

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re D.F., a Person Coming
Under the Juvenile Court Law.

B279808

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Los Angeles County
Super. Ct. No. DK08484

Plaintiff and Respondent,

v.

JUDITH D.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Julie Fox Blackshaw, Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

In this dependency case, mother Judith D. challenges the court's jurisdictional findings under Welfare and Institutions Code¹ section 300, subdivisions (b) and (d), regarding mother's failure to protect her daughter D.F. (minor) from serious physical harm and sexual abuse by mother's male companion. The Department of Children and Family Services (Department) moved to dismiss the appeal as moot because, during the pendency of the appeal, the court terminated jurisdiction over the minor. Due to the seriousness of the sexual abuse allegation and potentially far-reaching consequences that finding may have on mother and other members of her family, we reach the merits of her appeal. Because substantial evidence supports the court's jurisdictional finding under section 300, subdivision (d), we affirm.

FACTS AND PROCEDURAL BACKGROUND

1. Background

At the time the petition was filed, mother lived with a male companion, A. Rosas, and their 18-month old son R.R. The minor, who was a product of mother's marriage to Z.F. (father), also resided in mother's home. She was 15 years old when the petition was filed. Minor's older sister, J.F., lived with father at that time.

The family came to the attention of the Department in May 2014 after a referral regarding a domestic violence incident that occurred at a family gathering. Rosas, who was intoxicated at

¹ All undesignated statutory references are to the Welfare and Institutions Code.

the gathering, argued with mother and got into an altercation with his adult nephew. The Department investigated allegations of emotional abuse regarding all three children but the allegations were found to be inconclusive.

Mother reported, however, the minor was attending therapy sessions because she was diagnosed with depression and because she had suicidal ideation after breaking up with a boyfriend. Mother also told the Department that the minor was a diabetic and was not compliant with her medication or checking her blood sugar level. Mother said the minor was stubborn and defiant, and that she felt overwhelmed trying to cope with the minor's mental and physical health issues. Shortly thereafter, the minor was hospitalized due to suicidal ideation. The Department offered voluntary family services, and both mother and father agreed to participate. Father subsequently changed his mind but agreed to be available regarding the minor.

Over the next several months, the minor appeared to be making some progress but then began running away from the home in the middle of the night and was hospitalized after taking too much of her antidepressant medication. The Department concluded mother had gone "above and beyond" to meet the minor's needs but recommended the court assert dependency jurisdiction over the minor.

2. The Section 300 Petition

On November 26, 2014, the Department filed a petition under section 300, subdivision (b).² The court later sustained the

² The petition included allegations under section 300, subdivision (j), relating to the minor's sister. Those allegations were subsequently dismissed.

following allegation: “The [minor’s] mother ... and father ... are unable to provide appropriate parental care and supervision of [the minor] due to the child [sic] mental and emotional problems and chronic runaway behavior. Remedial Services have failed to resolve the family problem in that the parents continue to be unable to provide appropriate parental care and supervision of [the minor]. The parents’ inability to provide care and supervision of [the minor] endangers the child’s physical health and safety and places the child at risk of physical harm and damage.” The minor was released to both parents and generally resided with mother.

Over the next 18 months, the Department continued to work with the family. Despite mother’s best efforts, the minor continued to struggle with her mental and physical health. Then, in May 2016, the minor attempted to commit suicide and was subsequently hospitalized. The court retained jurisdiction over the minor and ordered the Department to continue to provide services to the family.

3. The Section 342 Petition

In early June 2016, the minor abruptly moved to father’s house. Mother told the Department the minor moved because they had been having some disagreements. The minor subsequently disclosed that she moved to father’s house because, during the previous year, Rosas made several inappropriate comments to her and, on one occasion, touched her inappropriately. The matter was reported to the Department, which undertook an investigation.

The minor told the Department that approximately one year earlier, she was sleeping in bed with mother and R.R. During the night, Rosas came to the bed, touched the minor’s leg,

opened the minor's legs, and then rubbed her vaginal area over her clothing. The minor said it was an isolated incident. The minor told mother of the incident the following morning. When mother confronted Rosas, he claimed he only touched the minor's knee, and that he thought he was touching mother, not the minor, at the time.³ Typically, the minor slept next to the wall and mother slept at the edge of the bed. That night, however, mother slept next to the wall and the minor slept at the edge of the bed. Rosas left the family home for a few days, but then returned.

The minor also disclosed that sometime after the touching incident, Rosas was drunk and came into her bedroom. Rosas looked at the minor in a manner that made her feel uncomfortable, then told the minor she had nice legs and asked if he could touch her legs. He also asked the minor if she could help him download some pornographic videos. Mother initially denied knowing about the incident but later conceded she knew about the porn request and told Rosas his actions were inappropriate. Rosas acknowledged commenting on the minor's legs but denied making the request for assistance in downloading pornographic videos.

The minor indicated that when she raised these issues with mother, mother would always take Rosas's side. For her part, mother said that although she believed the minor, she questioned the minor's honesty because she has lied in the past. Mother also gave conflicting statements about the incidents. After Rosas was

³ The court rejected father's claim: "I think that that's patently absurd for you not to be able to tell the difference between [mother] and [the minor]." The court based its finding in part on the fact that mother and the minor had different body types.

arrested, mother told law enforcement the incident on the bed could not have been a mistake because she and the minor have completely different bodies. The minor has thick legs while mother has skinny legs; Rosas often teased mother about her “chicken legs.” Mother later minimized the incident, however, telling the Department that “what happened was a misunderstanding.”

Rosas was arrested and subsequently incarcerated. During an interview with law enforcement, Rosas admitted touching the minor’s vagina thinking it was mother, telling her she had nice legs, and asking her to help him download pornographic material. But in subsequent conversations with the Department, Rosas denied touching the minor’s vaginal area. Also, during an interview with the Department, Rosas indicated he and mother planned to resume their relationship upon his release from jail. Mother said she did not plan to resume the relationship, except to the extent required to allow R.R. to see his father.

In early October 2016, the Department filed a subsequent petition under section 342 alleging mother failed to protect the minor from serious physical harm (§ 300, subd. (b)(1)) and sexual abuse (§ 300, subd. (d)). On December 19, 2016, the court found the following allegation true under both subdivisions: “On a prior occasion, [the minor’s] mother’s ... male companion, [A.] Rosas, father of the child’s half-sibling, [R.R.] ..., sexually abused the child, when the child was 15 and 16 years old in which, the Rosas father grabbed the child’s knees and opened the child’s legs and fondled the child’s vagina. On a prior occasion, the Rosas father asked the child to help the Rosas father search for pornographic videos on the Rosas father’s cell phone. The Rosas father told the child that the child had beautiful legs and could the Rosas father

touch the child's legs, making the child feel uncomfortable. The mother knew of the sexual abuse of the child by the Rosas father and failed to protect the child. On 8/23/2016, the Rosas father was arrested for Lewd Act Upon a Child, (14 or 15 years old). Such sexual abuse of the child by the Rosas father, and the mother's failure to protect the child endangers the child's physical health and safety, creates a detrimental home environment and places the child at risk of serious physical harm, damage, danger, sexual abuse and failure to protect." The court released the minor to both parents.

The court terminated jurisdiction over the minor on April 27, 2017, shortly before her 18th birthday.⁴

DISCUSSION

Mother contends no substantial evidence supports the court's findings at the December 19, 2016 hearing on jurisdiction and disposition under the section 342 petition that she failed to protect the minor from serious physical harm and sexual abuse (§ 300, subds. (b)(1) & (d)).

1. We consider the merits of mother's appeal.

During the pendency of the appeal, the court terminated jurisdiction over the minor. The Department filed a motion to dismiss the appeal on May 11, 2017, arguing the appeal is moot because our ruling will have no practical effect.⁵ (See, e.g., *In re*

⁴ On July 3, 2017, we granted the Department's unopposed request for judicial notice of the court's minute order dated April 27, 2017. (Evid. Code, § 452, 459.)

⁵ The Department also argued in its respondent's brief that we should not consider the merits of mother's appeal because she failed to

Michelle M. (1992) 8 Cal.App.4th 326, 330 [dismissing appeal as moot because “no direct relief can be granted even were [the court] to find reversible error, because the juvenile court no longer has jurisdiction”].)

“‘As a general rule, “an appeal presenting only abstract or academic questions is subject to dismissal as moot.” [Citation.]’ [Citation.]” (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547.) However, a reviewing court ordinarily will not dismiss as moot challenges to jurisdictional findings that may adversely affect a parent in the future, if subsequent dependency proceedings are ever initiated, or even contemplated, for the parent’s children. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1431–1432; *In re John S.* (2001) 88 Cal.App.4th 1140, 1143; *In re Joshua C.*, *supra*, 24 Cal.App.4th at pp. 1547–1548.) Here, mother seeks review of the court’s findings that she failed to protect the minor from physical harm and sexual abuse because those findings have potentially far-reaching consequences to her personally, and could be used in any future dependency proceedings. As to the finding that mother failed to protect the minor from sexual abuse, we agree and for that reason, we deny the Department’s motion to dismiss the appeal and exercise our discretion to review mother’s appeal on the merits. (See *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452 [considering mother’s appeal from jurisdictional findings against her under section 300, subdivision (d), because allegations regarding sexual abuse carry “particular stigma” and could be used against mother in future dependency cases].)

challenge the court’s original jurisdictional finding, which provided a sufficient basis for the court’s jurisdiction. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 72.)

2. Substantial evidence supports the court’s jurisdictional findings regarding mother’s failure to protect the minor from sexual abuse.

2.1. Standard of Review

“ ‘In reviewing the jurisdictional findings and disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] 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 R.T.* (2017) 3 Cal.5th 622, 633.)

“ ‘The term “substantial evidence” means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value. [Citation.]’ [Citation.] ‘In making this determination, all conflicts 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.]’ [Citation.]” (*In re E.B.* (2010) 184 Cal.App.4th 568, 574–575.)

2.2. Analysis

Mother contends there is insufficient evidence to support the court's finding on count d-1, that she failed to protect the minor from sexual abuse.⁶ We disagree.

Jurisdiction under section 300, subdivision (d), requires proof that a "child has been sexually abused, or there is a substantial risk that the child will be sexually abused ... by his or her parent ... or the parent ... has failed to adequately protect the child from sexual abuse when the parent ... knew or reasonably should have known that the child was in danger of sexual abuse." Subdivision (d) defines "sexual abuse" with reference to Penal Code section 11165.1, which in turn defines "sexual abuse" to include any act that violates Penal Code section 288, subdivision (c)(1), (lewd or lascivious acts upon a child) or Penal Code section 647.6 (annoying or molesting a child). Subdivision (c)(1) of Penal Code section 288 makes it unlawful to commit a lewd or lascivious act "upon or with the body" of a child of 14 or 15 years with the intent of gratifying the perpetrator's passions. Subdivision (a) of Penal Code section 647.6 makes it a misdemeanor to "annoy" or "molest" a child under 18 years of age. That section "does not require a touching [citation], but does require conduct that would unhesitatingly disturb or irritate a normal person [citation]. '[T]o determine whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective* test[.]' [Citation.] The

⁶ Because the court sustained an allegation under section 300, subdivision (b), in 2014 and asserted jurisdiction over the minor on that basis, we do not reach mother's argument that the court's 2016 jurisdictional finding under the same subdivision was also erroneous.

defendant's observable conduct, *on its own*, must unhesitatingly irritate or disturb a reasonable person; in evaluating it, we may not consider either the defendant's intent or the child's subjective discomfort. [Citation.]” (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1162, emphasis in the original.)

Here, at a minimum, Rosas's act of opening the minor's legs and rubbing her vaginal area while she was asleep (or, at least, while he thought she was asleep) meets the “annoy” or “molest” standard of Penal Code section 647.6, subdivision (a), and therefore falls within the scope of the “sexual abuse” contemplated by section 300, subdivision (d). In addition, Rosas's leering glances, his comment that the minor's legs were beautiful accompanied by a request to touch her legs, and his request that the minor assist him in downloading pornographic videos also meet that standard. (See, e.g., *People v. Carskaddon* (1959) 170 Cal.App.2d 45, 46 [holding predecessor of Penal Code section 647.6 violated by a defendant's asking a 17-year-old girl, who was a stranger to him, “extremely lewd and obscene questions” with respect to whether “she had ever had certain unnatural acts performed upon her”].) Thus, there is substantial evidence the minor was sexually abused and physically harmed within the meaning of section 300.

As to whether mother failed to protect the minor from Rosas's sexual abuse, we consider whether mother “knew or reasonably should have known that the child was in danger” of such abuse. (§ 300, subd. (d).) On that point, we note there is no indication that Rosas's criminal history includes any offense related to sexual abuse of minors or adults. Further, there is no evidence in the record that prior to the incidents involved in the present case, Rosas had exhibited any inappropriate behavior or

prurient interest in the minor. Indeed, the minor described the incident in the bed as “an isolated incident.” Accordingly, we see no indication that mother knew, or reasonably should have known, of the potential for sexual or physical abuse prior to the incident in the bed.

After that incident, however, mother was aware Rosas sexually abused the minor and she was therefore on notice of the potential for future sexual abuse. Thus, in the language of section 300, subdivision (d), she “knew or reasonably should have known” the minor was in danger of further sexual abuse by Rosas. Mother did not act accordingly, perhaps because she had doubts about the minor’s truthfulness. Further, although mother was reportedly angry with Rosas after the incident in the bed, the minor believed mother “always seems to take his side.” And although Rosas left the family home after the first incident, he returned after a few days and continued to live with mother as well as the minor. At that point, mother could have asked Rosas to move out of the home in order to protect the minor from further abuse. Alternatively, mother could have urged the minor to live with father, which would also have protected her from further abuse at the hands of Rosas. Mother did neither. Moreover, although mother initially told law enforcement she believed Rosas’s actions could not have been accidentally directed at the minor, as he claimed, mother subsequently minimized Rosas’s behavior during her interactions with the Department by suggesting there was simply a “misunderstanding” about Rosas’s conduct.

On the basis of this evidence, we conclude the court’s finding that mother failed to protect the minor from sexual abuse is supported by substantial evidence.

Citing *In re Rocco M.* (1991) 1 Cal.App.4th 814, mother argues the Department failed to establish that at the time of the jurisdictional hearing, the minor was currently at risk for future sexual abuse—a fact mother contends was required in order to assert jurisdiction over the minor.

We note that *In re Rocco M.* was recently called into question by the Supreme Court on another ground. (See *In re R.T.*, *supra*, 3 Cal.5th at p. 633.) And as to the issue advanced by mother—that proof of a current risk of harm is always required to support a jurisdictional challenge—*In re Rocco M.* has been heavily criticized and a split of authority currently exists on that issue. (See *In re J.K.* (2009) 174 Cal.App.4th 1426, 1433–1439 [holding proof of prior acts of physical or sexual abuse sufficient to support dependency jurisdiction, even in the absence of a showing of risk of future harm].) We need not address the current state of the law on this issue, however, because even if proof of a current risk of harm at the time of the jurisdictional hearing is always required, there is substantial evidence to support such a finding here.

As noted, Rosas was interviewed during his incarceration and testified he and mother planned to resume their relations upon his release. Although mother denied wanting to continue the relationship, she visited Rosas frequently while he was in jail in order to allow him to see their son, R.R. Mother expressed the desire to preserve the relationship between R.R. and Rosas in the future, which could provide opportunities for Rosas to access the minor upon his release—a date which was uncertain at the time the court made the challenged findings, as Rosas had not yet been tried. Given mother’s past minimization of Rosas’s conduct, her failure to take action after Rosas fondled the minor’s vagina

while she was in bed (even though mother did not believe Rosas's claim that the touching was accidental), and mother's past tendency to side with Rosas, the court could reasonably have concluded under section 300, subdivision (d), that the minor was at risk for future sexual abuse.

DISPOSITION

The order entered on December 19, 2016 is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

BACHNER, J.*

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