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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re AIDEN R., a Person Coming Under the Juvenile Court Law.

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B294893

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MATTHEW R.,

Defendant and Appellant.

(Los Angeles County Super. Ct. No. 18CCJP05777B)

APPEAL from an order of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Affirmed in part, dismissed in part.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Peter Ferrera, Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

Matthew R. appeals from the juvenile court's jurisdiction findings and disposition orders declaring his child, Aiden R., a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivision (d), removing Aiden from his physical custody, placing Aiden with Aiden's mother, Jessica, and requiring Matthew to take parenting classes and participate in sex abuse counseling. The court also required Matthew's visitation with Aiden to be supervised. Matthew argues that substantial evidence does not support the juvenile court's jurisdiction findings and that the disposition orders must be reversed because the court based those orders on the erroneous jurisdiction findings. While Matthew's appeal was pending, the juvenile court terminated jurisdiction, awarded joint legal custody of Aiden, awarded joint physical custody of Aiden with his primary residence with Jessica, and restricted Matthew's participation in Aiden's school activities on school premises.

We conclude that, although the juvenile court terminated jurisdiction during the pendency of this appeal, Matthew's appeal from the jurisdiction findings is not moot. But because the disposition orders have been superseded by the custody order, and Matthew did not appeal from that order or from the order

¹ Undesignated statutory references are to the Welfare and Institutions Code.

terminating jurisdiction, the appeal from the disposition orders is moot. Finally, we conclude substantial evidence supported the juvenile court's jurisdiction findings that Matthew sexually abused Aiden's sister, Audrey, and that his conduct put Aiden at risk of harm within the meaning of section 300, subdivision (d).

FACTUAL AND PROCEDURAL BACKGROUND

A. The Department Files a Petition Under Section 300, and the Juvenile Court Detains Aiden and His Sister

Five-year-old Aiden and his eight-year-old sister Audrey (who has a different biological father) lived with Jessica. On July 15, 2018 the Los Angeles County Department of Children and Family Services received a referral that Audrey may have been the victim of physical abuse. At the time of the referral, Jessica and Matthew had separated. Matthew had moved out of the house, but his name was still on the lease because "he want[ed] to have access to the home." The Department learned Jessica and Matthew had a history of domestic violence. The Department also learned Matthew "smacked" Audrey on the cheek and hit her "bottom" with his hands and a hanger. Aiden reported that Matthew "hits" and "kicks" Audrey and that Matthew hit Aiden with a hanger on his buttock area when disciplining him.

The Department obtained a court order for a forensic examination of Audrey, and Audrey reported "significant history of physical and sexual abuse by [Matthew]." Audrey stated that she spent nights with Matthew "at his place" and that "he was weird around [her]." Audrey told the doctor Matthew touched her, and she demonstrated how he touched her by moving her hand over her "upper thigh into her genital area." Audrey stated that, when Matthew touched her skin, "her pants were down a little and her shirt was pulled up a little" and that these

incidents happened "a lot," "10-100 times." Audrey also reported Matthew "would hold [her] hands back and touch [her] bottom against the skin" and "would go underneath [her] underwear." Audrey told the doctor Aiden "was present" during these incidents.

The Department also obtained a court order for a forensic examination of Aiden, and Aiden told the doctor Matthew hit him with a hanger. When asked whether he ever saw Matthew "touching" Audrey, Aiden stated, "I would have to sit on the floor, he would touch her on the upper leg, not sure why he would do that, I couldn't really see."

The Department's investigator interviewed Matthew several days after the children's forensic examinations. Matthew denied he sexually abused Audrey and stated Jessica's family had "coached" Audrey. When the investigator told Matthew examiners would question Audrey and Aiden further about the allegations of physical and sexual abuse, Matthew asked for an example of a question the examiner would ask Aiden. Matthew also asked how "it can be proved that what Audrey is reporting is a result of her being coached," and the investigator told Matthew that "the Department goes based on the child's statement and the consistency of her statement."

In a forensic interview conducted a few days after the Department's interview with Matthew, Audrey stated that on one occasion, while she was sitting on the couch, Matthew "passed by [her] and then he went like this." Audrey demonstrated what "this" meant by "sliding her left hand across her lower stomach; the area below her belly button and above her vagina." Audrey said that she was wearing underpants and a tank top and that she "got freaked out." Audrey explained she did not disclose this incident to the doctor who had conducted the forensic examination because she "just g[o]t freaked out and scared."

Audrey also disclosed that on one occasion Matthew "lied down next to [her] and [she] found out that he was naked under the blanket so [she] got embarrassed and . . . walked away and went to the couch." Audrey stated when she was lying next to Matthew, Matthew was "moving and he was kind of shaking." When asked about "being touched inappropriately . . . on her thighs," Audrey stated a 10-year-old boy named Angel had tried to touch her. Audrey said Angel also tried to kiss her and "hump" her, but she "pushed him off." Audrey demonstrated how Angel tried to "mess" with her by bouncing up and down on the chair. When asked "if anyone else had touched her without clothes," Audrey said, "No." Audrey also stated the two incidents she described to the interviewer were the only times when Matthew "ha[d] done something to her."

In Aiden's forensic interview, which also took place after Matthew's interview with the Department's investigator, Aiden said Matthew "doesn't hit [him] anymore now." Aiden also "denied that he has ever seen someone touch somebody else."

On September 10, 2018 the Department filed a petition under section 300, subdivisions (a), (b)(1), (d), and (j), alleging Matthew's conduct placed the children at risk. Specifically, as relevant to this appeal, the Department alleged under section 300, subdivision (b)(1), that Matthew, when disciplining the children, "smacked" Audrey's cheek and pulled her hair and "smacked" Aiden's cheek and hit Aiden's arm. The Department also alleged under section 300, subdivision (b)(1), Matthew "inappropriately touched . . . Audrey by grazing [her] stomach," which placed Audrey and Aiden "at risk of harm."

The Department alleged under section 300, subdivision (d), Matthew "sexually abused . . . Audrey by touching and fondling the child from [her] upper thigh to [her] genital area underneath [her] clothes." The Department also alleged that, on one

occasion, Matthew "held [Audrey's] hands and touched and fondled [her] buttocks underneath [her] clothes" and that, on another occasion, Matthew "was naked underneath a blanket as [Audrey] laid next to [him]." Finally, the Department alleged Matthew's "sexual abuse of . . . Audrey . . . endanger[ed] [her] physical and emotional health and safety and place[d] [her] and [her] sibling, Aiden, at risk of serious physical and emotional harm, damage, danger, [and] sexual abuse." The juvenile court detained Audrey and Aiden from Matthew.

B. The Juvenile Court Makes Jurisdiction Findings and Disposition Orders

Matthew pleaded no contest to the Department's allegations under section 300, subdivision (b)(1), but denied he sexually abused Audrey within the meaning of section 300, subdivision (d). Matthew argued that Audrey's statements describing inappropriate touching of her thigh referred to Angel and that, when the social worker asked Audrey whether "that was the only time that someone tried to touch [her]," Audrey only said, "Um-hum." Matthew argued the Department also failed to show "Aiden [was] at risk of sexual abuse by [Matthew], given that there has been no sexual abuse of Audrey."

The juvenile court sustained the allegations under section 300, subdivision (b)(1) (to which Matthew pleaded no contest) and subdivision (d). The court removed Aiden from Matthew and placed him with Jessica, ordered Matthew to take parenting classes and participate in individual counseling with "a licensed therapist with a sex abuse background," and restricted Matthew's visitation with Aiden. Matthew timely appealed the jurisdiction findings and disposition orders.

C. The Juvenile Court Terminates Jurisdiction with a Custody Order

On July 23, 2019 the juvenile court terminated jurisdiction and issued a custody order granting Jessica and Matthew joint legal custody of Aiden (51 percent to Jessica and 49 percent to Matthew) and joint physical custody of Aiden, with Aiden's primary residence with Jessica. The court also restricted Matthew's participation in Aiden's school activities on school premises. Matthew did not appeal the order terminating jurisdiction or the custody order.

DISCUSSION

Matthew argues "substantial evidence does not factually support the allegations, nor does any alleged touching by [him] meet the legal definition of sexual abuse." Matthew also argues the juvenile court's termination of jurisdiction does not moot his appeal because he "continues to suffer adverse effects from the juvenile court's erroneous jurisdictional findings"

A. The Appeal of the Jurisdiction Findings Is Not Moot "As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.] However, dismissal for mootness in such circumstances is not automatic, but 'must be decided on a case-by-case basis." (In re C.C. (2009) 172 Cal.App.4th 1481, 1488.) A case ""is not moot if the purported error is of such magnitude as to infect the outcome of [subsequent proceedings] or where the alleged defect undermines the juvenile court's initial jurisdiction finding."" (In re Marquis H. (2013) 212 Cal.App.4th 718, 724.) "[T]he critical factor in considering whether a dependency appeal is moot is whether the appellate

court can provide any effective relief if it finds reversible error." (*In re N.S.* (2016) 245 Cal.App.4th 53, 60; see, e.g., *id.* at p. 61 [appeal was moot because the mother "has been awarded custody of [her child] and the jurisdictional findings are not the basis of any current order that is adverse to her"]; *In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1096, fn. 6 [appeal was not moot, even though the parent did not appeal the order terminating jurisdiction, "because the disposition order continues to adversely affect her"]; *In re J.K.* (2009) 174 Cal.App.4th 1426, 1431-1432 [father's "challenge to the jurisdictional findings is not moot" because "the sustained jurisdictional findings against [the father] have had an adverse effect on his custody rights"].)

Matthew argues the jurisdiction findings have resulted in custody orders from which he still suffers: Aiden's primary residence is with Jessica, and Matthew has restrictions on his participation in Aiden's school activities on school premises. Because Matthew did not appeal from the orders terminating jurisdiction and awarding custody, these orders are not subject to appellate review. But a reversal of the juvenile court's jurisdiction findings may still provide Matthew with some relief.

Custody and visitation orders, also known as "exit orders," continue until modified or terminated by a subsequent order of

Section 362.4 provides that, if a juvenile court terminates jurisdiction over a case, the court may issue "an order determining the custody of, or visitation with, the child." (§ 362.4, subd. (a).) "If no action is filed or pending relating to the custody of the minor in the superior court of any county, the juvenile court order may be used as the sole basis for opening a file in the superior court" (§ 362.4, subd. (c).) "Custody and visitation orders issued under section 362.4 are sometimes referred to as "family law" orders or "exit" orders." (*In re Ryan*

the superior court." (§ 362.4, subd. (b).) "Any custody or visitation order issued by the juvenile court . . . pursuant to Section 362.4 . . . shall not be modified . . . unless the court finds that there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child." (§ 302, subd. (d); see *In re A.R.* (2009) 170 Cal.App.4th 733, 740 ["[t]o overcome . . . restrictions" in custody and visitation orders, a parent must "prove, in family court, that 'there has been a significant change of circumstances . . . and modification of the order is in [the child's] best interests"]; *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 ["[r]elief from, or modification of, [the custody and visitation] orders is based on the best interest of the child and may be sought either in a pending family law action or, if none is pending, a new action based solely on the orders"].)

Reversal of the juvenile court's jurisdiction findings that Matthew sexually abused Audrey and that Aiden was at risk of harm would be "a significant change of circumstances" on which Matthew could seek in family law court a modification of the juvenile court's custody order. (See *In re A.R.*, *supra*, 170 Cal.App.4th at p. 740.)³ Such an appellate victory in this case

K. (2012) 207 Cal.App.4th 591, 594, fn. 5.) We take judicial notice of the custody order in this case under Evidence Code sections 452, subdivision (d), and 459.

Although Matthew's appeal from the jurisdiction findings in this case is (barely) not moot, the better practice would have been for Matthew to have appealed the order terminating jurisdiction and the accompanying custody order. (Cf. *In re Michelle M.* (1992) 8 Cal.App.4th 326, 330 ["no direct relief can be

might not convince a family law court to modify the juvenile court's custody order, but it could help Matthew meet his burden to show there has been a significant change of circumstances.

Matthew's appeal of the disposition orders, however, is moot because the juvenile court's custody order superseded the disposition orders. (See *Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150, 1165 ["the exit order 'shall be a final judgment and shall remain in effect after [the juvenile court's] jurisdiction is terminated"].) The disposition orders no longer adversely affect Matthew, and no decision in this appeal could grant him any relief from orders that no longer exist. (See *In re E.T.* (2013) 217 Cal.App.4th 426, 436 ["[a]n appeal may become moot where subsequent events, including orders by the juvenile court, render it impossible for the reviewing court to grant effective relief"].)⁴

granted . . . because the juvenile court no longer has jurisdiction and we are only reviewing that court's ruling"].)

The Department argues Matthew's appeal is not justiciable because Matthew did not contest the findings under section 300, subdivision (b)(1), that Matthew "graz[ed]" Audrey's stomach. One of the bases of the custody order, however, was the more severe finding that Matthew repeatedly touched Audrey's thigh and buttocks for the purpose of sexual arousal or gratification under section 300, subdivision (d). A reversal of that finding could be a significant change in circumstances even if the "grazing" finding remains. (See *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452 [appeal of "pernicious" findings under section 300, subdivision (d), was justiciable, even though the mother did not contest all jurisdiction findings against her, because the findings under section 300, subdivision (d), "could potentially impact the current or future dependency proceedings"].)

B. Substantial Evidence Supported the Jurisdiction Findings Under Section 300, Subdivision (d)

1. Applicable Law and Standard of Review

"The Department has the burden of proving by a preponderance of the evidence that . . . children are dependents of the court under section 300." (In re I.J. (2013) 56 Cal.4th 766, 773; see §355, subd. (a).) Section 300 provides, "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: . . . subdivision (d) . . . 'The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent." (See In re I.J., supra, 56 Cal.4th at p. 772.) Penal Code section 11165.1, subdivision (a), states that "sexual abuse' means sexual assault," which includes "conduct in violation of . . . [Penal Code] [s]ection 647.6 (child molestation)." Penal Code section 11165.1, subdivision (b)(4), provides that "sexual assault" includes the "intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification." (See In re R.C. (2011) 196 Cal.App.4th 741, 749, fn. 7.)

"[S]ection 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. . . . The legislatively declared purpose . . . 'is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused . . . and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (In re I.J., supra, 56 Cal.4th at p. 773; see In re R.V. (2012) 208 Cal.App.4th

837, 843 [juvenile court "need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child"].)

"In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court."" (*In re I.J.*, *supra*, 56 Cal.4th at p. 773; see *In re D.C.* (2015) 243 Cal.App.4th 41, 51-52 ["[t]he appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the findings or order"].)

2. Substantial Evidence Supported the Finding Matthew Sexually Abused Audrey

Matthew contends substantial evidence did not support the juvenile court's finding he sexually abused Audrey within the meaning of section 300, subdivision (d). Referring to Penal Code section 647.6, Matthew argues "there was absolutely no showing that [he] ever touched Audrey with an unnatural or abnormal sexual interest or intent with respect to children." Matthew also contends Audrey's statements "lacked corroboration, were inconsistent and were unreliable." None of these contentions has merit.

As discussed, section 300, subdivision (d), refers to Penal Code section 11165.1 for the definition of sexual abuse, and Penal Code section 11165.1 defines sexual abuse to include conduct described by Penal Code section 647.6. As stated, however, in addition to conduct described by Penal Code section 647.6, Penal

Code section 11165.1 lists other kinds of conduct that qualify as "sexual assault," including "[t]he intentional touching of the . . . inner thighs . . . buttocks . . . or the clothing covering them . . . for purposes of sexual arousal or gratification." (Pen. Code, § 11165.1, subd. (b)(4); see In re Jordan R. (2012) 205 Cal.App.4th 111, 135.) Matthew's conduct, as reported by Audrey, falls squarely within Penal Code section 11165.1, subdivision (b)(4). Audrey described to the doctor who performed the forensic examination how Matthew touched her, and she demonstrated with her hand that Matthew touched her upper thigh and genital area, conduct Aiden confirmed. Audrey also described how Matthew held her hands back and touched her buttocks beneath her underwear. And there was evidence Matthew repeatedly touched Audrey's "intimate parts." (Pen. Code, § 11165.1, subd. (b)(4).) The juvenile court could reasonably conclude, given the manner and frequency with which Matthew touched Audrey's body, that he did so for the purpose of sexual arousal or gratification. (See In re R.C., supra, 196 Cal.App.4th at p. 750 ["[a] touching which might appear sexual in context because of the identity of the perpetrator, the nature of the touching, or the absence of an innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose"].)

Matthew attempts to discredit Audrey by pointing to inconsistencies in her statements and arguing she later "retracted the statement that [Matthew] had touched her bottom under her underwear." This argument does not help Matthew on appeal. "[I]nconsistencies and conflicts in the evidence go to credibility of witnesses and weight of the evidence, which are matters for the trial court." (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1149; see *In re Jordan R.*, supra, 205 Cal.App.4th at p. 136 ["[t]o the extent the trial court's findings rest on an evaluation of

credibility, the findings should be regarded as *conclusive* on appeal"].) Although in a later interview Audrey did not repeat her allegation Matthew touched her bottom, she did describe how Matthew touched the area below her belly button and above her vagina, which made her feel uncomfortable, and she admitted she was "scared" to share this information with the doctor. (See *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 195 ["[a]s is often the case, [the victim's] testimony and the various reports given to investigators contained inconsistencies," but "the essence of the offense . . . did not change"], disapproved on another ground in *In re I.J.*, *supra*, 56 Cal.4th at p. 781.)

It was also a reasonable inference from the evidence that, at some time between Audrey's forensic exam and her forensic interview, Audrey felt compelled to minimize her statements about Matthew's conduct. The evidence showed Aiden, too, felt compelled to recant his earlier statement that Matthew "would touch [Audrey] on the upper leg." It was during this same time period, between the children's forensic examinations and their forensic interviews, that the Department interviewed Matthew about the sexual abuse allegations. And it was during this interview that Matthew asked how to disprove the allegations against him and what questions the examiner might ask in subsequent interviews with Aiden. The trial court reasonably discounted the children's subsequent modifications of their initial statements to the doctor. (See In re Maria R. (2010) 185 Cal.App.4th 48, 59 [juvenile court's disbelief of the child's "later assertion that she had made up the allegation of sexual molestation" was "fully supported by the record," which reflected that the child "was under pressure to retract her initial allegation of sexual abuse", disapproved on another ground in *In re I.J.*, *supra*, 56 Cal.4th at p. 781.)

Matthew also argues Audrey's "accounts are unreliable as they have been contaminated by the suggestions of others." However, "[t]o warrant rejection of the statements of a witness who has been believed by the trier of fact, it must be physically impossible for the statements to be true, or their falsity must be apparent without resorting to inferences or deductions." (*In re Jordan R.*, *supra*, 205 Cal.App.4th at p. 136.) Matthew has not shown or even argued that Audrey's account of sexual abuse was physically impossible or apparently false. In fact, the evidence showed exactly how possible Matthew's conduct was, including that he had Aiden sit on the floor and almost out of view to allow Matthew to sexually abuse Audrey in Aiden's presence.

Finally, Matthew argues Audrey's statements lacked corroboration. Corroboration of a victim's statements, however, is not required. "The testimony of a single witness is sufficient to uphold a judgment." (*In re S.A.*, *supra*, 182 Cal.App.4th at p. 1148.) Moreover, "section 355 specifically authorizes the admittance of and reliance on the hearsay statements of minors who are the subject of dependency proceedings without reference to corroboration." (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1249; see *id.* at pp. 1249-1250 ["corroboration is not necessary" to support a jurisdiction finding under section 300, subdivision (d)].) The juvenile court did not err by making jurisdiction findings based on Audrey's statements. (See *In re P.A.* (2006) 144 Cal.App.4th 1339, 1344-1345 [notwithstanding the absence of corroborating evidence, the minor's statements contained in the social study report constituted "substantial evidence" to support

the juvenile court's finding that the minor "currently was at risk of harm and sexual abuse" from her father].)⁵

3. Substantial Evidence Supported the Finding Aiden Was at Risk of Harm

Matthew contends substantial evidence did not support the juvenile court's finding Aiden was at risk of harm within the meaning of section 300, subdivision (d). But there was substantial evidence to support the finding. Aiden stated he had to sit on the floor when Matthew touched Audrey's upper leg, so he "couldn't really see." This statement indicated Aiden knew his father was touching his sister in a way (or at least doing something) his father did not want him to see. Although Aiden did not understand why Matthew would engage in such conduct, Aiden was exposed to and in close physical proximity to Matthew's sexual abuse of Audrey. Such exposure and proximity supported the finding Aiden was at risk of harm. (See *In re Ricky* T. (2013) 214 Cal.App.4th 515, 523 [because "[s]exual abuse of other children in [the child's] presence would . . . constitute annoying or molesting [the child] within the meaning of Penal Code section 647.6," the child "was at risk of being a victim of sexual abuse as defined in section 300, subdivision (d)"]; In re P.A., supra, 144 Cal.App.4th at p. 1347 ["aberrant sexual

The juvenile court may not rely exclusively on statements by child witnesses who "lack the capacity to distinguish between truth and falsehood at the time of testifying," "unless the court finds . . . sufficient indicia of reliability." (*In re Lucero*, *supra*, 22 Cal.4th at p. 1248.) Matthew does not contend, and the record does not support a finding that, Audrey lacked the capacity to distinguish between truth and falsehood.

behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior"].)

DISPOSITION

The jurisdiction findings against Matthew under section 300, subdivision (d), are affirmed. The appeal from the disposition orders is dismissed as moot.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.