Filed 3/27/13 In re Isabella K. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ISABELLA K., et al., Persons Coming Under the Juvenile Court Law.	B243264 (Los Angeles County Super. Ct. No. CK91628)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent. v. MACK K., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark A. Borenstein, Judge. Affirmed.

Eliot Lee Grossman, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Deputy County Counsel for Plaintiff and Respondent.

Mack K. (father) appeals from a judgment of the juvenile court, challenging the jurisdictional findings which were based upon evidence that father had developed photographs depicting a child engaged in an act of "obscene sexual conduct." Father contends that the conduct depicted was neither "obscene" nor "sexual conduct" as defined in the relevant statutes. We reject father's contentions and affirm the judgment.

BACKGROUND

1. Procedural history

Minors seven-year-old Isabella K. and three-year-old Anne K. came to the attention of the Department of Children and Family Services (DCFS or Department) after someone in the film-processing department of a Target store reported to Culver City Police Department (CCPD) that father had brought in a roll of film that included nude shots of a child. After the Department and law enforcement investigated, father was arrested and charged with manufacturing child pornography pursuant to Penal Code section 311.11, a misdemeanor.[1] On February 7, 2012, after the Department filed a petition to bring the minors within the jurisdiction of the juvenile court, the minors were detained and released to mother. A jury acquitted father of the criminal charge prior to the adjudication hearing.

The petition alleged pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (d), that father had sexually abused the children by taking 25 nude photographs of them in sexually explicit poses, endangering their physical health and safety and placing them at risk of physical harm, damage, danger, and sexual abuse. The petition also alleged that father had physically abused Anne by spanking her with a belt, and that mother had failed to protect the children. Father denied the allegations and the juvenile court scheduled a contested adjudication hearing. Mother submitted to the jurisdiction of the juvenile court, which struck all counts as to mother and declared her to be the nonoffending parent. The court also struck the three counts against father alleging

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

physical abuse by spanking with a belt, leaving counts b-1 and d-1, sexual abuse based upon the photographs.

After a contested adjudication hearing, the juvenile court sustained the remaining two counts, declared the children dependents of the court, and removed them from father's custody. The court adopted a disposition plan that included parenting education for both parents, individual counseling for each parent and child, monitored visits for father, and family enhancement services for father. Father filed a timely notice of appeal from the orders.

2. Department evidence

In the contested adjudication hearing, the Department presented the testimony of CCPD Detective Eden Palacio and children's social worker/dependency investigator, Mercedes Mendoza (DI Mendoza). In addition, the court admitted DCFS reports prepared primarily by DI Mendoza and MART (multi-Agency Response Team) social worker Raul Perez (CSW Perez).[2] Among the photographs admitted into evidence were 10 in which Anne is depicted nude while lying, sitting, or standing on a bed. Another depicts a nude Isabella performing a handstand, with Anne, also nude, bent over in front of her sister looking toward the camera between her legs, showing her buttocks and genitals.

Detective Palacio testified that in mid-January 2012, she went to a Target Store after being notified that father had come to pick up the developed photographs, accompanied by Anne. Father was detained. Detective Palacio viewed the photographs, and questioned father and Anne. Detective Palacio found one of the photographs to be disturbing and inappropriate and another to be questionable, but did not find that they depicted sexual conduct when viewed in the context of the remaining 11 nude

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[2] The juvenile court admitted the Department's exhibits 1 through 4, consisting of the detention report dated February 7, 2012, with attached police report and photographs, the PRC (jurisdiction/disposition) report filed March 15, 2012, a "Last Minute Information" report filed April 23, 2012, and a Last Minute Information with attached letter, filed July 30, 2012.

photographs of the child. Detective Palacio placed an "x" under the two objectionable photographs, which ended in the numbers 28 and 29 on the film.

The two marked photographs depicted Anne lying on a bed with her legs far apart. In No. 28, her arm is stretched over her head; in No. 29, one hand is placed over her vagina, giving the appearance of masturbating, and her rectal area is visible. Based on the training for her assignment to the Special Victims Unit, Detective Palacio knew that three-year-olds commonly touched their genitals. Therefore she did not believe the photographs rose to the level of child pornography and she released father.

The criminal investigation was turned over to Los Angeles Police Detective Lisa Kelly. During February and March 2012, Detective Kelly and the social workers interviewed the family. The information gathered was summarized in their reports. Mother was born and raised in China. Father was born and raised in Florida, and lived in China during the 1990's, when he met and married mother, a middle-school English teacher. When they moved to the United States, mother attended college and became a math teacher. At the time of the children's detention, father had a law degree and was a member of the California State Bar, but provided full-time care for the children and was not employed outside the home.

When showed the photographs, father said he had not meant any harm; it was late at night on his birthday after he had celebrated with some wine. He thought Anne looked cute jumping on the bed and wanted to finish the roll of film. He could not see well through the viewfinder, and had merely snapped the pictures. Father explained to Detective Kelly that he could not keep clothes on Anne and that it was not his fault. He said, "My daughter Anne does not like to wear clothes, she likes to run around the house butt naked, and she can act provocative." When a social worker asked father what he meant by "provocative," father said that Anne liked to run around and show her "butt and her front to everybody"; adding, "What am I supposed to do, beat her?"[3]

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[3] Both parents denied using corporal punishment. Isabella said that when she misbehaved, she was not allowed to play with toys or watch television. Anne told CSW

Father and mother did not sleep together because he snored, and mother needed a good night's sleep because she got up early for work. Anne usually slept with father so not to disturb mother. Father claimed that in the Chinese culture, children slept with their parents, but his family slept in two beds because their small apartment would not accommodate a king-size bed that would fit all of them. Mother told investigators that Anne slept with her father because she like to do so, not because of Chinese culture, adding, "We don't see or hear about these kinds of things in China." Mother also explained that Anne had eczema and did not like to wear clothes.

Mother did not find Anne's behavior provocative or sexual in any way, explaining that Anne would merely dance around playfully. Mother said that father took many photographs of their children for memories and meant no harm. When the social worker showed mother the photographs believed to be inappropriate, mother said she did not know father had taken the photographs and that she was disappointed in him.

The social workers reported that the children showed no signs of physical abuse such as marks or bruises, and that they were well groomed and dressed appropriately. Isabella told CSW Perez that that father took many photographs, but she did not allow him to photograph her without clothes. She said that Anne did not like to wear clothes. Isabella also said she was happy at home and that no one had touched her inappropriately.

Anne said she liked living in her house because it was warm, that she slept with father, and that she did not like to wear underpants when she slept. She denied that anyone had touched her "private parts." Anne said that father took pictures of her. When asked what she was wearing when he took the pictures, Anne replied, " I am wearing different kinds of clothes, sometimes he takes pictures of me when I am naked, and he tells me to sit down right in front of the camera." When asked how she felt when he took pictures of her naked, Anne said "nervous," which she defined as "kind of sad." Most of the nude photographs show Anne smiling or laughing, with the exception of photographs No. 28 and 29.

Perez that when she misbehaved, mother would hit her with her hand and father would hit her on her "bottom" with a belt.

3. Father's testimony

Father testified at the adjudication hearing. The juvenile court admitted the remaining photographs on the roll processed by the Target store, depicting the children fully clothed during family outings, as well as several photographs of father sharing a meal with an acquaintance or relative. Father testified that he was a "photo buff" and had taken more than 3,000 photographs that he kept in albums.

Father explained the circumstances surrounding the taking of the nude photographs of Anne. It was about 10:30 p.m. on his birthday, the lights were out in the house, and mother and Isabella were asleep in the other bedroom. Father had drunk three glasses of wine and he decided to "burn[] up" the rest of the exposures on the roll by taking many pictures with the hope that one would be cute. Father used his analog camera, which was loaded with a high-speed film that required little light. Father claimed he did not see that Anne's legs were spread in the shot or that her hand was over her vagina as though masturbating in the other, because it was dark in the room and he looked only through the viewfinder, which was very small. Father did not realize that the photographs would come out as they did, and claimed that if there had been more light in the room, he would not have taken shots like that. Father understood why he was arrested, conceding that the photographs were "over the top," but denied they were obscene. He also denied telling Anne how to pose.

Father explained that when he told investigators that Anne was provocative, he meant no more than that she liked to throw all her clothes off and run around the house naked. He meant that she was naughty and immature, not that she was "lewd." Father claimed that "provocative" was simply a poor choice of words and that he had a limited vocabulary.

DISCUSSION

I. Jurisdictional findings: count b-1

Father contends that the judgment of the juvenile court must be reversed. Father challenges both counts, but presents no argument to support his challenge to count b-1 beyond his contentions that Welfare and Institutions Code section 300, subdivision (b) is

inapplicable to a custodial parent and that there was "no evidence" to support a finding of "serious physical harm" or "substantial risk" of such harm.

Father's three-sentence challenge to count b-1 includes no citation to authority other than quoting short excerpts from Welfare and Institutions Code section 300, subdivision (b), which is not inapplicable to custodial parents.[4] As father has failed meet his burden to provide any meaningful analysis, citation to pertinent authority, or even to make his contention under a separate heading or subheading, we deem his challenge to count b-1 as abandoned and affirm the juvenile court's order. (See *In re Phoenix H.* (2009) 47 Cal.4th 835, 845; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Though we may simply affirm the judgment without considering father's contentions regarding count d-1, as a single count is sufficient to establish jurisdiction under Welfare and Institutions Code section 300 (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451),[5] we nevertheless, exercise our discretion to reach the merits of father's contentions as to count d-1, as both counts allege the same facts and may affect future proceedings. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.)

II. Jurisdictional findings: count d-1

Father contends that count d-1 should not have been sustained because the photographs were not obscene. Count d-l was alleged pursuant to Welfare and Institutions Code section 300, subdivision (d), which provides a basis for dependency jurisdiction: "The child has been sexually abused, or there is a substantial risk that the

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4 In relevant part, section 300, subdivision (b) provides: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, *or* the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left . . . ." (Italics added.) Section 300, subdivision (b) is thus not limited to the noncustodial parent.

5 Respondent asks that we consider an article regarding "grooming" behavior by pedophiles. We decline to do so as it was not first presented to the trial court and because it is unnecessary, given that father failed to show the order sustaining count b-1 was in error.

child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse."

The juvenile court found that the two photographs, Nos. 28 and 29, came within the definition of sexual exploitation in all three subparagraphs of section 11165.1, subdivision (c). Section 11165.1 defines "sexual abuse" as sexual assault or sexual exploitation, and subdivision (c) of that section provides three alternative definitions of "sexual exploitation": (1) preparing, selling, or distributing obscene matter depicting a minor engaged in obscene acts in violation of Section 311.2, or employment of minor to perform obscene acts in violation of subdivision (a) of Section 311.4; (2) knowingly using a child to pose or model in any pictorial depiction involving obscene sexual conduct; or (3) depicting a child engaged in an act of obscene sexual conduct or knowingly developing any film or photograph so depicting a child.

Neither "obscene" nor "sexual conduct" is defined in section 11165.1. Father contends the definition is found in the test applied to adult pornography, formulated by the United States Supreme Court in *Miller v. California* (1973) 413 U.S. 15 (*Miller*).[6]

Father's also cites Section 311, subdivision (a), which reads: "As used in this chapter [7.5], . . . '[o]bscene matter' means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that,

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6 Nine years after *Miller*, the Supreme Court held that the *Miller* obscenity standard did not apply to child pornography, as the First Amendment did not protect sexually explicit depictions of children. (*New York v. Ferber* (1982) 458 U.S. 747, 761 (*Ferber*).) The court enunciated a separate standard for child pornography: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. . . . [Citations.]" (*Id*. at pp. 764-765.) The court left the question whether such images were constitutionally protected due to educational, scientific, or artistic value to a case-by-case "as applied" analysis. (*Id*. at p. 773.) However, as the court observed, "'It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.' [Citation.]" (*Id*. at p. 761.)

taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Father suggests that because section 311 closely tracks the *Miller* test, the definition of obscene as used in section 11165.1, subdivision (c), must also conform to the *Miller* definition of obscene. He then concludes that the photographs were not obscene because they "do not appeal to the 'prurient interest of the average person,' are not 'patently offensive,' and do not lack serious artistic value." (§ 311, subd. (a); see also, *Miller, supra*, 413 U.S. at p. 24.) Father acknowledges that the only published dependency case to consider the definition of obscene as used in section 11165.1, subdivision (c), rejected a similar contention, but he contends that the case was wrongly decided and should not be followed. (See *In re Ulysses D.* (2004) 121 Cal.App.4th 1092, 1097-1098 (*Ulysses D.*).)

In *Ulysses D.* the court held that "sexual conduct" as used in section 11165.1 is defined in sections 311.3 and 311.4, which contain no requirement that the conduct be obscene. Since those sections were mentioned in two clauses of section 11165.1, subdivision (c) and assuming the applicability of the section 311 definition of obscene, the court concluded that as used in section 11165.1 the word, obscene, was obsolete and unnecessary surplusage in light of the United States Supreme Court's decision in *Ferber*. (*Ulysses D., supra*, 121 Cal.App.4th at pp. 1096-1098 & fn. 2.) The *Ulysses D.* court also relied on the Legislature's addition of subdivision (h) to section 311 in 1996, which expressly approved *People v. Cantrell* (1992) 7 Cal.App.4th 523 (*Cantrell*), a California case that found the *Ferber* test, not the *Miller* test, applicable to sections 311.2 and 311.4. (See *Cantrell, supra*, at pp. 540-543.)

Father suggests that *Ferber* merely enunciated standards by which a statute may be considered constitutional, and that *Cantrell* did not and could not amend the Penal Code to change the statutory definition of obscene, as only the California Legislature could make the change. Father also takes issue with the conclusion in *Ulysses D.* that the Legislature added subdivision (h) to section 311 to amend or delete the statutory definition of obscenity. (See *Ulysses D., supra*, 121 Cal.App.4th at p. 1098.) He argues

the Legislature merely "express[ed] its approval of the holding of [*Cantrell*,] that, for the purposes of [chapter 7.5], matter that 'depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct' is limited to visual works that depict that conduct." (§ 311, subd. (h).)

We need not agree or disagree with *Ulysses D.*'s conclusion that the Legislature added subdivision (h) to section 311 in order to redefine obscene, as we do not agree that section 311 (or the *Miller* test) was applicable to dependency proceedings prior to the amendment. As we explain, we agree with *Ulysses D.* that "sexual conduct" as used in section 11165.1 is defined in sections 311.3 and 311.4; however we independently conclude that the word "obscene" as used in section 11165.1 is surplusage.

Images of the sexual conduct described in sections 311.3, subdivision (b), and 311.4, subdivision (d)(1), qualify as child pornography unprotected by the First Amendment under the *Ferber* standard. (*Cantrell*, *supra*, 7 Cal.App.4th at p. 540 [§ 311.4]; *In re Duncan* (1987) 189 Cal.App.3d 1348, 1359-1360 [§ 311.3].) Those sections prohibit conduct related to child pornography or possession of child pornography without using the modifier "obscene." (See also §§ 311.2, subds. (c) & (d); 311.11.) The definition of "sexual exploitation" in section 311.3, subdivision (a), is nearly identical to the definition in section 11165.1, subdivision (c).[7] Father suggests that the addition of "obscene" in section 11165.1 indicates a legislative intent to impose a more onerous constitutional standard by adopting the *Miller* test set forth in section 311.

We disagree. The definition in one statute can be a useful tool in determining the Legislature's intended definition of the same word in another statute; however, "where a

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[7] Section 311.3, subdivision (a), provides: "A person is guilty of sexual exploitation of a child if he or she knowingly develops, duplicates, prints, or exchanges 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 that depicts a person under the age of 18 years engaged in an act of sexual conduct."

word of common usage has more than one meaning, the meaning which will best attain the purposes of the statute under consideration should be adopted. [Citations.]" (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 49.) The purpose of the *Miller* test and thus section 311, subdivision (a), is to protect the freedom of expression guaranteed under the First Amendment. (*Ferber*, *supra*, 458 U.S. at p. 756.) Child pornography that fails to meet the *Miller* test is not protected by the First Amendment because the purpose of regulating such material is to safeguard the physical and mental health of children. (*Ferber*, *supra*, at pp. 757-758, 764; *Cantrell*, *supra*, 7 Cal.App.4th at p. 541.)

Even in post-*Ferber* criminal prosecutions, California courts have assumed that child pornography is not subject to the *Miller* test of obscenity. (See, e.g., *People v. Woodward* (2004) 116 Cal.App.4th 821, 838-839; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1754 (*Kongs*); *Cantrell*, *supra*, 7 Cal.App.4th at pp. 541-542.) It is apparent from such cases that the commonly understood meaning of the word obscene in relation to adult pornography differs from the commonly understood meaning of obscene in relation child pornography. Indeed, since *Ferber* was decided, child pornography has been considered obscene *per se*. (See *People v. Manfredi* (2008) 169 Cal.App.4th 622, 626; *People v. Woodward*, *supra*, at pp. 838-839.)

The instant case is a dependency proceeding, not a criminal prosecution. "Notwithstanding any other provision of law, the purpose of the provisions . . . relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (Welf. & Inst. Code, § 300.2.) There is no language in Welfare and Institutions Code section 300, subdivision (d), or in Penal Code section 11165.1, subdivision (c), that incorporates section 311's definition of obscene, and we discern no intent in the dependency statutes to protect parents' freedom of expression by doing so by implication. We thus decline to engraft the obscenity definition of section 311, subdivision (a), onto section 11165.1, as applied in the context of a dependency case.

In determining whether or not a child faces the risk of sexual abuse we first look in the Child Abuse and Neglect Reporting Act (§ 11164 et seq.) for the definition of "sexual abuse." In section 11165.1 we find that "'sexual abuse' means sexual assault or sexual exploitation." Sexual exploitation includes the act of knowingly photographing a child in an act of "obscene sexual conduct." (§ 11165.1, subd. (c)(3).) Section 11165.1, subdivision (c) then expressly refers to conduct prohibited by chapter 7.5, which includes the definition of sexual conduct in section 311.3, subdivision (b)(5) as "Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer." Both statutes are similar to and have the same purpose as the dependency statutes: protecting children from sexual abuse or sexual exploitation. (See *Cantrell, supra,* 7 Cal.App.4th at pp. 540-542.)

We are mindful that in general, a statutory construction which render words surplusage are to be avoided. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.) However, "this rule gives way to the paramount rule of interpreting a statute in a manner consistent with its legislative intent as expressed in the statute's language. [Citation.]" (*In re David S.* (2005) 133 Cal.App.4th 1160, 1167-1168.) The shared purpose of the two statutes provides evidence of such consistency. We conclude that the "obscene sexual conduct" of section 11165.1 has the same meaning as "sexual conduct" as used in section 311.3.

III. Substantial evidence

Father contends that there was not substantial evidence to support a finding that the photographs depicted sexual conduct as defined by section 311.4, subdivision (d). In particular, father contends that the two photographs upon which the juvenile court relied do not depict either of the only two applicable acts: actual or simulated masturbation; or "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer." (§ 311.4, subd. (d)(1).)

"We review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court's conclusions." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) "'All conflicts must be resolved in favor of the respondent and

all legitimate inferences indulged in to uphold the [order], if possible.' [Citation.]" (*Ibid*.) Issues of fact and credibility are questions for the juvenile court and it is not our function to redetermine them. (*In re Rubisela E*. (2000) 85 Cal.App.4th 177, 195.) "'"'In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*.' [Citation.] . . . ."' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) Unless father meets his burden to show the order is not supported by substantial evidence, we affirm the order "even if other evidence supports a contrary conclusion. [Citation.]" (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

Father argues that there is nothing in the photographs that would sexually stimulate the viewer any more than Michelangelo's "David and the numerous representations of naked children in Renaissance art." The phrase "for the purpose of sexual stimulation of the viewer" does not describe the photographer's intent, but is merely meant to exempt "simple, straightforward nude photographs of children without more . . . even if they should depict the pubic or rectal areas of children . . . ." (*Cantrell*, *supra*, 7 Cal.App.4th at pp. 542-543.) Photographs Nos. 28 and 29 bear little if any resemblance to Renaissance statues or cherubs, and are not simple, straightforward nude photographs.

Father suggests that the guidelines set forth in *Kongs* favor a determination that the photographs do not depict sexual conduct. (See *Kongs*, *supra*, 30 Cal.App.4th at p. 1755.) Factors to consider include: "1) whether the focal point is on the child's genitalia or pubic area; [¶] 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." (*Ibid*.; see also *Ulysses D.*, *supra*, 121

Cal.App.4th at p. 1096.) Any one or more of the factors will support the finding. (*Kongs*, *supra*, at p. 1755.)[8]

Father claims that photograph No. 29 did not exhibit the child's genitals at all because her hand covered them. He also claims that the setting is not sexually suggestive and that the pose is not unnatural or indicative of masturbation, as Detective Palacio testified that three-year-olds commonly touched their genitals. Father's characterizations of the photographs notwithstanding, we find that the *Kongs* factors support the juvenile court's order. Both photograph No. 28 and No. 29 show Anne lying nude on an unmade adult-size bed with her legs apart, satisfying the *Kongs* second and fourth factor. Both photographs were taken from the foot of the bed, so that the legs and genitalia were visible first, satisfying the first *Kongs* factor. In photograph No. 28, the child's arm is stretched over her head in what could be considered a sexually provocative manner, satisfying the third *Kongs* factor, and in photograph No. 29, she has placed one hand over her vagina, either masturbating or covering herself in what might be considered sexual coyness, satisfying the fifth *Kongs* factor. (See *Kongs*, *supra*, 30 Cal.App.4th at p. 1755.)

As we conclude that substantial evidence supports a finding of sexual abuse as defined in 11165.1, subdivision (c)(3), that father depicted a child in photographs in which the child is engaged in sexual conduct, we need not reach contentions regarding alternative definitions in the statute. We thus affirm the juvenile court's order finding jurisdiction under Welfare and Institutions Code section 300, subdivision (d).

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8 Number six would be indispensable only in a criminal prosecution under section 311.4. (*Kongs*, *supra*, 30 Cal.App.4th at p. 1755.)

DISPOSITION

The judgment of the juvenile court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.*
FERNS

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