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

In re Z.Q., a Person Coming
Under the Juvenile Court Law.

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

H039756
(Santa Clara County
Super. Ct. No. JD21571)

The Department of Family and Children's Services (Department) commenced a dependency proceeding on behalf of four-year-old Z.Q (minor or Z.) under Welfare and Institutions Code section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse).¹ In his appeal from the juvenile court's April 22, 2013 dispositional orders (§ 395), J.M., minor's presumed father (father), challenges the court's jurisdictional findings related to sexual abuse and its dispositional order removing minor from his custody. Father mainly

¹ All further statutory references are to Welfare and Institutions Code unless otherwise stated.

argues that those jurisdictional findings and the removal order were not supported by substantial evidence.

Upon careful review, we affirm.

I

Procedural History

On November 29, 2012, a juvenile dependency petition was filed on behalf of Z.Q. under section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse). On December 19, 2012, a first amended petition was filed under those same subdivisions.

The first amended petition alleged that on November 27, 2012, four-year-old Z. was "placed into protective custody due to repeated sexual abuse" by father. Father was "arrested after he admitted to police that he sexually molested his daughter." Father admitted to his last molesting the child on November 26, 2012. "[F]ather repeatedly digitally penetrated the child, telling her that she had a 'monster' inside of her that he needed to take out." "The sexual abuse caused the child to bleed. The father wiped the blood on a towel, showed the bloody towel to the child and told her that he took the 'monster' out of her."

The petition further alleged that mother, J.Q.,(mother) has a substance abuse history. "In 2011, prior to entering residential drug treatment, . . . mother would leave the child with friends and family and not return for days and sometimes weeks. The whereabouts of the mother would be unknown to those caring for the child." Mother was "currently in an adult-only residential substance abuse recovery program." Her "substance abuse places the child at risk of harm and neglect in her care."

A contested jurisdiction and disposition hearing commenced on April 15, 2013. On April 18, 2013, the court, pursuant to the parties' stipulation, ordered the admission of the audio and video files containing Detective Angel Mina's interviews of minor, father, and N.H. and provided that the transcripts of those files could not be relied upon as a true and accurate representation of the recordings themselves.

Following the hearing, the juvenile court found the allegations of the first amended petition to be true as alleged and minor was a child described by section 300, subdivisions (b) and (d). It adjudged minor to be a dependent child of the court. The court ordered minor to continue under the Department's care, custody, and control for placement with an approved relative or non-relative extended family member. It ordered reunification services and supervised visitation for both parents.

Father filed an appeal on June 12, 2013.

II

Contested Jurisdiction and Disposition Hearing

At the contested jurisdiction and disposition hearing, the juvenile court admitted into evidence the Jurisdiction/Disposition Report (dated December 20, 2012), addendums to that report (dated, January 10, 2013, March 18, 2013 and April 12, 2013). The court admitted a number of exhibits into evidence and heard the testimony of multiple witnesses.

The evidence showed the following. Father, who was from Honduras, and mother married in 2008. The parents separated and, in 2011, father obtained full custody of minor due to mother's substance abuse. Father had filed for divorce.

Mother had an admitted substance abuse problem and her drug of choice was methamphetamine. Mother had been homeless in January and February 2012. Mother had completed a residential treatment program on October 29, 2012 and then transitioned to outpatient services and into a transitional housing unit.

On the morning of Sunday, November 25, 2012, Z. made disclosures to G.M., her maternal grandmother. While minor and G.M. were sitting on her bed and watching T.V., minor revealed that her daddy took a monster out of her butt and pointed to her front. Minor said father told her that she had a monster and he had to take it out. According to minor, he took it out and then her "butt" started bleeding and he grabbed a little towel and cleaned her. G.M. called C.P.S.

On the evening of November 26, 2012, an emergency response social worker, Mi Sook Oh, went to the home of the reporting party, G.M. G.M. related what Z. had told her. Minor said father touches her butt, indicating her vagina. Minor said father told her that she had a "monster" inside of her and he had to take it out with his hand. Minor had showed G.M. her middle and index fingers and indicated that father "put his fingers into her butt to take the monster out." Father had a towel in his hand and put the monster in the towel. Father always had a towel whenever he took the monster out of her; minor showed a little hand towel to G.M. Minor said she was bleeding after father took the monster out and he wiped the blood on the towel. Social Worker Oh testified that it was very unusual for a four year old to give that level of detail.

On November 27, 2012, Detective Angel Mina, a San Jose police officer, interviewed minor at the Child Interview Center. Social Worker Oh observed the interview.

During the interview, minor was very distracted and unfocused. Detective Mina indicated that she found minor able to tell the difference between a truth and a lie "[i]n some respect" and explained that minor had a difficult time focusing and concentrating. Minor was able to respond to Detective Mina's initial interview questions to determine whether she knew the difference between a truth and a lie but the detective was unable to complete the entire protocol of questions because of her inability to focus. Minor's inability to focus did not affect, however, the detective's assessment of minor's disclosures.

On a diagram of a girl, minor identified the vagina as the "butt" and the buttocks as the "back." Minor eventually told Detective Mina that father took a monster out of her butt and she felt much better. Minor said it hurt inside her tummy when the monsters came out. Minor demonstrated on a diagram of a girl's body how father took out the monster. The detective testified, and the video of the interview showed, that minor placed her index and middle finger together and put in her fingers and pulled them out.

Minor indicated her clothes were pulled down when father took out the monsters. She further indicated that, after pulling the monster out, father put his hand in a towel.

During a break in or after Detective Mina's interview of Z., Social Worker Oh had an exchange with Z.'s mother. Z., who was present, volunteered some information. Minor said that "her dad took out monsters from inside of her butt," "he put [a] towel in her butt," and her father took "out the monster and then put it on the towel" Minor indicated that she pulled down her pants when father took the monster out. Minor told Oh that father took off his shirt and pants and wore his underwear.

Detective Mina twice interviewed father; the first interview was held in the sexual assault unit's interview room after father's arrest and the second interview was conducted in the main jail. Detective Sanchez was the translator during the first interview and Detective Perez was the translator during the second interview; both are certified Spanish speakers. Detective Mina does not speak Spanish and relied on those detectives to tell her what father was saying during the interviews.

During the first interview, father initially indicated that he slept on the floor and minor slept on the bed but he subsequently admitted that he slept with minor on the bed. Father initially denied that he took minor to the bathroom or gave her baths but he eventually admitted that, as her primary caretaker, he performed that care. Father initially said that he never touched minor but father changed his story after the officers began discussing DNA evidence.

Father subsequently disclosed that, after he picked up minor and brought her home the previous Sunday, minor went to the bathroom. Father saw she was scratching herself. He indicated that he had checked minor on Monday, the day before the interview, prior to taking her to the babysitter. Father indicated that minor woke up and started scratching; he took off her clothes. He wiped her with a towel and looked. He admitted to opening minor's legs and the lips of her vagina with his hand; his fingers slipped and went inside but not with any bad intention. Father indicated that he had previously told minor that if

she did not clean properly, worms would come out and this was the origin of the word "monster."

In that first interview, father indicated that he had twice checked minor; the first time had occurred four months ago. After minor had been with mother, father noticed minor was scratching and indicating she was hurting. After deciding to check, he opened the lips of minor's vagina with his hand and wiped with a towel. He indicated that his fingers did not go in that time but his fingers went in by mistake the second time. He reported that he had checked minor only two times.

When he was subsequently interviewed at the jail on November 29, 2012, father was asked to further explain how his fingers slipped in. Father demonstrated opening minor's vagina with his thumbs and indicated that Z. moved and a fingertip slipped inside. After the detective questioned how a finger could have slipped in under that scenario, father described a different scenario. He explained that his fingers of his left hand slipped in as minor was lying on her back on the bed, his right hand was holding her legs back, and his left hand was wiping her with a towel. Father said he was sorry, he cleaned her, and he put her pants back on.

Detective Mina found father was not credible and his explanations of his conduct were unreasonable. In Detective Mina's expert opinion, father put his finger in Z.'s vagina for sexual pleasure and not in the course of his "normal caretaker responsibility."

On November 29, 2012, father was released from custody. At that time, no charges had been filed against him.

An Addendum Report, dated April 12, 2013, incorporated a felony complaint, which was not file stamped, charging father with one count of violating Penal Code section 288, subdivision (a), and included an allegation of substantial sexual conduct with a victim under 14 years of age (Pen. Code, § 1203.066, subd. (a)(8)). Also attached to the report was a criminal protective order, filed February 22, 2013, that prohibited father from having any contact with minor.

Nancy Castro, whom the court recognized as an expert in child welfare investigation, risk assessment, and identification of appropriate interventions for abused and neglected children, agreed with the assessment and recommendations contained in the Jurisdictional/Disposition Report, which had been prepared by Social Worker Leslie Salmon.

Her review had included, but was not limited to, the CWCMS, a statewide case management system that child welfare social workers use to note encounters or interactions with the family or other service providers. Among other information, she had taken into consideration a CWCMS case note, dated November 29, 2012, indicated a social worker intern for the Department, who had not previously met minor, transported her to the children's interview center. Minor immediately asked the intern whether there would be "any more blood."

Although there was testimony that father's former girlfriend had made a doctor's appointment for Z. on November 1, 2012 to address Z.'s diarrhea or her "particularly scratchy bottom" and father had taken Z. to the appointment, Castro's review of the medical record of that visit disclosed no information that minor had "an itchy vagina." The record did not indicate that the stated purpose of the visit was to check an itchy vagina or diarrhea being experienced by minor; rather, the stated reason was "4yo well visit."

In Social Worker Castro's opinion, minor had been sexually abused by father. She relied upon minor's consistent statements regarding her father pulling monsters out of her "butt," which contrasted with father's inconsistent statements. She found father lacked credibility. In her opinion, there was not a reasonable explanation for him inserting his finger into minor's vagina and he needed to accept that he sexually abused his daughter. Minor's mother was still addressing substance abuse issues. Castro believed that minor could not be safely maintained in the home of either parent and placing minor back in father's care would put her at greater risk for future sexual abuse.

III

Discussion

A. Jurisdictional Findings

Father essentially challenges the sufficiency of the evidence to support the petition's sexual abuse allegations found true by the juvenile court.

1. Jurisdiction under Section 300, Subdivision (d)

A child is within the jurisdiction of the juvenile court under section 300, subdivision (d), if "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent"

Penal Code section 11165.1 states that "'sexual abuse' means sexual assault or sexual exploitation as defined" in the section. "Sexual assault" is defined by Penal Code section 11165.1 to include, among other crimes, a violation of Penal Code section 288, subdivisions (a), (b), or (c)(1) (lewd or lascivious acts upon a child) and a violation of Penal Code section 289 (sexual penetration). (Pen. Code, § 11165.1, subd. (a).)

"Under section 288(a), 'any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony.' 'Any touching of a child under the age of 14 violates this section, even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the intent to arouse or gratify the sexual desires of either the perpetrator or the victim.' (*People v. Lopez* (1998) 19 Cal.4th 282, 289)" (*People v. Shockley* (2013) 58 Cal.4th 400, 404.)

Penal Code section 289 defines "sexual penetration" to mean "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance,

instrument, or device, or by any unknown object." (Pen. Code, § 289, subd. (k)(1).) As statutorily defined, "[f]oreign object, substance, instrument, or device" includes "any part of the body, except a sexual organ." (Pen. Code, § 289, subd. (k)(2).)

Penal Code section 11165.1, also provides a nonexclusive list of conduct that qualifies as "sexual assault" that includes, among other conduct, "[a]ny intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose" and "[t]he intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child . . . for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose."

2. *Sufficiency of the Evidence*

a. *Standard of Review*

Well established principles guide our review of the sufficiency of the evidence. "In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193) "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] "[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is

appropriate]." ' [Citation.]" (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321)' (See also *In re Angelia P.* (1981) 28 Cal.3d 908, 924)" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

"The fact that it is possible to draw some inference other than that drawn by the trier of fact is of no consequence. [Citation.]" (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) In assessing the sufficiency of the evidence, reviewing courts "have no power to judge the effect, value or weight of the evidence, consider the credibility of witnesses or resolve conflicts in the evidence. [Citation]" (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1162.)

b. *Allegations Regarding Father's Admissions of Sexual Molestation*

The court found true the allegations that father admitted to police that he sexually molested his daughter and admitted to last molesting the child on November 26, 2012. Father contends that substantial evidence does not support those findings. We agree because father never admitted to having the requisite intent.

Father did not admit to touching minor "with the intent of arousing, appealing to, or gratifying" his or Z.'s "lust, passions, or sexual desires" (Pen. Code, § 288, subd. (a).) Father did not admit to digitally penetrating minor "for the purpose of sexual arousal, gratification, or abuse" (Pen. Code, § 289, subd. (k)(1).) He maintained that he had no bad intention.

The insufficiency of the evidence to establish that father admitted sexually molesting Z., however, does not constitute reversible error. (See Cal. Const., art. VI, § 13.) The court's true findings that are supported by substantial evidence established minor was a child within the juvenile court's jurisdiction.

3. *Substantial Evidence Supported Allegation of Digital Penetration*

Father asserts no substantial evidence supports the finding that he digitally penetrated Z. He argues that the court erred in accepting Z.'s statements regarding taking monsters out of her "butt," the word she used for vagina, and rejecting other evidence that

undermined those statements. Father maintains that Z.'s statements were unreliable because she was "a highly distracted and unfocused, 4-year-old, who was unable to discern truth from fiction." He also contends that the interpretation skills of the police officers, who acted as interpreters when Detective Mina questioned him, were "so grossly lacking" that the court could not properly rely on their translation of his statements.

The juvenile court was responsible for assessing credibility, weighing the evidence, and resolving evidentiary conflicts. (See *In re A.S.* (2011) 202 Cal.App.4th 237, 244.) "Our role in considering an insufficiency of the evidence claim is quite limited." (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1177.) As we have indicated, "[w]e do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the findings of the juvenile court [citation], drawing all inferences from the evidence which support the court's determination. [Citation.]" (*Ibid.*)

"Recent studies have undermined traditional notions regarding the unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately. 'Empirical studies have produced results indicating that most of these traditional assumptions are completely unfounded.' [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 315.) "[I]t is now well established that a child's testimony cannot be deemed insubstantial merely because of his or her youth." (*Ibid.*)

In this case, minor more than once reported that father took monsters out of her "butt," her word for vagina, and she showed how he did it. Father's inconsistent statements and affirmative statements concerning touching minor's genital opening that were made during the police interviews tended to corroborate her account.

It is true that Ramiro Rivas, a certified court interpreter, whom the court recognized as an expert in the translation or interpretation of English to Spanish and vice versa, testified on behalf of father with regard to deficiencies in the interpretation provided during the two recorded police interviews of father. In Rivas's opinion, neither

Detective Sanchez nor Detective Perez had acted as a competent interpreter and their translations involved many inaccuracies.

Witness Rivas acknowledged, however, that, during the first interview, Detective Sanchez used a Spanish word that means "inside" when he asked father with reference to father's fingers, "did they go inside?" He indicated that father's responses, that they went inside just a little bit but with no bad intention, were correct translations. He also acknowledged that, during the second interview, father used a Spanish word that in context was best translated as "slipped." He conceded that, when father was asked about the two fingers, father said "the two sort of slipped in because she moved."

Social worker Castro was a certified bilingual social worker and she had been raised speaking only Spanish. She spoke with father primarily in Spanish. Although Castro was not from Honduras, father had not ever expressed a problem with understanding her and she had no difficulty understanding him when he spoke.

Castro listened to the police interviews with father and understood the Spanish. She understood everything said by father and Detectives Sanchez and Perez. In her opinion, Detective Sanchez had, for the most part, provided an accurate interpretation of father's statements and Detective Perez had also accurately interpreted father's statements.

In the end, it was up to the juvenile court to assess credibility. " "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or

falsity of the facts upon which a determination depends." ' [Citation.]" (*People v. Maciel* (2013) 57 Cal.4th 482, 519.)

The act of penetrating a genital opening within the meaning of Penal Code section 289 includes any "penetration, however slight." (Pen. Code, § 289, subd. (k)(1).) Penetration of the labia majora is sufficient; penetration of the vagina itself is not required. (See *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371.) The evidence was sufficient to support the juvenile court's finding that father digitally penetrated minor.

4. *Purpose of Sexual Gratification*

Father argues that neither Z.'s statements nor his statements establish that the touching was done for the purpose of sexual gratification. As indicated, lewd touching requires the perpetrator to have "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child" (Pen. Code, § 288, subd. (a)) and sexual penetration requires the perpetrator to act for "the purpose of sexual arousal, gratification, or abuse" (Pen. Code, § 289, subd. (k)(1).) Father asserts that "[g]iven the lack of any suggestion of sexual motivation," his touching must be considered "most consistent with a non-sexual touching that occurred during the course of [his] routine parenting duties." He points out that Z. never indicated that "the touching was accompanied by kissing, masturbation, nakedness, or any other sexual action." He insists that neither Z.'s statements nor his statements provided evidence that he was "seeking sexual gratification by touching Z."

"Generally, a defendant's intent must, of necessity, be established by circumstantial evidence." (*People v. Swearington* (1977) 71 Cal.App.3d 935, 949.) The manner of touching may be relevant in determining intent or purpose. (Cf. *People v. Martinez* (1995) 11 Cal.4th 434, 445.) In addition, the relationship of the parties and the presence or absence of any nonsexual purpose may be relevant. (Cf. *id.* at p. 450, fn. 16.)

"Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. [Citation.]" (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 549.)

In this case, the court considered that father did "some changing in his story" On the other hand, the juvenile court found the testimony of Detective Mina and Social Worker Castro credible. It was the detective's opinion that father put his finger in Z.'s vagina for sexual pleasure and not in the course of his "normal caretaker responsibility." It was Castro's opinion that minor had been sexually abused by father. The juvenile court impliedly found father digitally penetrated Z.'s genital opening without a credible nonsexual purpose and disbelieved father's explanation for his conduct. It could reasonably draw the inference that father digitally penetrated Z.'s genital opening for the purpose of sexual gratification. "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Substantial evidence supports the finding that father digitally penetrated Z. for the purpose of sexual gratification and he sexually abused her.

The juvenile court properly found Z. was within its jurisdiction and could be adjudged a dependent child of the court pursuant to section 300, subdivision (d). It is sufficient that jurisdiction is proper under this subdivision. (See *In re I.J.* (2003) 56 Cal.4th 766, 773.)

B. Dispositional Order Removing Z. from Father's Custody

The juvenile court found by clear and convincing evidence that Z.'s welfare required her removal from father's physical custody. (See § 361, subs. (c)(1) & (c)(4); Cal Rules of Court, rule 5.694(d)(1) & (d)(4).)

Father argues that the "Department could not possibly meet its burden to show that placing Z. outside [his] care was necessary for her protection" because "no substantial evidence supports the jurisdictional findings upon which the removal order was

predicated." We have found that the court properly assumed jurisdiction under section 300, subdivision (d) (sexual abuse).

"[T]he clear and convincing evidence standard applies for any juvenile court decision taking a dependent child from the physical custody of his or her parents or guardian. However, the requirement that a party establish facts by 'clear and convincing evidence' applies only in the trial court." (*In re Walter E.* (1992) 13 Cal.App.4th 125, 139.) "The clear and convincing standard was adopted to guide the trial court; it is not a standard for appellate review. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750) The substantial evidence rule applies no matter what the standard of proof at trial." (*In re E.B.* (2010) 184 Cal.App.4th 568, 578.) The substantial evidence of sexual abuse of Z. by father also was sufficient to support her removal from his physical custody.

DISPOSITION

The dispositional orders are affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.