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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re E.S., A Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.S.,

Defendant and Appellant.

B253531

(Los Angeles County
Super. Ct. No. CK42745)

APPEAL from orders of the Superior Court of Los Angeles County,
Marilyn K. Martinez, Judge. Affirmed.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for
Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel, Dawyn Harrison,
Assistant County Counsel, and Kimberly Roura, Deputy County Counsel, for Plaintiff
and Respondent.

J.S. (father) appeals from the juvenile court's orders sustaining the jurisdictional findings against him and removing his eight-year-old son, E.S., from his custody. Father contends there was no substantial evidence in support of the juvenile court's finding that there was a substantial risk E.S. would be sexually abused. Father's arguments are without merit and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 12, 2013, an eighteen-year-old man, J.R., went to the police station to file a report against father. J.R. reported that, the previous day, father had approached him in the YMCA locker room while J.R. was getting dressed. Father asked J.R. if he was a student at the local high school and offered to give J.R. \$50.00 if he would buy father a high school shirt. Father said to J.R., “ ‘What are you, 15 or 16?’ ” J.R. responded, “ ‘Why?’ ” and did not tell father his age. Father then asked J.R. if he was looking for work because father needed someone to assist him with his photography business.¹ Father said that he had a studio, photographed large parties, and needed help setting up equipment. They exchanged phone numbers.

Later that evening, J.R. received text messages from father. Father started by asking J.R. if he wanted to make \$100. He then asked whether J.R. was “bisexual, or curious and open[-]minded,” and if J.R. would do a nude photo shoot from the waist down. Father also wrote that he would pay J.R. based on what he was willing to do and listed amounts of money he would pay for various sexual acts.

¹ Father actually works in the medical field.

J.R. asked father to send him a sample photo so that he could see what kind of shoot father intended to do. Father texted J.R. several photos of male and female genitalia and wrote that “[h]igh [s]chool kids send him pictures.” Only one of the photos showed a face, and J.R. said he thought he recognized the subject as a high school student he wrestled against the year before. Father wrote that “he paid kids money for sexual acts” and that he knows a lot of bisexual students at the local high school “that love money and go to him.” Father also asked if J.R. would masturbate in front of father for money. J.R. said that he thought father was a “sexual predator” and reported him to the Los Angeles Police Department.

On April 18, 2013, the police executed a search warrant at the house where father lived with E.S. and E.S.’s mother. The police seized father’s cell phone and two computers and found 36 photos on those devices that met the “ ‘child porn criteria.’ ” Detective Quint interviewed father, who initially denied soliciting sexual acts from J.R. for money, stating that he had only asked J.R. to purchase a high school shirt for him. The detective then explained to father that the police had possession of the entire text conversation. At that point, father said he wanted to “ ‘[h]ook up’ ” with J.R. Father said J.R. told father he was eighteen years old and that J.R. “looked younger.” Father further said that he had lied about engaging in sexual acts with high school students, and had only said this to “ ‘make [J.R.] more comfortable.’ ”

On April 23, 2013, the Department of Children and Family Services (Department) received a referral from the police department alleging that E.S. may be a victim of sexual abuse based on the criminal investigation of father. The Department

investigated the allegations and filed a petition under Welfare and Institutions Code² section 300, subdivision (d) alleging that father's sexual abuse of minors placed E.S. at risk of harm and sexual abuse.³ The trial court detained E.S. and father agreed to move out of the home and have his visits with E.S. monitored.

In the Jurisdiction/Disposition Report, the Department reported the results of its interviews with various witnesses. The Department interviewed E.S., who denied that father had engaged in any inappropriate behavior with him. However, E.S. said that he had showered with father in the past and added that he and father had “ ‘wrestle[d]’ ” in the shower. E.S. described a naked wrestling incident in which father had grabbed him from the waist, picked him up in the air, and put him against the shower wall before placing him back down. E.S. found this incident to be humorous.

Father told the Department he was “upset” that he was “suspected of being a ‘pedophile,’ ” and “adamantly denied that he ha[d] done anything wrong.” He further stated that he was “not worried about the police investigation because the police [would] not discover anything inappropriate on his electronic devices.”

The Department also interviewed the police officers who had executed the search warrant. Detective Quint described the photos father had texted to J.R. as follows: “ ‘all but one image was from the neck area down to the thigh area only. . . . I do

² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

³ The petition also alleged that the parents' abuse of marijuana endangered E.S. This charge was later dismissed.

believe that the pictures are of children. . . . The people in the pictures are not developed. For instance, one was a picture of a girl . . . and there's no breast development on this girl. There were [] also photos of male and female genitalia and some of these kids lacked pubic hair.' ”

Detective Quint also said that the police had found in father's possession “ ‘a couple’ ” “ ‘strange’ ” videos of E.S. “ ‘lying on the bed.’ ” E.S. was fully clothed in the videos, but the detective said he found it “ ‘odd’ ” that “ ‘it's a constant video of the boy lying on the bed.’ ” “ ‘[Y]ou can tell that []father is taping him because you hear his voice, but . . . [there is] [n]o interaction and minimal talking.’ ”

With respect to photos found on father's computer, Officer Aldridge said that “ ‘the pictures . . . appeared to be of children. We're not medical professionals, so we can't tell you for sure that they were kids, but the details . . . were consistent with being minors. There was lack of pubic hair, features were not very well developed, there was lack of breast development in the female pictures.’ ”

The jurisdictional/dispositional hearing occurred on December 17, 2013. The Department submitted its reports into evidence as well as the police report on the investigation of father. Father also submitted a supplemental police report into evidence. No witnesses were called.

The juvenile court sustained the petition's allegations regarding sexual abuse, finding that father had taken the subject photographs of minors “for the purpose of sexual stimulation of himself, the viewer,” and that father's possession of child pornography on his cell phone, which was not locked, “placed his child at risk by

reasonably making an opportunity for his young child to observe the photographs.” The court also found that “[father] is in complete denial of his conduct His denial is a factor why his child is at risk because he doesn’t understand the wrongdoing of his conduct.” The juvenile court removed E.S. from father’s custody and ordered E.S. to remain in mother’s custody with family maintenance services provided for father. Father timely appealed.

CONTENTIONS

Father contends there was no substantial evidence supporting the juvenile court’s findings that E.S. was at substantial risk of sexual abuse.

DISCUSSION

1. Applicable Law

Section 300, subdivision (d) establishes jurisdiction over a child when parents sexually abuse the child or there is a substantial risk the child will be sexually abused as defined in Penal Code section 11165.1. Subdivision (c) of Penal Code section 11165.1 equates sexual abuse of children with their “sexual exploitation” which is defined as, among other things, hiring a minor to engage in “sexual conduct” in child pornography, or possessing or distributing such pornography. (Penal Code, § 11165.1, subd. (c).) “Sexual conduct,” for purposes of this statute, includes the “exhibition of the genitals . . . for the purpose of sexual stimulation of the viewer.” (Penal Code, § 311.3, subd. (b)(5).)

We review the juvenile court’s jurisdictional and dispositional findings for substantial evidence.⁴ (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) Substantial evidence is “evidence that is reasonable, credible and of solid value.” (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1401.) “ ‘In making this determination, all conflicts [in the evidence and in reasonable inferences from the evidence] are to be resolved in favor of the prevailing party, and issues of fact and credibility are questions for the trier of fact. [Citation.] In dependency proceedings, a trial court’s determination will not be disturbed unless it exceeds the bounds of reason. [Citation.]’ ” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.)

2. *There Was Substantial Evidence That E.S. Was at Substantial Risk of Sexual Abuse*

Father contends that the juvenile court erred in finding that E.S. was at substantial risk of sexual abuse because there was insufficient evidence father had engaged in improper conduct involving a minor. Specifically, father argues that (1) the

⁴ Father contends that the proper standard of review here is de novo because the trial court was not required to “make determinations of credibility of witnesses,” citing to *People v. Jackson* (2005) 128 Cal.App.4th 1009. The *Jackson* court applied de novo review to the trial court’s denial of a request to unseal records on the ground that First Amendment rights were involved and the trial court had made no findings of fact not relevant to the First Amendment issue. Here, by contrast, we review the juvenile court’s jurisdictional and dispositional findings which, under well-established law, are subject to the substantial evidence standard of review. (See, e.g., *In re David M.*, *supra*, 134 Cal.App.4th at p. 828.) Furthermore, father’s argument that de novo review applies whenever “the trial court does not take testimony” is without merit. Pure questions of law based on undisputed facts are subject to de novo review. (*1300 N. Curson Investors, LLC v. Drumea* (2014) 225 Cal.App.4th 325, 332.) Here, that the witnesses did not testify in court is irrelevant; the trial court was still required to make factual findings based on the record of disputed facts before it.

evidence did not establish that the photographs in father's possession depicted minors, (2) those photographs did not show sexual conduct, and (3) father did not sexually abuse E.S.

First, there was substantial evidence the individuals in the photographs in father's possession were minors. Father essentially argues that we should reweigh the evidence in the light most favorable to father and disregard all contrary evidence. He contends that the police officers' opinions were not of "solid value" because the officers were not "sure" the photographed subjects "were kids." Father further contends that the photographs of pre-pubescent bodies could have indicated a "delay[]" in puberty in an adult, not necessarily an adolescent body. However, "where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; [] we have no power to judge of the effect or value of the evidence, to weigh the evidence . . . or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370, disapproved on another point in *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2.)

Here, Officer Aldridge and Detective Quint opined that the photos of nude individuals found on father's phone and computer depicted minors. In addition, the pre-pubescent characteristics of certain subjects in those photos led to the reasonable inference that those individuals were children. Even father apparently believed that the subjects in the photos on the phone were minors, as he texted them to J.R. stating that they depicted high school students. Father never qualified that statement to indicate that

those individuals were part of the small minority of high school students who are over 18 years old.

Second, there was substantial evidence father had sexually abused minors through hiring them to be photographed engaging in sexual conduct. As stated above, sexual abuse of a child as defined in the Penal Code includes hiring a minor to exhibit his or her genitals “for the purpose of sexual stimulation of the viewer” or possessing such pornography. (Penal Code, §§ 11165.1, subd.(c), 311.3, subd. (b)(5).) The court in *People v. Kongs* (1994) 30 Cal.App.4th 1741 established the following guidelines for determining whether a photo of a child is intended to sexually stimulate a viewer:

“1) whether the focal point is on the child’s genitalia . . . ; [¶] 2) whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; [¶] 3) whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; [¶] 4) whether the child is fully or partially clothed, or nude; [¶] 5) whether the child’s conduct suggests sexual coyness or a willingness to engage in sexual activity; [¶] 6) whether the conduct is intended or designed to elicit a sexual response in the viewer.” (*Id.* at p. 1755.) Any one of these factors will support the finding. (*Ibid.*)

Here, father argues that there was insufficient evidence that the photos were intended to sexually stimulate the viewer. However, with respect to the photos father texted to J.R., four of those images focused on the individuals’ genitalia as they depicted them “from the neck area down to the thigh area.” Accordingly, under *Kongs*, they met the definition of a photo “intended to sexually stimulate a viewer.” Father also

argues that the photos “might have [been] collected [] for their artistic value” or “[h]e might have [had] a medical interest in the photos” This is simply speculation as father never submitted evidence to this effect. In addition, such speculation is undermined by the context in which father sent these photos to J.R.; father texted these photos to J.R. with the explanation that he had hired the depicted minors to perform sexual acts.

Third, there was substantial evidence father believed J.R. was a minor when father propositioned him, and that father had engaged in sexual conduct with other minors. Father argues that he knew J.R. was 18 years old when he texted J.R. However, the juvenile court chose to believe J.R.’s account of events: that father had asked him if he was 15 or 16 years old, and that J.R. had never told him his age. Under the substantial evidence standard, we defer to the juvenile court’s findings of credibility. Likewise, father’s argument that he “did not have any sexual relationships with any minors” hinges on his statements claiming he had previously lied about having paid high school students to perform sexual acts. The juvenile court was entitled to find that father’s initial statements were credible, and his later recanting of those statements not credible.

Fourth, father argues that E.S. was not at risk of sexual abuse because father had never sexually abused him in the past. However, the juvenile court may properly find a child at risk of sexual abuse even without a finding that the abuse has already occurred. (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1003 [the juvenile court is “not helpless to act until [the perceived] danger has matured into certainty.”])

Based on the totality of the evidence, there was substantial evidence supporting the juvenile court's finding that E.S. was at risk of sexual abuse. Father's possession of child pornography, his attempt to hire J.R. to engage in sexual conduct, and father's statements that he had hired minors to engage in sexual conduct showed that father had a sexual interest in minors and had acted on that interest.

In addition, as stated by the juvenile court, father's possession of child pornography on his cell phone, which was not locked, "placed his child at risk by reasonably making an opportunity for his young child to observe the photographs." We also agree with the trial court that "[father's] denial is a factor why his child is at risk because he doesn't understand the wrongdoing of his conduct." Father not only denied all wrongdoing, but was also caught attempting to conceal his behavior; he initially lied to the police about having sent sexual images and texts to J.R.

The evidence further showed that father was sexually manipulative: he constructed detailed lies about a fictional photography business in order to lure J.R. into performing sexual acts for him. There was also evidence, viewed in the context of father's sexual interest in young males, that father had engaged in inappropriate conduct with E.S.: father had "wrestled" naked in the shower with E.S. and filmed him on the bed in a "strange" manner. Father's sexual interest in and abusive behavior towards other minors as well as his inappropriate conduct with E.S. constituted substantial evidence in support of the finding that E.S. was at risk of being sexually abused by father. On all these grounds, we find there was substantial evidence in support of the sustained jurisdictional findings.

3. *The Removal Order Was Supported By Substantial Evidence*

Under section 361, subdivision (c), the juvenile court may remove a dependent child from the physical custody of his parents when the court finds, by clear and convincing evidence, that there is “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 there are no reasonable means by which the minor’s physical health can be protected without remov[al]” from the parents’ physical custody.

Here, there was substantial evidence showing that father had a sexual interest in minors, both male and female, that he had hired minors to engage in sexual conduct, that he had attempted to conceal these actions and denied all wrongdoing, and that he had engaged in certain behaviors with E.S. that, when viewed in light of his sexual interest in young males, appeared inappropriate. All of this evidence supported the finding that there would be a substantial danger to E.S.’s physical and emotional well-being if he were returned to father’s care and that there were no reasonable means by which E.S. could be protected without removal. Accordingly, substantial evidence supports the removal of E.S. from father’s custody.

DISPOSITION

The orders of the juvenile court are affirmed.

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EDMON, J.*

WE CONCUR:

KLEIN, P. J.

KITCHING, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.