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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CIARA T., a Person Coming Under the Juvenile Court Law.	B268364 (Los Angeles County Super. Ct. No. CK57750)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CEDRIC T., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Annabelle Cortez, Judge. Affirmed in part, reversed in part.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Cedric T. (father) appeals from the juvenile court's order of July 22, 2015 declaring Ciara T. (daughter) a dependent child of the court under Welfare and Institutions Code section 300.[1] He contends substantial evidence does not support the findings he posed a risk to daughter of physical harm under section 300, subdivisions (a) and (b), and of sexual abuse under section 300, subdivision (d). We disagree as to the allegations under subdivisions (a) and (b), but agree as to the allegation under subdivision (d). Therefore, we reverse the order sustaining the petition as to father under subdivision (d), but otherwise affirm.

BACKGROUND

Daughter was born in March 2015 to father[2] and S.B. (mother). The parents had been in an on-again, off-again relationship since 2012 that included domestic violence. Daughter lived with mother and a half-sibling and had visits with father.

Mother, who had a history of violent outbursts, stated father frequently provoked arguments with her which at times escalated to physical violence. The police were called on a number of occasions. The parents engaged in a heated argument in the hospital when daughter was born. Mother required paternal grandmother to be present when father came for visitation, because, when she and father were alone, they always argued and "it wasn't a safe environment to be in."

Father had a criminal history. In 1992, when he was a juvenile, he committed second degree robbery (Pen. Code, § 211). In 1994, when he was 17 years old, he committed rape by force or fear (Pen. Code, § 261, subd. (a)) and assault with a deadly weapon not a firearm with great bodily injury likely (Pen.

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[1] All undesignated section references are to the Welfare and Institutions Code.

[2] Father is daughter's presumed father.

Code, § 245, subd. (a)(1)). Convicted as an adult, he was placed in the custody of the California Youth Authority in 1995 and sentenced to 14 years in prison in 1997. He lived in a cottage designated for sexual offenders during the three years that he was in the custody of the California Youth Authority. The treatment he received was individual counseling two to three times per week. He did not complete the program, and did not receive a written report from the program's staff documenting the progress he had made. All treatment for sexual offending ceased when he was transferred from the California Youth Authority to state prison. At some point, he wrote a letter to the victim apologizing for his crimes, though he had no subsequent contact with her and did not know if she received the letter. After 11 years of incarceration, he was released from prison in 2005 and from parole in 2008. In 2012, he was convicted of grand theft from person (Pen. Code, § 487, subd. (c)) and vandalism (Pen. Code, § 594, subd. (a)). He was sentenced to three years probation on condition he served 365 days in jail. He testified he was released from jail after 30 days. It was expected he would be released from probation in June 2015.

Mother did not believe that father posed a risk of sexual abuse to her children. Mother's four-year-old daughter by another father told the department that father had never inappropriately touched her.

On May 7, 2015, father arrived agitated and angry to pick daughter up for visitation. Mother stated father made disrespectful comments which provoked a heated argument in daughter's presence. When father refused to leave, mother struck him on the back, threw a diaper bag at him, and pushed him out of the house. Mother believed father intentionally provoked her. Mother was arrested for spousal battery, and daughter was taken into protective custody and released to father. The Department of Children and Family Services (department) filed a

petition under section 300. Father wanted to continue having a relationship with mother, though not an intimate relationship, as they were both the parents of daughter.

On July 22, 2015, daughter was declared a dependent of the court based on the following sustained allegations under section 300, subdivisions (a) (risk of physical harm inflicted non accidentally), (b) (risk of physical harm due to failure to protect), and (d) (risk of sexual abuse). It was alleged that the parents engaged in a violent physical altercation in the child's presence on May 7, 2015 and have a history of engaging in verbal altercations in the children's presence. Mother struck father, threw a diaper bag at him, and pushed him. In May 2015, mother was convicted of domestic battery. Father is a registered sex offender, having committed the crime of rape by force and fear, and has convictions for robbery second degree with firearm use and assault with a deadly weapon not a firearm with great bodily injury likely.

Concerning the risk of sexual abuse, the court noted that the underlying conviction was for a forcible rape, not a statutory rape, and it involved an assault with a weapon and the likelihood of great bodily injury. The court found father did not meet the burden of producing evidence to rebut the section 355.1, subdivision (d) presumption, even though the conviction was old.[3] "[W]hile [father] participated in classes in the cottage [at California Youth Authority], . . . there's nothing before the Court with respect to an actual completion of any substantive progress that he may have made in the class. [¶] . . . Thereafter, after his release, . . . he's had multiple law-related legal issues."

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[3] Under section 355.1, subdivision (d), a parent's prior conviction of sexual abuse or a requirement to register as a sex offender is prima facie evidence that the child is a person described by section 300, subdivisions (a), (b), (c), or (d), constituting a presumption affecting the burden of producing evidence.

Concerning the risk of harm from domestic violence allegedly engaged in by father, the court found daughter was present during the May 7 incident and the police were involved in domestic violence issues. "[D]omestic violence is not just the physical altercations, but also the Court considers the domestic violence to be broader, to also include the verbal altercations. [¶] . . . [D]omestic violence in the household where children live creates a substantial risk of serious harm to the kids. . . . [T]he court need not wait until the kids are actually harmed for the court to assume jurisdiction . . . and find that the kids are at risk of harm. [¶] . . . [Father] also has law-related issues concerning battery."

The court ordered daughter placed in home of parent-father under department supervision, with family maintenance services. Mother was granted monitored visits two to three times per week. Parents were ordered to comply with a criminal protective order in mother's criminal case, mother was to have no contact with father, and father was not to be present at mother's visits. Father was ordered to participate in individual counseling and other services narrowly tailored to address case issues.

DISCUSSION[4]

I. *Section 300, subdivisions (a) and (b)*

Father contends substantial evidence does not support the findings he posed a risk to daughter of suffering physical harm under section 300, subdivisions (a) and (b). We disagree.[5]

"'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

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[4] As an initial matter, father acknowledges the sustained allegations that mother's conduct creates a risk of harm under section 300 constitutes an independent basis for juvenile court jurisdiction over daughter. "[The juvenile] court may base jurisdiction on the actions of one or both parents, and once established, the court may enter orders binding both parents. [Citation.] As well, 'an appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence.' [Citation.]" (*In re H.R.* (2016) 245 Cal.App.4th 1277, 1285-1286.) However, because the findings at issue might prejudice father in the future and are the basis for counseling orders, we consider father's contentions on the merits.

[5] Because father's counsel "submitted" the allegation under section 300, subdivision (b) to the court without argument, and argued other points, the department contends that he invited any error and thus forfeited his right to challenge the court's finding sustaining the subdivision (b) allegation. However, the principle of invited error applies "where a party, for tactical reasons, persuades the trial court to follow a particular procedure." (*In re Jaime R.* (2001) 90 Cal.App.4th 766, 772.) Here, father's submission of the issue to the court was not inviting the court to follow a particular procedure. Nor was it the same as admitting the allegation or stipulating to the truth of the allegation. Counsel simply submitted on one issue and concentrated on arguing others. Counsel's conduct did not relieve the court of its obligation to determine whether sufficient evidence supported asserting jurisdiction under the subdivision (b) allegation. Thus, the issue is not forfeited.

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. [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.]" [Citation.]' [Citation.]" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

Subdivision (a) of section 300 describes a child who suffered or there is a substantial risk the child will suffer serious physical harm inflicted nonaccidentally by the child's parent. Subdivision (b) describes a child who suffered or there is a substantial risk the child will suffer serious physical harm as a result of the parent's failure to adequately supervise and protect. "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) "[T]he court may . . . consider past events when determining whether a child presently needs the juvenile court's protection. [Citations.] A parent's past conduct is a good predictor of future behavior. [Citation.] 'Facts supporting allegations that a child is one described by section 300 are cumulative.' [Citation.] Thus, the court 'must consider all the circumstances affecting the child, wherever they occur.' [Citation.]" (*In re T.V.* (2013) 217 Cal.App.4th 126, 133.)

A child's exposure to domestic violence may serve as the basis of a finding of jurisdiction under section 300, subdivisions (a) and (b). (*In re R.C.* (2012) 210 Cal.App.4th 930, 941; *In re M.M.* (2015) 240 Cal.App.4th 703, 720-721.)

“‘“[D]omestic violence in the same household where children are living . . . is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.” [Citation.]’” (*In re R.C., supra*, 210 Cal.App.4th at p. 941.)

Concerning the finding that father’s conduct creates a risk of physical harm under section 300, subdivisions (a) and (b), father contends that he was the victim of mother’s domestic violence, and that the court improperly expanded the definition of domestic violence to include verbal arguments. However, that mother engaged in violence against the father in the incident which precipitated the instant petition, and that father’s conduct might have been limited to verbal arguments with mother, does not mean that he did not create a risk of domestic violence to which daughter was exposed. The court accurately stated that father had a three-year history of participating in domestic violence with mother. The police were called on a number of occasions. There was evidence that mother became physically violent when angry, but that father nonetheless provoked and participated in verbal arguments leading to such physical violence by mother. Indeed, daughter was present during the argument on May 7 that escalated to punching, shoving, and throwing an object. Despite the volatility of his interactions with mother, father intended to continue having a nonintimate relationship with her. Under these circumstances, father’s provoking or participating in arguments with mother, who has a propensity to escalate to physical outbursts, and his desire to continue in a nonromantic relationship with her, created a risk of physical violence, placing daughter at risk of harm.

The decision in *In re E.B.* (2010) 184 Cal.App.4th 568 is analogous in principle. There, the mother contended that “she was exclusively the victim of domestic violence” and “nothing she did or is likely to do endanger[ed] the

children." (*Id.* at p. 575.) The court rejected the argument: "Mother admitted to DCFS that Father abused her emotionally and physically, the latter within the hearing of the children. When he verbally berated her after Daughter was born she would sometimes leave, but she always returned when he apologized. In February 2008 he struck her four times and the children heard her screaming, yet she stayed with him another seven months. Mother's remaining in the abusive relationship, and her record of returning to Father despite being abused by him, supports the juvenile court's finding that her conduct in the domestic altercations endangered the children." (*Id.* at p. 576.)

By analogy, in the instant case, father's intentional conduct (provoking mother and arguing with her, leading her to act out in violence) helped create the circumstances in which domestic violence by mother in the presence of daughter occurred, even though father was ultimately the recipient of the violence. Based on the foregoing, the court could reasonably conclude daughter is at current risk of harm from father's engagement in domestic violence.

II. *Section 300, Subdivision (d)*

Section 300, subdivision (d) describes a child who has been or is at substantial risk of being sexually abused by his or her parent. In the instant case, concerning the finding daughter is at risk of being sexually abused, the court concluded that father had not rebutted the presumption of section 355.1, subdivision (d). We disagree.

"Section 355.1 provides that a parent or guardian's prior conviction of sexual abuse as defined in Penal Code section 11165.1 or the parent's legal obligation to register as a sex offender as a result of a felony conviction pursuant to Penal Code section 290 constitutes 'prima facie evidence in any proceeding that

the [child who is the subject of the dependency proceeding] is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence.' [¶] The effect of a presumption affecting the burden of producing evidence is well established: It 'require[s] the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.' [Citations.] Once rebutted, the presumed fact may still be considered by the fact finder, as well as any reasonable inferences to be derived therefrom [citation], but without regard to the benefit of the presumption." (*In re Quentin H.* (2014) 230 Cal.App.4th 608, 614-615.)

In the present case, in 1995, at age 18, father was tried as an adult and convicted of rape by force or fear (Pen. Code, § 261, subd. (a)) and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), crimes he committed in 1994 at age 17. He was placed in the California Youth Authority in 1995, where he was housed in a cottage designated for sexual offenders and received individual counseling two to three times per week, though he did not complete the program, and did not receive a written report from the program's staff documenting his progress. In 1997, he was sentenced to 14 years in prison and his treatment ended. He was released from prison in 2005 and from parole in 2008, and complied with the requirement that he register as a sex offender.

On these facts, despite the age of the convictions and the absence of any allegations of sexual abuse since, the court found that father had not rebutted the presumption of section 355.1 because of the seriousness of the convictions and the absence of evidence concerning his completion of, or progress in, sex offender

treatment following the convictions. Although we do not discount the nature of father's prior convictions, we cannot agree that the evidence, viewed as a whole, failed to rebut the presumption of section 355.1. The conduct underlying the convictions occurred in 1994 when father was 17 years old, 21 years before the July 2015 hearing in the instant case. Regardless of the absence of evidence that father successfully completed a program for sex offender counseling, there was absolutely no indication in the evidence that father had engaged in sexual conduct of a criminal or inappropriate nature of any kind since his prior crimes. Indeed, the evidence was to the contrary. Mother did not believe that father posed a risk of sexual abuse to her children, and her four-year-old daughter by another father told the department that father had never inappropriately touched her. Father's crimes after his release from prison (grand theft from the person and vandalism) were not sex offenses. He had written a letter of apology to his rape victim, which showed a level of understanding of the harm his crimes had caused, and he was in compliance with the requirement that he register as a sex offender.

Thus, despite the serious nature of father's prior rape conviction and his inability to successfully complete a sex offender counseling program while incarcerated, the evidence as a whole would certainly support a finding by a reasonable trier of fact that daughter was not at substantial risk of sexual abuse from father. Therefore, the evidence presented to the court rebutted the presumption of section 355.1 regarding the allegation under section 300, subdivision (d) (substantial risk of being sexually abused by father). The presumption therefore disappeared. Further, absent the presumption, we conclude that there was insufficient evidence to sustain the allegation under subdivision (d). There was, in short, no substantial evidence that daughter was at risk of sexual abuse from father. Therefore, we reverse the finding sustaining that allegation.

DISPOSITION

The order sustaining the petition as to father is affirmed regarding the allegations under section 300, subdivisions (a) and (b), and reversed as to the allegation under section 300, subdivision (d).

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.