to return to their parents. Thompson-Green never observed anything that would cause her to believe the children would be at risk in the parents' care.

On cross-examination, Thompson-Green testified that she was not familiar with the circumstances that had led to the children's removal. She said it would surprise her to learn that mother had struck one of the other children, poured water on her and knocked her out of a chair, or that father fed the children marijuana and used them to cultivate and transport marijuana. She did not know whether these facts would change her opinion about whether the children would be at risk in the parents' care, but she conceded, after hearing them, that the parents' good behavior during the visits could "be deceiving." She agreed that N.D.'s poor behavior with the foster parents might be an example of testing adults to see how far he could go.

Mother called Angelique Flores to testify. Flores was a county social worker. She was assigned to N.D. and D.D.'s case and her job was to monitor parental visits and monitor the initial case plan. She testified that the parents were participating in a portion of the initial case plan. They had enrolled in late January at Haven Counseling in a program called Family Matters on parenting and child neglect. They attended twice a week. They did not enroll in any counseling before that because they believed they were innocent and because their attorneys had advised against it. For the same reasons, they were continuing to refuse to submit to drug testing and had not agreed to be assessed for substance abuse counseling. They were continuing to use marijuana and had told Flores they did so for medical reasons. They told Flores that if the court ordered them to participate in substance abuse counseling and to submit to drug testing, they would comply.

Flores supervised visits every other week for six months. The parents attended every scheduled visit. She considered the visits to be successful. The children were

always very happy to see the parents. They were respectful and obedient. The parents never appeared intoxicated and never smelled of marijuana.

Flores went to the family's house monthly for announced visits. She found the house to be very clean and well-maintained and saw no safety hazards. She saw no marijuana.

Flores gave equivocal testimony when asked her opinion about whether there would be a substantial risk to the children if they were returned home. Mother's counsel asked whether Flores had "seen anything" in the course of her observations that indicated a risk to the children. Flores said no. Counsel for N.D. asked Flores whether she had any objection to the children being returned to the parents. Flores said, "Based on my experience with the parents—and I'm talking about my experience only—I don't object." During cross-examination by counsel for the county, however, Flores gave a different opinion. Counsel asked whether Flores was aware of the court's findings that the children were exposed to marijuana smoke, used for cultivating and transporting marijuana, and fed marijuana. Flores said yes. Counsel then asked whether, in Flores's professional opinion, it would be appropriate to return the children to the parents. Flores said, "Based on what you are telling me, no." Father's counsel then sought clarification, asking Flores, "So would you say your experience with the parents isn't consistent with what was found true [by the court]?" Flores said yes.

Counsel for the county did a re-cross and asked whether Flores's testimony was that, based on her own observations, she did not see a risk to the children in returning them home. Flores said yes. Then counsel asked, "You have a different opinion, however, ... based upon all of the sustained facts of the allegations and the petition. Is that correct?" Flores said, "That's correct." Mother's counsel continued to pursue the matter on re-direct. He asked, "Based on everything that you know about this case at this time, do you believe that [D.D.] and [N.D.] would be at—that there's a substantial risk of abuse or neglect if the children were returned at this time?" Flores said no.

Counsel for the county did another re-cross and asked whether, in light of “all of the facts of the petition that have been sustained, including the fact that the children have been exposed to secondhand smoke, they have been asked to cultivate and transport, notwithstanding and including the physical abuse to [E.D.], you think it’s safe for these children to go home based on your knowledge, skills and experience as a social worker of the department?” Flores answered no. She tried to clarify her apparently conflicting testimony by saying that “what I know now from my experience” with the family was “cloud[ed]” by her knowledge of the court’s prior findings. Counsel also asked, “Do you have any reason to suspect that [the parents] would stop the prior behaviors that the court has found places these children at risk without some counseling?” Flores said no.

D.D. testified. He had seen marijuana growing in his back yard and had seen mother smoking it. He said he had never been mistreated by either parent, had never seen the parents mistreat N.D., and was not afraid of the parents. He had seen changes in both parents. Father was not as angry as he used to be, and D.D. felt father loved him more. Father told him he was sorry about the situation and would do everything he could to bring D.D. home. Mother’s attitude was not good before, but it was much better now. D.D. wanted to go home, and he wanted N.D. to go home.

Counsel for E.D. and N.D. made offers of proof for them, which were accepted by all parties. E.D. would have testified that she had been in contact with N.D. and D.D. through sibling visitations and that she believed it would be in both boys’ best interest to go home. N.D. would have testified that he wanted to go home.

Father testified. He said he found the Family Matters course at Haven Counseling to be helpful. The class helped him “try to learn empathy with [his] children.” He looked forward to going to class. Commenting on D.D.’s remark that father was less angry, father said, “I feel I’m the same person. But I do understand exactly what [D.D.’s] talking about, because, yes, I have toned it down a lot.” Father had stopped growing

marijuana at his house, saying “[i]t’s a danger to my children.” He said he would never do it again.

Father continued to smoke marijuana, however. He smoked twice a day, consuming about \$5 worth of marijuana or three joints each week. He said, “I do it for medical reasons only. I am not a stoner. I smoke medical marijuana.” He said he intended to continue smoking it.

Father’s attorney examined him on the question of whether he would obey the court’s orders if the children were returned to him. He said he would, but his testimony reflected ambivalence, and he declared that he would not enroll in substance abuse counseling as he was convinced he had no marijuana abuse problem. He also appeared not to understand why he would need counseling on the issue of failure to protect his children:

“Q. Okay. Are you willing to comply with any orders of the court in order—if your children are returned to you, will you comply with any orders of the court?”

“A. Yes, I would.

“Q. Would that include abstaining from the use of marijuana?”

“A. It’s my medical—it’s medical. I’m not abusing it. It’s a medical—

“[County counsel]: Objection. Move to strike.

“[N.D.’s counsel]: Objection.

“THE COURT: Sustained.

“BY [father’s counsel]:

“Q. M[y] question is if the court returned your children and told you not to use marijuana, would you comply with that?”

“A. Yes.

“Q. Okay.

“And if the court returned your children and told you to take substance abuse, would you comply with that?”

“A. No. Because I don’t do drugs.

“Q. Okay.

“A. I smoke medical marijuana.

“Q. Okay.

“A. I have a doctor’s recommendation for it. I would never tell nobody to stop taking their pills—their cholesterol pills. I would never tell anybody to stop taking pain pills.

“[County counsel]: Objection, your Honor. Narrative. Move to strike.

“THE COURT: It’s stricken.

“BY [father’s counsel]:

“Q. If the court returned your children, you would stop smoking marijuana and you would test?”

“A. Yes, I would.

“Q. Okay. And are you willing to take the failure-to-protect class when you complete the Family Matters class?”

“A. Failure to protect?”

“Q. Yes.

“A. Who?”

“[County counsel]: I’m sorry, I didn’t hear that.

“THE WITNESS: Who did I fail to protect?”

“BY [father’s counsel]: [¶] Q. You understand that the department’s asking you to take a failure-to-protect class?”

“A. No, I didn’t.

“Q. Family—

“A. Okay. Yes.

“Q. If the court returned your children, would you be willing to take that class?

“A. Yes.”

Mother testified. She said the house still had marijuana in it, but no marijuana plants were growing there. She said she would do whatever was necessary to comply with any orders made by the court in returning the children, including abstaining from marijuana, keeping it out of the house, and finding a medical alternative to it. She said she was willing to comply with any orders to attend classes and counseling, but she was in danger of losing her job as a dental assistant because her employer was becoming impatient with her frequent need to leave for counseling or classes. There was a delay in her beginning the Family Matters class because of a conflict with her work schedule.

Father’s counsel argued that N.D. and D.D. should be returned home and family maintenance should be ordered. She said the failure-to-protect finding was based only on the altercation between E.D. and mother, and there was never any risk of abuse to N.D. and D.D. The only risk to them, counsel contended, arose from the parents’ marijuana use. Both parents testified that they would stop using marijuana if ordered. Father said he would not participate in substance abuse counseling, but substance abuse counseling was unnecessary and should not be ordered because father was not abusing marijuana. The only risk to the children arose from their exposure to the smoke and from their utilization by the parents in cultivating the plants. Because the parents had pledged to stop using and had already stopped cultivating, these risks had been eliminated.

Counsel for mother argued that Thompson-Green and Flores did not see any indications of risk during the visits or in the house. He said the parents’ marijuana use was medicinal and that, unlike “what we usually see in drug cases,” the parents were employed and their house was clean. He argued that the court could not find by clear and convincing evidence that there would be a substantial risk to the children if they were

returned home, and that there were no reasonable means by which they could be protected without being kept from the parents' custody. Counsel for D.D. argued that D.D. should be returned with family maintenance services. Counsel for N.D. submitted without argument.

Counsel for the county cited *In re Alexis E.* (2009) 171 Cal.App.4th 438 for the proposition that the juvenile court had discretion to order a parent with a medical marijuana card to stop using marijuana. She asked the court to follow the department's recommendation to continue the children's removal and order family reunification services. She argued that the court's orders should include an order to abstain from marijuana and to submit to drug testing and substance abuse counseling. She said, "I think there's every indication that the risk that the court found at the jurisdictional hearing from the parents' use of marijuana has continued unabated since we've dragged this disposition out these several months. ¶¶ ... ¶¶ [W]e have the reports. We have all of the information that's already in evidence. The lengthy use of marijuana. Criminal involvement with marijuana that goes back 25 years for the father and probably ten years by mom, if that's fair to say, based on her testimony at jurisdiction."

The court accepted the department's recommendation. It stated:

"At this time, the information in the report the court had received was that, among other things, the father stated he was not going to participate in the case plan because he was maintaining his innocence. And as I indicated to counsel, what I was interested in was whether or not the father, in particular, the parents as [a] whole, were going to participate and comply with the orders of the court as administered through the Department of Human Services.

"According to the report, the father's marijuana use goes back 25 years. He's—according to the petition, he's 38 years old. So it goes back quite a ways. So it predates significantly the so-called medical marijuana law. And the findings of the court are that he daily exposed the children to smoke. And we heard from the mother's—the way she used it was in her room, but that obviously it was being smoked.

“So the court at this time finds that the purposes of this whole process to reunite the family can be achieved by the cooperation of the parents with the orders of this court, which are designed to reunify the family entirely. But, at this juncture, the court’s going to order reunification [i.e., continued removal of the children with family reunification services]. And the court wants to get this matter to where the children are at home as soon as possible. But they are going to have to show that they are willing to comply with the orders of the court for the benefit of the children. That based on the evidence presented here today, the court is going to follow the recommendations that are—have been submitted.”

After making these remarks, the court noted for the record that “[t]he father just stormed out of here, counsel. That’s exactly what we’re talking about.”

The court found that father and mother had made no progress toward alleviating the causes of N.D.’s removal. It found clear and convincing evidence that there would be a substantial danger to the physical or emotional well-being of N.D. if he were returned to the parents’ custody and that there were no reasonable means of protecting him from that danger without continued removal from their custody. It ordered father and mother to participate in counseling for substance abuse and parenting and to submit to random, unannounced urine testing for drugs. It ordered father to participate in counseling for failing to protect his children and it ordered mother to participate in counseling for physical child abuse as a perpetrator. The court ordered a review hearing in four months.

DISCUSSION

Mother argues that the juvenile court’s decision was not supported by sufficient evidence. “When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof.” (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

To continue the removal of the children from their parents' custody at the dispositional stage, the court was required to make two findings: (1) that there would be "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home"; and (2) that there are "no reasonable means by which the minor's physical health can be protected without" removal. (§ 361, subd. (c)(1).) These findings must be supported by clear and convincing evidence. (§ 361, subd. (c).) The prior findings at the jurisdictional stage are "prima facie evidence that the minor cannot be safely left in the physical custody of the parent or guardian with whom the minor resided at the time of injury." (§ 361, subd. (e).) Mother argues that the evidence was not sufficient to support either of the two required findings.

I. Sufficiency of evidence of substantial risk

Mother argues that there was insufficient evidence to justify the first required finding: a substantial risk to N.D. if he were returned home. She says there was a "consensus" at the disposition hearing that N.D. should be returned home and that the court ordered continued removal based on "speculation that a risk would, at some point, arise."

We disagree. We could find a "consensus" at the disposition hearing only if we ignored the disposition report prepared for the department by Neuman and updated by her five weeks before the hearing. Her report and supplemental report recommended continued removal based on the parents' long history of inappropriate marijuana use and exposure of the children to marijuana, combined with Neuman's opinion that the parents had made no progress. Neuman was present at the disposition hearing; she was not called as a witness by either side, so the court could reasonably infer that her views had

not changed.⁴ The county's counsel, of course, also was not part of any "consensus" that N.D. should be returned home.

Besides the evidence related to marijuana use, exposure, cultivation and transportation, Neuman's reports contained evidence of a long history of physical and emotional abuse and neglect in the family. There was evidence that when E.D. was 10 years old, her parents withdrew her from school so she could supervise the other children and literally beat her black and blue as well. The inaction of the authorities in Nevada does not mean the abuse did not take place. Bruises were seen on E.D. by disinterested third parties, and father admitted to hitting her with a belt. By advising father to stop leaving marks and warning him of criminal consequences, the authorities implicitly found that he had inflicted the bruises through excessive discipline. In Kern County, past referrals involving the three older children for physical abuse, emotional abuse, general neglect, and failure to protect were found to be substantiated.

In claiming there was no substantial evidence of ongoing risk, mother emphasizes the parents' testimony that they would follow the court's orders if the children were returned to them. There was other evidence, however, on the basis of which the court could reasonably find that the parents had little understanding of the reasons why the children were removed and that, therefore, the risks continued. Father said he had learned the importance of feeling empathy for his children, but two months earlier the department had needed to pursue separate dispositional proceedings for E.D. because father refused to give his consent to allow her to receive her anxiety medication. He said E.D. could not have the medication until he got the other children back. This might have

⁴Mother's opening brief states that "the social worker essentially recanted the recommendation contained in the report when she testified at the disposition hearing that [N.D.] could safely return home." Mother's appellate counsel apparently has confused Neuman, the social worker who authored the disposition report and supplemental disposition report, with Flores, the social worker who monitored visits and testified at the disposition hearing. Neuman did not recant.

been intended as a cruel punishment for E.D.'s courageous decision to contact the authorities in this case, or it might have been intended as a misguided attempt to bargain with the department, but in any event, it destroyed any credibility father had in claiming he had learned empathy. It also supported Neuman's opinion that father had made no progress.

Father's initial response when asked whether he would participate in counseling for failure to protect was similarly revealing. "Who did I fail to protect?" he asked. Father asked this question during a court proceeding that was the culmination of years of abuse and neglect: three substantiated referrals in Bakersfield, two warnings in Las Vegas, and lifetime daily exposure to secondhand marijuana smoke for all the children. Father backpedaled after this and said he would participate in the counseling, but his true state of mind had already been revealed. Father's angry departure from the courtroom could reasonably be interpreted as a further expression of his sense that he was being persecuted for no reason. Neuman's opinion that father had made no progress was still well-supported at the time of the hearing.

Although father ultimately said he would abstain from marijuana and submit to testing, the whole of his testimony at the disposition hearing provided an ample basis for the court to agree with Neuman's opinion that father had not made progress on the issue of marijuana use. Although he had been using marijuana since early adolescence and had for years exhibited exceptionally poor judgment in exposing his children to marijuana smoke, feeding his children marijuana, using his children to cultivate and transport marijuana, and smoking marijuana while driving, he refused to consider the possibility that he had a substance abuse problem because he now had a medical recommendation. He declared he would not submit to an order to participate in substance abuse counseling because he did not "do drugs." Even legal drugs can be abused, and there was substantial evidence that father is a lifetime abuser of marijuana, even if he currently has a medical condition that can be helped by marijuana. The court could reasonably find that father's

testimony demonstrated an ongoing risk arising from his refusal to acknowledge even the possibility that he has a problem.

Neuman's opinion that mother had not made progress on the issue of physical abuse also continued to be supported at the time of the disposition hearing. At the jurisdiction hearing, mother blamed E.D. for the altercation that led to the children's removal. At the disposition hearing, mother said she would participate in any counseling that was ordered, but, unlike father, she did not testify that she had gained insight. Her counsel had argued on her behalf at the jurisdiction hearing that the physical abuse issue was insignificant and should be stricken from the petition. There was no indication at the disposition hearing that mother's view of the matter had changed.

Mother relies on the testimony of Thompson-Green and Flores, but the testimony of those witnesses was weak. Thompson-Green knew nothing of the background facts of the case or the reasons for the children's removal. Her testimony was simply that the visits went well and N.D.'s return was not contraindicated by anything that happened in her presence. Flores's testimony was confusing and certainly did not unequivocally support the parents' position. The court could reasonably interpret it to mean that everything Flores observed firsthand supported N.D.'s return, but the remaining facts of the case weighed against his return.

Mother argues that when the court said the parents would "have to show that they are willing to comply with the orders of the court," it was improperly using the children's custody as a bargaining chip to pressure the parents to comply with the case plan even though there was no current risk to N.D. She relies on *In re Steve W.* (1990) 217 Cal.App.3d 10, in which the case plan required the mother to participate in services designed to help her avoid relationships with abusive men. The juvenile court stated that it would not take the chance that the mother might not participate in these services, but would instead ensure her participation by ordering the child's removal until after she had complied. The Court of Appeal reversed, holding that there was no evidence that the

mother would not follow the court's orders, that the juvenile court's fear that she would not follow them was unsubstantiated, and that there was no substantial evidence of current risk to the child. (*Id.* at pp. 15-16, 22-23.) In *In re Henry V.* (2004) 119 Cal.App.4th 522, similarly, the Court of Appeal reversed a removal disposition on grounds of insufficient evidence of substantial risk, making the observation that "out-of-home placement is not a proper means of hedging against the possibility of failed reunification efforts, or of securing parental cooperation with those efforts. It is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent." (*Id.* at p. 525.)

The present case is not similar to *In re Steve W.* or *In re Henry V.* Here, the juvenile court had a well-founded fear not just that the parents would disobey its orders by not participating in services, but that they did not understand the gravity of their shortcomings, were determined to deny responsibility and to blame others, and therefore would fail to put an end to the abusive and neglectful behavior that had caused the children's detention. As we interpret the record, the court ordered N.D.'s continued removal so that the parents could use services to begin rooting out the causes of their abusive and neglectful behavior, and thereby reduce the ongoing risk to N.D. before he came home. This case is not an instance of a juvenile court using its power to continue removal to compel a parent to participate in services in the absence of substantial evidence of ongoing risk to the child.

Mother argues that the court improperly relied on medical marijuana use alone as the reason it was continuing the children's removal. She cites *In re Alexis E., supra*, 171 Cal.App.4th 438, in which the Court of Appeal stated that a parent's "use of medical marijuana, *without more*, cannot support a jurisdiction finding ... any more than his use of the medications prescribed for him by his psychiatrist" could. (*Id.* at p. 453.) Our decision here is fully consistent with this holding. The juvenile court's ruling was not based on medical marijuana use alone. There was substantial evidence that the parents'

use of marijuana was abusive, even if they had medical conditions for which marijuana was a suitable treatment. Father said he was “not a stoner,” but both parents used marijuana long before they obtained medical recommendations for it, and they had long engaged in inappropriate marijuana-related behavior (exposing the children to smoke, feeding the children marijuana, using the children in cultivation and transportation of marijuana, smoking in the car, social smoking in the children’s presence with father’s parents) that had nothing to do with their medical needs. The juvenile court reasonably could find that marijuana abuse was a deeply ingrained problem in the family and that only superficial changes had been made. The juvenile court reasonably could make similar findings about the role physical abuse played in the family.

Finally, mother contends that the parents initially refused to participate in the case plan only because of their mistaken belief that their participation would be used against them as an admission that the allegations in the petition were true. She points to section 16501.1, subdivision (f)(12)(B), which provides: “Parents and legal guardians shall be advised that, pursuant to Section 1228.1 of the Evidence Code, neither their signature on the child welfare services case plan nor their acceptance of any services prescribed in the child welfare services case plan shall constitute an admission of guilt or be used as evidence against the parent or legal guardian in a court of law.” The record contains no evidence that mother and father ever received this advisement. Mother argues that in light of this, the court could not properly use the parents’ initial refusal to participate in the case plan as evidence of recalcitrance.

The record makes it clear, however, that father and mother initially refused to participate in the case plan not only because of their mistaken belief that participation could be used against them, but also because they were firmly convinced that they had done nothing wrong and needed no services. The court reasonably could consider the parents’ disinclination to accept responsibility for their own behavior as evidence of an ongoing risk that some of the conditions that led to the children’s detention remained.

There is no reason to conclude that, if father and mother had received the section 16501.1 advisement, they immediately would have overcome their belief in their innocence and willingly would have started participating in services. The evidence instead shows that, because of their failure to acknowledge the deficiencies in their behavior, it is overwhelmingly probable that they initially would have refused to participate in the case plan even if they had received the advisement.

For all the above reasons, we conclude that the juvenile court reasonably could find, by clear and convincing evidence, that there would be substantial danger to N.D.'s physical health, safety, protection or physical or emotional well-being if he were returned home.

II. Sufficiency of evidence of lack of reasonable alternatives

The juvenile court stated on the record that it had found by clear and convincing evidence that there were no reasonable means of protecting N.D. without removing him from his parents' custody. Mother argues that the court must have "failed to consider" the existence of reasonable alternative means because it did not state on the record what alternative means it had considered and rejected. Mother also argues that sufficient evidence did not support the court's finding.

There is no merit in the contention that the court must not have considered the issue because its statement on the record was limited to the finding itself and did not include a statement of alternative means the court considered and rejected. We do not impute error on the basis of silence. "A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The finding that there were no reasonable alternatives was supported by substantial evidence. The court's decision not to return N.D. was founded, in essence, on a determination that the parents were not credible when they professed that they had addressed the issues that had necessitated the children's detention. For all the reasons we have discussed, this determination was well-supported. In this case, the facts that supported this determination also supported the court's finding that there were no reasonable alternatives to continued removal, for the parents essentially believed they had done no wrong; they could not be relied upon to comply with a program of in-home measures designed to protect N.D.

Mother argues that the parents could have participated in counseling and other services with N.D. in their custody and that the department could have ensured N.D.'s safety by means of close supervision, including random, unannounced visits. The record, however, shows that the court reasonably could reject this course of action. Mother continued to believe her physical abuse of E.D. was E.D.'s fault. Father used his role in these dependency proceedings to try to harm E.D. by denying her access to medication. Father continued to refuse to consider the possibility that he was a marijuana abuser. If the parents believed they had done no wrong, supervision would likely be ineffective, and the threat of unannounced visits would not be a deterrent for them. Under the circumstances, the court could find that alternative measures like these would be ineffective.

The department argues that mother has forfeited this issue because she did not make an objection regarding it in the juvenile court. Since we agree with the department's position on the merits of this issue, we need not decide whether the issue was preserved for appeal.

DISPOSITION

The order of the juvenile court is affirmed.