

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re E.P. et al., Persons Coming Under
the Juvenile Court Law.

M.P.,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Real Party in Interest.

B289238

(Los Angeles County
Super. Ct. No. DK16066A-C)

ORIGINAL PROCEEDING. Petition for extraordinary writ. (Cal. Rules of Court, rule 8.456.) Kristen Byrdsong, Commissioner. Petition denied.

Christopher R. Booth, by appointment, for Petitioner M.P.

No appearance for Respondent.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Real Party in Interest.

Children's Law Center of Los Angeles – CLC1, Dan Szrom and Meredith Alexander for child J.P.

The juvenile court declared three children to be dependents after their mother pled no contest to failing to protect them from sexual abuse in a household rife with incestual rape. After the mother received 18 months of reunification services, the juvenile court terminated those services and set the matter for permanency planning. The mother has filed a writ petition challenging that termination as unsupported by substantial evidence and infected by evidentiary error. Because her claims lack merit, we deny the writ petition.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The family*

Maria P. (mother) and Carlos P. (father) have three children together—Estevan (born September 2000), Juliana (born October 2003), and Victor (born September 2008). Father has an adult son, Roberto P., by another woman.

B. *Sexual abuse within the household*

In 2015 and 2016, mother's and father's household was rife with incest. Juliana, then age 12 or 13, was being sexually abused by her father, by Roberto, and by Estevan. Father

admitted to having vaginal intercourse with her, digitally penetrating her, and forcing her to orally copulate him. He ultimately was convicted of the felony of having continuous sex with a minor (Pen. Code, § 288.5). Roberto and Estevan also each had repeated vaginal intercourse with Juliana. During that same timeframe Roberto regularly sodomized Estevan, and father fondled Estevan. And Estevan was inappropriately touching Victor.

At the time this abuse was occurring, the family had already been under the supervision of the Los Angeles County Department of Children and Family Services (the Department) based on previous reports of sexual abuse. As part of that supervision, mother was taking classes on sexual abuse awareness. However, mother claimed not to be aware of any of the abuse going on in the household. Mother maintained her ignorance of the abuse even though father, Estevan, and Juliana each reported that mother was often in the same room when the abuse was occurring or saw the abuse on the video cameras she had installed around the house.

II. Procedural Background

A. *The petition*

In March 2016, the Department filed a petition with the juvenile court asking it to exert dependency jurisdiction over Estevan, Juliana, and Victor on the grounds that (1) father was “repeatedly forcibly raping” Juliana, “forc[ing] [her] to orally copulate” him, and “digitally penetrat[ing]” her vagina, while mother knew or should have known about this abuse; (2) Roberto was sexually abusing Juliana by “forcibly raping” her and fondling her, while father and mother knew of the abuse but failed to protect Juliana from this abuse; (3) Estevan was

vaginally penetrating Juliana, while father and mother failed to protect Juliana from this abuse; (4) Roberto was sexually abusing Estevan by “forcibly raping” him anally and ejaculating on his stomach, while father and mother knew of the abuse but failed to protect Estevan from this abuse; (5) father was sexually abusing Estevan by inappropriately touching Estevan’s penis and anus; (6) father physically abused Juliana with a belt, while mother should have known about the abuse; and (7) mother inappropriately disciplined Estevan and Juliana by striking each with a sandal and by whipping Estevan with a rope.¹ The Department further alleged that these allegations rendered jurisdiction appropriate under Welfare and Institutions Code section 300, subdivisions (b)(1), (d), or (j).²

B. *Mother’s plea and subsequent dispositional order*

In January 2017, mother entered a no contest plea admitting the above stated allegations. The juvenile court then declared Estevan, Juliana, and Victor to be dependents, removed them from mother, ordered the Department to provide mother with reunification services, and ordered mother to follow an individualized case plan. Among other things, mother’s case plan required her to (1) complete a parenting class, (2) participate in individual counseling with a “licensed therapist” to address “case issues including sexual abuse awareness,” and (3) participate in

¹ The Department’s operative petition contained four additional allegations, but they were ultimately dismissed when, as noted below, mother pled no contest to the above described allegations.

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

conjoint counseling with the children once each child's therapist indicated that the child was ready for such counseling.

C. *Progress during reunification*

Mother completed a parenting class. She also participated in individual counseling with two different therapists—namely, with Jessie Gonzalez (Gonzalez) from May through July 2017, and then with Sonia Macedo (Macedo).³ Mother engaged in some conjoint counseling with Estevan and with Victor.

Mother regularly kept her monitored visitation appointments with the children, but the children continued to show the after effects of the incest. Estevan reported that he still has sexual fantasies about Juliana and masturbated to them. Victor continued to act out sexually. While in foster care, Victor exposed himself to other children on two occasions and once asked another boy to give him oral sex. In March 2018, Victor's foster parents caught him humping a teddy bear and, when asked why, Victor said he missed Juliana. Mother's acts during visitation may have encouraged this behavior: during one visit, she gave Victor an iPad containing sexual images interspersed with family photos, and during a different visit, she hugged him for nearly five minutes while he was straddling her lap with his legs wrapped around her hips. Juliana remained traumatized and refused any contact with Estevan.

D. *Eighteen-month review hearing*

In March and April 2018, the juvenile court conducted a three-day evidentiary hearing to determine whether to return one

³ Before disposition, mother received eight months of therapy to increase her cognitive coping, stress management, and communication skills.

or more of the children to mother after 18 months of reunification services.

The Department called the social worker assigned to mother's case. The social worker testified that mother seeks to reunify with all three children and that, in the social worker's view, her request showed a lack of "clear understanding of sexual abuse" awareness given the danger of placing Juliana in the same house with her two brothers—Estevan and Victor—at least one of whom continues to express sexual desire for her. The social worker also testified that mother had not demonstrated that she had the skills necessary to protect Juliana from the danger posed by her siblings.

Mother offered evidence as well. She and the Department stipulated that Estevan would testify that he wanted to live with mother, and Juliana testified in chambers that she desired to live with mother. Mother called her two therapists, Gonzalez and Macedo. Gonzalez testified that, during her two months as mother's therapist, her "treatment goals" were to "decrease [mother's] depressive symptoms" and that she "focused [the therapy] mostly on . . . coping skills." Macedo testified that her "primary" "treatment" "goal" was also to "decrease [mother's] depressive symptoms," and that mother had made "a lot of progress" in that regard. Macedo noted that she and mother would, at every session, discuss the sexual abuse mother was facing with her family but noted that "sexual abuse awareness" was not the "primary focus" of her individual therapy. A few months earlier, Macedo told the Department that she was "unable to assess if [mother] is able to provide her children with safety as she [had] not observed [mother] with her children"; on

the stand, Macedo indicated that she had still not seen mother with the children.

Mother herself took the stand. She testified that the social worker lied in her reports, and that the foster mother who saw Victor straddling mother for several minutes misunderstood that mother was merely comforting Victor after injuring him while clipping his toenail. Mother had as recently as December 2017 wanted to regain custody of all three children, but testified at the hearing that she understood that Estevan might be a “danger” to Juliana and thus wanted only to regain custody of Juliana and Victor.⁴ When confronted with Victor’s comment that he was humping a teddy bear because he missed Juliana, mother admitted that “maybe [it] wouldn’t be appropriate to have [Juliana and Victor] . . . together at the same time.” Mother nevertheless said that she had a “safety plan” in place to ensure that Victor would not sexually abuse Juliana—namely, that she would “do [her] best” to make sure each child was “always” under [her] supervision” by putting each of them in their own room and, if necessary, locking them inside their rooms every night while mother slept in her own room or whenever mother used the bathroom. Mother alternatively said she would be fine with just regaining custody of Juliana.

E. *Juvenile court’s ruling*

After considering the testimony and entertaining closing argument, the juvenile court terminated mother’s reunification services and set the matter for a permanency planning hearing. The court found it appropriate to terminate reunification services because, in its view, a preponderance of the evidence established

⁴ Estevan has since turned 18.

that returning the children to mother “would pose a substantial danger [to] their physical and mental health.”

Separate and apart from finding mother’s testimony not to be credible, the juvenile court’s ultimate finding of detriment to the children rested on two subsidiary findings. First, the court found that the Department had provided mother reasonable reunification services, but that mother had failed to comply with the case plan that was part of those services because the individual counseling she attended “failed to address” “sexual abuse awareness,” which was an express requirement of the case plan and also “the most important issue[] in this case.” Second, the court found that returning the children to mother was dangerous to their physical and mental health because mother said she did not notice three of the four males in the household sexually abusing Juliana and one another in 2015 and 2016, because mother “was not able to state in any way how she would protect the children” if she regained custody in 2018, and because mother’s desire to reunite with all three children (or even just Victor and Juliana) despite the dangers mother herself perceived demonstrated that mother “ha[s not] learned anything in the 18 months she [has] received services.”

F. *Writ petition*

Mother filed a timely writ petition.

DISCUSSION

In her writ petition, mother challenges the juvenile court’s order terminating reunification services and setting a permanency planning hearing. (§ 366.26, subd. (d)(1)(A) [noting propriety of writ review of these orders]; *In re X.Z.* (2013) 221 Cal.App.4th 1243, 1246 [same].) More specifically, mother argues that the juvenile court erred in (1) concluding that termination of

reunification services was warranted under section 366.22, and (2) ruling that her two therapists were not qualified as expert witnesses. We review mother's first claim for substantial evidence (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705 (*Constance K.*)), and her second for an abuse of discretion (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322).

I. Termination of Reunification Services

When a juvenile court conducts a review hearing 18 months after a dependent child is removed from his or her parent, the court must return the child to that parent unless it "finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a)(1).) The Department bears the burden of proving such a detriment. (*Ibid.*) Because the case "plan is usually developed to . . . overcome the problem that led to removal [of the child] in the first place" (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1748 (*Blanca P.*)), a parent's "failure . . . to participate regularly and [to] make substantive progress in court-ordered treatment programs" is "prima facie evidence" that returning the child to that parent would be detrimental (§ 366.22, subd (a)(1)). However, a parent's compliance (or substantial compliance) with the case plan does not dictate a finding in the parent's favor. That is because detriment can be proven in other ways. One such way is by "properly supported psychological evaluations which indicate return to a parent would be detrimental to a minor" (*Constance K., supra*, 61 Cal.App.4th at p. 705), at least if those evaluations are "reasonably specific and objective" (*Blanca P.*, at p. 1750). Another way is by looking to "the manner in which the parent

has conducted . . . herself in relation to [the] minor in the past.” (*Constance K.*, at p. 705.)

Applying these standards, substantial evidence supports the juvenile court’s finding that returning the children to mother would be detrimental to them for several reasons. To begin, mother did not comply with her case plan, and her failure constitutes prima facie evidence of detriment. Although she completed the parenting class and attended individual therapy, the individual therapy she attended focused on mother’s own depressive symptoms, and *not* the “sexual abuse awareness” mandated by the case plan. Tangentially discussing the sexual abuse issues mother was facing with her family is not the same thing as receiving counseling regarding “sexual abuse awareness.”

Even if we overlook mother’s noncompliance with her case plan, other evidence independently demonstrates that mother remains blind to the risk of sexual abuse in her household. Mother insists she never noticed the sexual abuse repeatedly inflicted upon Juliana, Victor, or Estevan by father or Roberto even though the abuse occurred under the very same roof, and on many occasions, in the very same room mother occupied. Indeed, mother later admitted through her no contest plea that she knew or should have known of that ongoing abuse. Mother has since attended no classes and received no counseling on sexual abuse awareness, and her prior counseling on that topic did not help her see the abuse that gave rise to the allegations underlying this case.

As recently as the 18-month hearing, mother saw little problem in regaining custody of both Victor and Juliana notwithstanding Victor’s sexual conduct and notwithstanding her

own acknowledgement that “maybe” it “wouldn’t be appropriate” to have the two of them “together at the same time.” Her chief solution was to be with both children at all times (which is a physical impossibility) or to lock them in their rooms (which may create a whole different set of issues). Mother’s alternative solution was to ditch her effort to regain custody of Victor and to seek only custody of Juliana. Even if we overlook the ease with which mother seems willing to abandon her efforts to regain custody of one or more of her children in order to obtain custody of *any* of them, substantial evidence supports the juvenile court’s implicit finding that even Juliana alone would not be safe in mother’s custody given that Roberto and Estevan are now adults; mother has a three-bedroom home; and nothing prevents mother from allowing either to move back in with her and Juliana once, as would be the case, the Department is no longer supervising the family.

Mother responds that this case is indistinguishable from *Blanca P.*, *supra*, 45 Cal.App.4th 1738. In *Blanca P.*, the court ruled that a social worker’s opinion that a parent “fail[ed] to ‘internalize’” the court-ordered counseling she completed was not a basis for terminating reunification services when that failure was based upon the parent’s refusal to believe that the other spouse had engaged in child molestation. (*Id.* at pp. 1750-1751.) The court acknowledged that “psychological evaluations can serve as credible evidence to sustain a detriment finding” if they are “reasonably specific and objective,” but found that “[t]he failure to ‘internalize’ general parenting skills [was] simply too vague to constitute substantial, credible evidence of detriment.” (*Ibid.*)

This case is nothing like *Blanca P.* Here, we have objective evidence of the near-ubiquitous incest going on in the household;

we have objective evidence—through mother’s own admissions—that she should have noticed all of this sexual abuse; and we have objective evidence that Victor poses a risk to Juliana, yet mother still seeks to regain custody of both children, and her articulated plan for protecting them is at best impractical and at worst destined to fail.

In sum, substantial evidence supports the juvenile court’s finding that returning one or more of the children to mother would be detrimental to them.

II. Expert Testimony

Evidence Code section 720 requires a trial court to assess whether a person “is qualified to testify as an expert” by looking to whether her “special knowledge, skill, experience, training, or education [is] sufficient to qualify [her] as an expert *on the subject to which [her] testimony relates.*” (Evid. Code, § 720, subd. (a), italics added.)

Although the juvenile court sustained objections to Gonzalez’s and Macedo’s qualifications as expert witnesses, the court nevertheless permitted Gonzalez and Macedo to offer opinions on topics typically reserved for expert witnesses—namely, that mother had made “a lot of progress” in her individual therapy, that she has been “proactive” in acting on the therapist’s recommendations, that she was “really open to . . . services,” and that she did not lack “insight” into her children’s trauma. The only question that mother asked and to which she was not permitted to get an answer was whether, in Macedo’s professional opinion, mother could protect the children if they were returned to her custody. However, Macedo testified that she had never observed mother with the children and had previously indicated that, absent such observation, she could not

offer an opinion on that subject. Thus, Macedo's opinion on this topic was that she could not formulate an opinion.

Any error in this regard was in any event harmless. To begin, the exclusion of Macedo's non-opinion was surely harmless. Moreover, the evidence of detriment to Juliana and Victor should either or both be returned to mother was amply established by the other evidence described above. Even if we assume for the sake of argument that mother's two therapists would have opined that returning the children to mother was not detrimental, it is not reasonably probable that the juvenile court's detriment finding would have been any different. (*People v. Watson* (1956) 46 Cal.2d 818, 830-831.)

Mother raises three arguments in response. First, she contends that the juvenile court ignored the therapists' testimony because they were not officially labeled as "experts." This contention is belied by the juvenile court's own ruling, which referred to the therapists' testimony. It also seems to rest on the notion that labeling a witness an "expert" somehow entitles the witness's testimony to greater weight; it does not. Second, mother asserts that an expert's qualifications are important under *People v. Kelly* (1976) 17 Cal.3d 24, but *Kelly* addresses the qualification of expert testimony grounded in new methodologies; *Kelly* does not apply to "garden variety" "psychological testimony." (*People v. Cegers* (1992) 7 Cal.App.4th 988, 1000; *Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298, 314; *People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) Lastly, mother urges that the extent of an expert's qualifications go to the weight to be given to the expert's testimony, not to its admissibility. This is true to the extent a witness has the minimum qualifications necessary to be deemed an expert (*People*

v. James (1989) 208 Cal.App.3d 1155, 1164), but is irrelevant in this case given that the juvenile court admitted several of the therapists' opinions and only omitted those on which they were not by their own admission qualified to opine.

DISPOSITION

The petition for extraordinary relief is denied. The stay of the section 366.26 hearing is dissolved. This opinion shall become final immediately upon filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST