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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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

B295002
(Los Angeles County
Super. Ct. No. 18CCJP07175A)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.R.,

Defendant and Appellant.

APPEAL from findings and an order of the Superior Court of Los Angeles County. Kim L. Nguyen, Judge. Affirmed in part, reversed in part and remanded with directions.

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Jacklyn K. Louie, Deputy County
Counsel, for Plaintiff and Respondent.

M.R. (father) challenges the juvenile court's jurisdictional findings and removal order made at the combined jurisdiction/disposition hearing on January 7, 2019. He argues that insufficient evidence supports the juvenile court's findings made pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (d),¹ and that insufficient evidence supports the juvenile court's order removing J.R. (minor, born Sept. 2018) from his custody.

We affirm the juvenile court's jurisdictional findings. However, we reverse the juvenile court's removal order; the juvenile court failed to indicate whether reasonable means exist to protect minor without removing him from father's custody. The matter is remanded for a new disposition hearing.

FACTUAL AND PROCEDURAL BACKGROUND

Detention Report (Nov. 7, 2018)

On September 30, 2018, the Los Angeles Department of Children and Family Services (DCFS) received an emergency response referral regarding minor. He was born premature at

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

almost 26 weeks, was on a ventilator, and was in need of a blood transfusion due to having a lot of blood drawn. The parents, father and A.R. (mother), refused the blood transfusion despite the baby's neonatologist advising that the blood transfusion was necessary to keep the baby alive. The parents' religious beliefs forbade such interventions. During DCFS's investigation of this referral, it discovered that father had a previously substantiated sexual abuse allegation regarding his older daughter, a half-sibling to minor.

The social worker spoke with the parents at their home on October 2, 2018. Father said that he had a daughter, P.R. (born June 2004), who lived with her mother (A.S.), who had sole legal and physical custody of P.R. He stated that his visits with P.R. were monitored, explaining that he had been accused of sexual abuse, but that it did not happen. The social worker asked mother whether she knew of the sexual abuse. She replied that she and father had discussed it and she had no concerns. She and father had been married for three years; they met through the ministry.

Father denied any history of mental health, substance abuse, or child abuse. However, according to what had been previously reported, father had been a victim of sexual abuse. Father also denied having any criminal history, noting only that he had been questioned by law enforcement about the sexual abuse allegation.

The social worker obtained a copy of the May 21, 2011, police report regarding the sexual abuse allegation. On May 2, 2011, the police had gone to the home shared by father, P.R., and A.S. (father's ex-wife). P.R. had asked her mother how children were made. A.S. asked why P.R. wanted to know, and P.R.

replied that the prior week, father had taken her to a pizza restaurant after school. In the parked car, father told her that he had a secret to tell her, but P.R. had to promise not to tell her mother. Father then demonstrated how children are made by using his fingers and explaining that the penis goes inside the female and “white stuff comes out of it.”

The social worker also got a copy of a Pomona police report from January 26, 2006, regarding an allegation of attempted rape by father on a friend of A.S. In it, the victim reported going to their home to get some paperwork from A.S. Father answered the door, and, once inside the home, he told the victim that he wanted to have sex with her (an affair), but that they could not tell his then wife. Father then pushed the victim into the master bedroom, pinned her to the bed, and penetrated her. After, the victim told father that she was going to report the incident to the police.

The detention report included DCFS’s prior investigation into the 2011 sexual abuse by father of P.R. P.R. reiterated what was described in the police report. She added that, at that time, father masturbated in front of her. P.R. reported the incident to her mother.

During that investigation, the social worker met with father, who stated that he and A.S. had been married for four years and that he had been living apart for four to five years. They separated due to his cheating. Father reported that he had a very strong sex drive that he could not control and needed to satisfy. He disclosed that he needed to masturbate multiple times a day and was unable to control this behavior; he also used to watch pornography daily, but no longer did so. Father said that he tried to stop masturbating for a month, but that he felt

that during that time he was going to “explode.” He reported being sexually abused when he was 11 years old by a friend in his 20’s who “violated” him. Father never reported what had happened.

Father said that the last time he had contact with P.R. was a month ago. When asked why there was a restraining order² in place, father answered that it had to do with an incident he deeply regretted. He then admitted to masturbating in front of P.R. in the car, as P.R. has previously reported. Father expressed shame by his actions and embarrassment that A.S.’s family knew; he said that he understood that his actions were wrong. He did not know why he did what he did; he said that he should have been teaching P.R. about God instead of sex and the actions of adults. He then went on to say that he told P.R. that the reason he and A.S. had separated was because he had sex with someone else and A.S. found them in bed together. Father denied touching P.R. or asking her to touch him in an inappropriate manner.

The social worker admonished father to comply with the restraining order and to refrain from having any contact with P.R. He was provided with referrals for sex abuse counseling for offenders as well as parenting classes. He showed the social worker the court order that he complete a sex offenders program prior to any possibility of contact with P.R. Father said that he intended to do so.

² The sexual abuse referral was substantiated but then closed because a restraining order was issued against father that protected P.R. After the restraining order expired in 2012, father had monitored visits with P.R.

Father showed the social worker the restraining order that was in effect for one year (until June 14, 2012) during which time he was prohibited from having any visitation with P.R. He told the social worker that he had no other children and that there were no children residing in the home with him.

Father's criminal history included a January 2006 arrest for rape that was dropped for lack of evidence. Also attached to the detention report was the Pomona Police Department report regarding father and P.R.

Detention Hearing (Nov. 8, 2018)

At the detention hearing, the juvenile court made prima facie findings to detain minor from father, and released minor to mother's care. Father was granted monitored visits. The juvenile court ordered DCFS to make unannounced visits to the hospital where minor was and to assess mother as a possible monitor for father's visitation.

Jurisdiction/Disposition Report (Dec. 17, 2018)

DCFS reported that minor remained in the hospital. The dependency investigator spoke to mother, who said that she and father understood that what father had done with P.R. "was wrong." She monitored the visits between father and P.R. and noted that father acted appropriately. Mother believed that father had learned from his actions and that they "shouldn't define him." Mother stated that minor was her "priority" and that she would report anything inappropriate.

Mother knew about the rape allegation, saying, "It was an accusation." She described father as respectful towards her and their marriage. She said the goal was for them to be a family, but father would leave the home when minor was discharged from the hospital.

Father was also interviewed. He admitted to showing his penis to P.R. and to telling her how babies were made. He stated: “I don’t know why I did it. At the time I was watching a lot of pornography and I was weak minded.” He said that he had since stopped watching pornography. He and P.R. now had a good relationship and they had visits that were monitored either by mother or A.S. He said that he regretted what he had done and was embarrassed.

Regarding the rape charge, father said that the sex had been consensual. The woman called the police after he refused to give her money. He said that the woman did not cooperate with the investigation and that the case was closed.

The doctor at the hospital described the parents as appropriate with minor at the hospital; she had no concerns regarding their care of him.

DCFS reported that the parents visited minor every day in the hospital (father’s visits were monitored by hospital staff) and that they had enrolled in programs. Specifically, father had enrolled in a sex offender treatment program, which was set to begin on November 19, 2018. He also was attending individual therapy, which he found to be helpful. Father said that he was learning to control his impulses, which he did not do with P.R.

Both parents expressed a willingness to do what they needed to do. DCFS approved the maternal grandmother to monitor father’s visits.

Last Minute Information for the Court (Jan. 7, 2019)

Father’s therapist called the dependency investigator on December 18, 2018. She had completed five sessions with father. She had concerns about father, stating that he did not understand boundaries and excessively watched pornography.

Father became observably excited when talking about women, saying that he liked them young, although it was unclear to the therapist “to what limit.” The therapist wondered whether father might have some intelligence delay, and noted that this might limit his understanding of the trauma he had or could cause. She also indicated that while father said he was regretful, he was uncertain what he was remorseful about. The therapist stated: “His insight is poor. He’s remorseful but not sure for what. He doesn’t have the capacity to think things through. He’s like a little boy who doesn’t want to get caught. He has the propensity to lie.” She was concerned that mother may not be entirely aware of father’s addiction to sex and would therefore be limited in her ability to protect minor. And, at this time, she did not believe that minor “would be safe in father’s care.”

Minor was discharged home from the hospital on January 1, 2019.

Jurisdiction/Disposition Hearing (Jan. 7, 2019)

Following consideration of the written evidence and hearing argument from counsel, the trial court sustained the petition against father, pursuant to section 300, subdivisions (b)(2) and (d).³ In so doing, it stated that “although the sexual abuse that took place as to [P.R.] by [father] took place in 2011, the court does find[] that it is severe enough to demonstrate predatory behavior that gives the court great concern for this child.” The juvenile court found that father had not

³ The juvenile court dismissed the medical neglect count ((b)(1)) and the subdivision (j) count, finding that “the risk of harm is directed at this child.” No counts were sustained as to mother.

demonstrated any insight into his sexual abuse of P.R., struggled with the amount of pornography he watched and his ability to control his impulses, and only recently had begun sexual abuse counseling, which was not sufficient to eliminate the risk. The juvenile court believed that minor was “even more vulnerable than [P.R.] because of his young age, his medical fragility, and the fact that he is not verbal.” In so stating, the juvenile court noted that P.R. was prepubescent at the time of the abuse, as minor currently was.

The juvenile court then proceeded to disposition, iterating DCFS’s recommendations that included a home-of-parent (mother) order. Father’s counsel submitted on the case plan, asking only for no/low-cost referrals. The juvenile court had some concerns about mother’s ability to protect and kept in place a prior order that she not monitor father’s visits, but gave DCFS discretion to lift the restriction. The juvenile court declared minor a dependent of the juvenile court, removed custody of minor from father, and placed minor in mother’s home. Father’s visits were to remain monitored.

Appeal

Father timely appealed.

DISCUSSION

I. Substantial evidence support the juvenile court’s jurisdictional findings

Father argues that the juvenile court’s jurisdictional findings were not supported by substantial evidence. While he admits to sexually abusing his daughter, he asserts that that conduct did not place minor at a current substantial risk of harm.

A. Standard of review

A petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a section 300 petition comes within the juvenile court's jurisdiction. (§ 355.) We review the juvenile court's jurisdictional findings for substantial evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) Under this standard of review, we examine the whole record in a light most favorable to the findings of the juvenile court and defer to the lower court on issues of credibility of the evidence and witnesses. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1427; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733–734.)

B. Applicable law

Section 300, subdivision (b)(1), authorizes dependency jurisdiction when, inter alia, “[t]he 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.” (§ 300, subd. (b)(1).) Three elements are often cited as necessary for a jurisdictional finding under section 300, subdivision (b)(1): “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) “The third element . . . effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.)

“[P]roof of current risk of harm is not required to support the initial exercise of dependency jurisdiction under section 300, subdivision (b), which is satisfied by a showing the child has suffered or there is a substantial risk that the child will suffer, serious physical harm or abuse. [Citations.]” (*In re Adam D.* (2010) 183 Cal.App.4th 1250, 1261.)

Section 300, subdivision (d), provides, in relevant part, that a child may be adjudged a dependent when “[t]he 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.”

“[T]he court may . . . consider past events when determining whether a child presently needs the juvenile court’s protection. [Citation.] A parent’s past conduct is a good predictor of future behavior. [Citation.] ‘Facts supporting allegations that a child is one described by section 300 are cumulative.’ [Citation.] Thus, the court ‘must consider all the circumstances affecting the child, wherever they occur.’ [Citation.]” (*In re T.V.* (2013) 217 Cal.App.4th 126, 133.)

C. Analysis

Applying the foregoing legal principles, we conclude that the trial court’s jurisdictional findings are supported by substantial evidence. Father’s problem was a lack of impulse control and boundaries, as noted by his therapist seven years after his sexual abuse of P.R. And, as his therapist expressly noted, his “insight is poor. He’s remorseful, but not sure for what. He doesn’t have the capacity to think things through. He’s like a little boy who doesn’t want to get caught. He has the propensity to lie.” Although father had stated his regret over what he did to P.R., it appeared that his understanding of what

was so regretful falls short, making any progress towards addressing his actions unrealized by the time of the jurisdiction hearing. This is the risk to minor.

Father does not address this point in his appellate brief. Instead, he asserts that the evidence does not support a finding that minor, a boy, is at risk of harm based upon father's sexual abuse of P.R., a girl. We are not convinced. Given father's lack of grasp of what he did to P.R., we conclude that the juvenile court's findings are supported by substantial evidence. (See, e.g., *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415 [father's aberrant sexual behavior with a child's siblings place that child at risk of sexual abuse].)

II. *The juvenile court erroneously removed minor from father's custody*

Father argues that the juvenile court erred when it removed minor from his custody.

A. Standard of review

"At a dispositional hearing, the [juvenile] court's findings must be made on clear and convincing evidence. The [juvenile] court must find that the welfare of the child requires that [he] be removed from parental custody because of a substantial danger, or risk of danger, to [his] physical health if [he] is returned home and that there are no reasonable means to protect [him] without removing [him]. [Citations.] On review, we employ the substantial evidence test, however, bearing in mind the heightened burden of proof. [Citations.]" (*In re Kristin H.*, *supra*, 46 Cal.App.4th at p. 1654.)⁴

⁴ DCFS points out that some courts have applied the abuse of discretion standard of review to a juvenile court's dispositional

B. Applicable law

For a child to be removed from parental custody under section 361, subdivision (c)(1), DCFS has “the burden to prove by clear and convincing evidence that there is a risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child’s safety. [Citations.]” (*In re Yolanda L.* (2017) 7 Cal.App.5th 987, 992.) Pursuant to section 361, subdivision (e), the juvenile court must “make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home” and must “state the facts on which the decision to remove the minor is based.” In making this determination, the juvenile court considers evidence including the DCFS report, which must, by rule, include a “discussion of the reasonable efforts made to prevent or eliminate removal and a recommended plan for reuniting the child with the family, including a plan for visitation.” (Cal. Rules of Court, rule 5.690(a)(1)(B)(i).)

C. Analysis

We agree with father that removal of minor from father’s custody might not have been required. Certainly, as set forth above, father’s sexual abuse of P.R. made him a risk to minor. But DCFS did not discuss any reasonable efforts that it made to prevent or eliminate minor’s removal from father. While DCFS provided the family with services, it does not appear that those services were targeted to prevent removing minor from father. And, the juvenile court did not provide any explanation for its removal; notably, it did not make any reasonable efforts findings,

order. Under either standard of review, we reverse the juvenile court’s order.

as required by section 361, subdivision (e).⁵ But, reasonable means may have existed to protect minor from father without having to remove minor from father's custody. The parents were cooperating with DCFS. They were established in their programs and open to conjoint counseling, and father agreed to a psychological evaluation for any additional recommendations. Notably, father was participating in sex offender treatment and individual counseling. Mother was also participating in a sex abuse awareness program. Under these circumstances, allowing father to move back into the family home with DCFS and juvenile court supervision might not have placed minor at risk of harm.

It follows that we remand the matter for a new disposition hearing, at which time the juvenile court shall consider the evidence of reasonable efforts made to prevent minor's removal. If the juvenile court determines that reasonable efforts were made and that removal is still appropriate, it shall then state its reasons for why removal is necessary. (§ 361, subd. (e); Cal. Rules of Court, rule 5.690(a)(1)(B)(i).)

Finally, for the sake of completeness, we note that to the extent father suggests that the main reason for the removal was or may have been the parents' refusal to allow for a medically imperative blood transfusion for minor, we disagree. That allegation was dismissed from the section 300 petition.

⁵ Section 361, subdivision (e), provides, in relevant part: "The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home."

DISPOSITION

The juvenile court's jurisdictional findings are affirmed.
The juvenile court's removal order is reversed and the matter is
remanded for a new disposition hearing.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT