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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re OLIVIA T., a Person  
Coming Under the Juvenile  
Court Law.

B285727

(Los Angeles County  
Super. Ct. No. DK22607)

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

RICARDO T.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of  
Los Angeles County, Stephen Marpet, Juvenile Court Referee.  
Affirmed.

Matthew I. Thue, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,  
Assistant County Counsel, Brian Mahler, Deputy County  
Counsel, for Plaintiff and Respondent.

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Ricardo T., the presumed father of Olivia T., appeals the juvenile court's jurisdiction findings and disposition order removing then-two-year-old Olivia from his custody, releasing her to her mother B.W. (Mother) and terminating dependency jurisdiction with an order granting Mother sole legal and physical custody of Olivia and limiting Ricardo to monitored visitation. Ricardo contends the court's jurisdiction findings that Olivia was at substantial risk of sexual abuse and physical harm and its disposition order removing her from his custody are not supported by substantial evidence. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Juvenile Dependency Petition*

On April 24, 2017 the Los Angeles County Department of Children and Family Services (Department) filed a dependency petition pursuant to Welfare and Institutions Code section 300<sup>1</sup> alleging Ricardo had been arrested for uploading child pornography in violation of Penal Code section 311.1, subdivision (a),<sup>2</sup> and his conduct placed Olivia at substantial risk

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<sup>1</sup> Statutory references are to this code unless otherwise stated.

<sup>2</sup> Penal Code section 311.1, subdivision (a), provides "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops,

of serious physical harm and sexual abuse (§ 300, subds. (b), (d)). The petition also alleged that Ricardo had a history of domestic violence and substance abuse (marijuana) that put Olivia at substantial risk of serious physical harm. (§ 300, subds. (a), (b).)

2. *The Evidence Presented at the Combined  
Jurisdiction/Disposition Hearing*

Ricardo and Mother never married. During the more than two-year period they lived together as intimate partners, Ricardo physically assaulted Mother on multiple occasions, including when she was pregnant with Olivia, and later in Olivia's presence. After Ricardo violently attacked Mother in June 2015, Mother ended their relationship and obtained a 10-year criminal restraining order limiting their contact to peaceful custody exchanges. Ricardo was convicted of felony infliction of corporate injury to a spouse/cohabitant for the June 2015 assault and

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duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or to exhibit to, or to exchange with, others, or who offers to distribute, distributes, or exhibits to, or exchanges with, others, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, shall be punished either by imprisonment in the county jail for up to one year, by a fine not to exceed one thousand dollars (\$1,000), or by both the fine and imprisonment, or by imprisonment in the state prison, by a fine not to exceed ten thousand dollars (\$10,000), or by the fine and imprisonment."

sentenced to 270 days in jail, followed by five years' probation. He was also ordered to participate in domestic violence counseling.

After his release from jail, Ricardo lived with Olivia's paternal grandmother. He and Mother continued to co-parent Olivia pursuant to an informal shared custody agreement. Mother reported Ricardo had abided by the restraining order and no additional incidents of domestic violence between them had occurred. However, the Department reported on April 17, 2017 Ricardo threatened his current girlfriend and her family with a gun; and paternal grandmother told Mother Ricardo had "put hands" on her to stop her from intervening in a domestic dispute with his current girlfriend.

On April 19, 2017, while Ricardo was on probation for his domestic violence offense, a representative from an Internet file sharing website called law enforcement officials to report a person using a certain Internet Protocol (IP) address had uploaded a video to its platform that appeared to contain child pornography. The Los Angeles County Sheriff's Department, Human Trafficking Bureau traced the IP address to Ricardo. The video was of a young girl, 12 to 14 years old, masturbating. The Sheriff's Department executed a search warrant on Ricardo's home while Olivia was present. Ricardo was arrested, and his computer seized.

Ricardo appeared at the May 24, 2017 jurisdiction/disposition hearing in police custody. He submitted on the Department's reports and did not present additional evidence. Ricardo told social workers he had never engaged in any acts of domestic violence toward Mother and insisted his 2015 conviction was "a false conviction." Paternal grandmother

had misinterpreted a situation and erroneously believed he had hit Mother.

On May 24, 2017 the juvenile court sustained each of the allegations against Ricardo, finding Olivia a person described under sections 300, subdivisions (a), (b) and (d). The court declared Olivia a dependent child of the court, removed her from Ricardo's custody, released her to Mother's custody and terminated its jurisdiction with an order granting Mother sole physical and legal custody of Olivia and limiting Ricardo to monitored visitation.<sup>3</sup>

*3. Ricardo's Conviction for Knowingly Accessing or Downloading Child Pornography*

On June 1, 2017 Ricardo pleaded no contest in Los Angeles Superior Court (Super. Ct. case No. BA456588) to knowingly possessing or controlling an image depicting a child under 18 years of age engaging in or simulating sexual conduct (Pen. Code, § 311.11, subd. (a)). He was sentenced to five years' formal probation on condition he serve 181 days in jail. That criminal conviction requires Ricardo to register as a sex offender.

On April 17, 2018 we wrote the parties inquiring whether this court could properly take judicial notice of Ricardo's criminal conviction and registered sex offender status and, if so, whether, as a practical matter, the conviction mooted Ricardo's appeal. (See § 355.1, subd. (d) [evidence of a parent's criminal conviction for sexual abuse as defined in Penal Code section 11165.1 or evidence that parent is required as the result of a felony

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<sup>3</sup> The petition also alleged Mother had failed to protect Olivia from Ricardo. The court dismissed those allegations as unsupported.

conviction to register as a sex offender pursuant to Penal Code section 290 is “prima facie evidence” that the child of that parent is a person described by Section 300 and is at substantial risk of abuse or neglect[.]

Ricardo conceded judicial notice was permissible to evaluate mootness (*In re F.S.* (2016) 243 Cal.App.4th 799, 807-808, fn. 6), but argued the appeal was not moot. (See *In re N.S.* (2016) 245 Cal.App.4th 53, 60 [“the critical factor in considering whether a dependency appeal is moot is whether the appellate court can provide any effective relief if it finds reversible error”].) We agree. Because the presumption created by his criminal conviction is rebuttable, not conclusive, reversal of the juvenile court’s jurisdiction findings and disposition order, at least in theory, could provide Ricardo the opportunity to submit evidence to rebut the presumption, evidence he was not required to introduce at his jurisdiction hearing when the presumption was inapplicable and the Department had the burden of proof. Accordingly, we address the merits of Ricardo’s appeal.

## DISCUSSION

### 1. *Standard of Review*

“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.” [Citation.] “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.”” (*In re I.J.* (2013) 56 Cal.4th 766, 773.) We 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. (*Ibid.*; see *In re Quentin H.* (2014) 230 Cal.App.4th 608, 613.)

2. *Substantial Evidence Supports the Juvenile Court’s Jurisdiction Finding That Olivia Was at Risk of Sexual Abuse in Ricardo’s Custody*

Section 300, subdivision (d), authorizes dependency jurisdiction when the 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 or guardian.” Penal Code section 11165.1 defines sexual abuse to mean sexual assault or sexual exploitation, with the latter defined to include “[a] person who depicts a child in, or who knowingly develops, duplicates, prints, downloads, streams accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct . . . .” (Pen. Code, § 11165.1, subd. (c)(3).)

Ricardo contends the evidence to support a finding that Olivia was at risk of sexual abuse was thin. At the time of the jurisdiction hearing, Ricardo had been charged, not convicted, of distributing child pornography. There was no evidence of the location, date or time that Ricardo had uploaded the child pornography onto the file sharing website and no way to determine whether it had occurred while Olivia was with him at home or whether she had viewed, or was at risk of viewing, the video. Furthermore, Ricardo argues, there is no evidence that he

had ever sexually exploited, or attempted to sexually exploit, Olivia.

Ricardo's arguments miss the mark. Whether Olivia was home at the time Ricardo uploaded child pornography is not dispositive. The danger of sexual exploitation/sexual abuse from his interest in child pornography is just as acute whether Olivia was present or not. (Cf. *In re D.G.* (2012) 208 Cal.App.4th 1562, 1571 [“[t]here can be no normal sexual interest in any child”].) Moreover, that Olivia had not been exploited in any way did not mean jurisdiction was unwarranted. (See *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216 [“[t]he court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child”]; *In re R.V.* (2012) 208 Cal.App.4th 837, 843 [same].)

Citing *In re B.T.* (2011) 193 Cal.App.4th 685 (*B.T.*), Ricardo suggests his sexual interest in an unrelated 12-to-14-year-old girl is fundamentally different from targeting his own two-year-old child. In *B.T.* a 38-year-old mother engaged in a sexual relationship with the 15-year-old son of a neighbor that resulted in her pregnancy. Criminal charges were filed against the mother. The juvenile court found the mother's affair with her teenage neighbor put her children, including her infant daughter, at risk of sexual abuse. The *B.T.* court disagreed, finding no substantial evidence to support that leap—the mother's older children were all well-adjusted and denied being abused, sexually or otherwise, and there was no expert testimony or other evidence to suggest her sexual relationship with an unrelated 15-year-old boy placed her infant daughter at risk. (*Id.* at pp. 695, 697-698.)



Ricardo's reliance on *B.T.* is misplaced. Unlike the teenage children in *B.T.*, Olivia was of tender years and lacked a lengthy history with Ricardo; and unlike the infant B.T., Olivia is the same gender as the young girl in the pornographic video Ricardo accessed. (See *B.T.*, *supra*, 193 Cal.App.4th at p. 694 [distinguishing circumstances when minor target of parent's sexual interest is same gender as child that is subject of dependency proceedings].) Moreover, while the *B.T.* court deemed the Department's position that "an adult woman who has had a consensual relationship with an unrelated 15-year-old boy will probably sexually abuse her infant daughter" "a complete non-sequitur" (*ibid.*), the same cannot be said for a parent's interest in child pornography. Quite the contrary, the Legislature has deemed a criminal conviction for possessing child pornography *prima facie* evidence the child is in danger of sexual abuse while in that parent's custody. To be sure, that evidentiary presumption is inapplicable when, as here, criminal charges were still pending at the time of the jurisdiction hearing. Nevertheless, it is certainly not a leap, much less a non sequitur, to conclude that substantial evidence of Ricardo's interest and activities relating to child pornography created a substantial risk to Olivia of sexual abuse.

Finally, Ricardo's observation that the evidentiary burden to support his arrest (probable cause) is lower than that required to support jurisdiction (preponderance of the evidence), while legally correct, is simply beside the point. The Department presented evidence connecting the person who uploaded the child pornography to Ricardo's IP address. No evidence was presented to suggest the IP address did not belong to Ricardo or that another individual uploaded the material. The evidence in the

record, reasonable, credible and of solid value, amply supported the juvenile court's finding that Olivia was at risk of sexual abuse in Ricardo's custody. (Cf. *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216, fn. 4 [although burden of proof at disposition is by clear and convincing evidence, the burden of proof is for the edification and guidance of the trial court; the appellate court reviews the record for substantial evidence]; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881 [same].)<sup>4</sup>

3. *The Court's Disposition Order Was Supported by Substantial Evidence*

A child may not be removed from a parent or guardian with whom the child resides at the time the petition was initiated unless there is clear and convincing evidence of a substantial danger to the physical health, safety protection, or physical or emotional well-being of the child and there are no reasonable means to protect the child other than by removing the child from his or her parent's custody. (§ 361, subd. (c); *In re R.V.*, *supra*, 208 Cal.App.4th at p. 849.) At disposition the court shall determine whether reasonable efforts have been made to prevent

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<sup>4</sup> In light of our holding affirming the court's sexual abuse finding, we need not consider Ricardo's challenge to the court's alternate bases for dependency jurisdiction. (See *In re I.J.*, *supra*, 56 Cal.4th at p. 773 ["[w]hen a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that is enumerated in the petition is supported by substantial evidence"]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [same].)

or to eliminate the need for removal of the child from his or her home and “shall state the facts on which the decision to remove the minor is based.” (§ 361, subd. (e).)

The same evidence supporting the court’s jurisdiction finding under section 300, subdivision (d), also supports the court’s disposition order. (§ 361, subd. (c); *In re T.V.* (2013) 217 Cal.App.4th 126, 135.) Nevertheless, Ricardo contends the court failed to consider meaningful alternatives short of removal, such as whether paternal grandmother could protect Olivia while Olivia was in Ricardo’s custody or whether a more limited disposition order requiring Ricardo to stay off the Internet and/or submit to unannounced Department visits would protect Olivia. However, these alternatives were not presented to the juvenile court nor would they protect Olivia from the risk of Ricardo’s sexual abuse. Paternal grandmother could not supervise Olivia 24 hours a day every day; random visits from the Department could provide only limited supervision; and an order to refrain from Internet use, even if the court could be assured Ricardo would comply with it, would only protect Olivia from viewing child pornography in Ricardo’s custody. It would not protect her from the risk of his sexual abuse.

Finally, while the Department articulated the reasons removal was warranted, the juvenile court failed to explicitly state on the record the facts on which its removal order was based. The court erred. (§ 361, subd. (e).) Nonetheless, on this record it is not reasonably probable such findings, had they been expressly made, would have been in favor of continued parental

custody. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218 [and citing cases].)<sup>5</sup>

### DISPOSITION

The juvenile court's jurisdiction findings and disposition order are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

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<sup>5</sup> We are concerned about the frequency with which juvenile courts appear to disregard the Legislature's directive to articulate on the record the reasons supporting the courts' removal orders. While we evaluate that error for prejudice (see Cal. Const., art. VI, § 13 [before judgment can be reversed for ordinary error, it must appear error has resulted in a miscarriage of justice]; *In re Christian I.* (2014) 224 Cal.App.4th 1088, 1098-1099 [when juvenile court violates a statutory mandate, reversal is justified only when it is reasonably probable that the court would have reached a result more favorable to appellant in the absence of the error]), harmless error analysis is hardly a failsafe, particularly in those cases in which the record is not as clear as the juvenile court may otherwise believe. Accordingly, we urge all dependency bench officers to comply with section 361, subdivision (e)'s mandate to make the reasons for removal clear on the record.