Filed 9/17/18 In re A.B. CA2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICTP

In Re A.B. et al., Persons Coming Under the Juvenile Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.M., Defendant and Appellant.	B287184 (Los Angeles County Super. Ct. Nos. DK22781 & DK21936)

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph Diaz, Judge. Remanded with directions and affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant S.M.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephanie Jo Reagan, Deputy

County Counsel, for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

Appellant S.M. appeals from the dispositional orders and jurisdictional findings of the juvenile court as to his minor sons J.M. (J.) and A.B. (A.). We reject his contention of insufficient evidence, but remand with directions to correct a clerical error in the minute orders. Subject to that correction, the orders and findings are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant (father) is the presumed father of J., born in 2015, and the alleged father of A., born in 2017. Neither C.D., the mother of J., nor Al.B., the mother of A., is a party to this appeal.

In January 2017, J. came to the attention of respondent Los Angeles County Department of Children and Family Services (Department) following a domestic violence incident between father and C.D. at a Metro transit station. Following the termination of their four-year relationship shortly after J. was born, C.D. initially allowed father to visit J. under an informal agreement. However, C.D. terminated father's visits after he tried to take J. out of state without telling her. When father saw C.D. and J. at the transit station in January 2017, C.D. refused to allow father to hold J., who was in a stroller, and an angry confrontation ensued.

C.D. and father provided different accounts of the January 2017 incident. C.D. told the Department's investigating social worker that after she refused to allow father to see J., father

pushed her, slapped her on the face, punched her on the mouth, struck her face with his fist 10 times, and snatched J. from the stroller with sufficient force to break the straps of the seat belt. When C.D. tried to pull J. from father's arms, father "dropped" J., who landed on his side on the train tracks. J. did not cry or appear to be hurt, and C.D. was "not sure if father dropped the child on purpose or by accident." C.D. reported that father received Social Security benefits for an unknown diagnosis, she knew he used marijuana, she was told that he used some other drug, and she knew he had a history of angry outbursts.

Father told the social worker that C.D. was lying about the January 2017 domestic violence incident. He claimed that he did not hit C.D., and that J. was "'never dropped.'"

J.'s maternal grandmother told the social worker that father had anger issues after J. was born. The grandmother stated that she had advised C.D. to seek a court order after father tried to take J. out of state.

The social worker concluded that father had unresolved anger issues, which she witnessed firsthand when she ended several conversations because of father's anger and hostility. Given the parents' unresolved problems with visitation, the social worker believed that regardless whether J. had been dropped accidentally or intentionally, there was a substantial risk of physical harm to J. during future violent altercations between his parents over visitation. The social worker recommended that judicial intervention was required to establish safe and meaningful visitation between father and J.

J.'s Petition

In March 2017, the Department filed its original dependency petition on behalf of J. (Super. Ct. L.A. County, No.

DK21936.) The petition alleged that J. was a dependent child under subdivisions (a) and (b) of section 300 of the Welfare and Institutions Code.[1] A child is deemed a dependent child under subdivision (a) of section 300 if he or she "has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." (§ 300, subd. (a).) Subdivision (b) applies in relevant part if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." (§ 300, subd. (b).)

Counts a-1 and b-1 of J.'s petition were based on the January 2017 domestic violence incident, and count b-2 was based on father's history of substance abuse and current use of marijuana. By subsequent amendment, the Department added counts a-2 and b-3, which alleged that C.D. had engaged in violent behavior against her female roommate while J. was present.

After finding a prima facie basis to detain J., the juvenile court released him to C.D., the sole custodial parent when the original petition was filed. The court also granted C.D. a temporary restraining order against father.

A.'s Petition

When A. was born in February 2017, the hospital notified the Department that both A. and his mother Al.B. had tested

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[1] All further statutory references are to this code.

positive for marijuana. After completing its investigation, the Department filed a separate dependency petition for A. in May 2017. (L.A. County Super. Ct. No. DK22781.)

Counts a-1, b-3, and j-1[2] of A.'s petition were based on the January 2017 domestic violence incident between father and C.D. Counts b-1 and b-2 of A.'s petition were based on Al.B.'s past and present marijuana use and A.'s positive toxicology screen for marijuana.

The juvenile court found a prima facie basis to detain A., and released him to Al.B., the sole custodial parent when the petition was filed.

Jurisdictional Hearing

The court held a combined jurisdictional hearing for J. and A. At that hearing, C.D. pleaded no contest to count b-3 of J.'s petition, thus admitting she had engaged in violence against her female roommate while J. was present. (A related count, count a-2 of J.'s petition, was dismissed.) Also at that hearing, Al.B. pleaded no contest to count b-1 of A.'s petition, thus admitting she had used marijuana before and during her pregnancy with A., and that A. was born with marijuana in his system. (A related count, count b-2 of A.'s petition, was dismissed.)

Father requested an evidentiary hearing on the remaining counts involving the January 2017 domestic violence incident (counts a-1 and b-1 of J.'s petition and counts a-1, b-3, and j-1 of A.'s petition), and his use of marijuana (count b-2 of J.'s petition).

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[2] Subdivision (j) of section 300 applies where the "child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions." (*Ibid.*)

The evidence submitted by the Department included its March 29, 2017 report, which described a history of "unresolved anger issues" between father and C.D. C.D. admitted she had been physically violent with father, and father admitted he had anger problems and that he hated C.D.

Father had received a diagnosis of "MMR (Mildly Mentally Retarded)," and the Department was uncertain whether this affected his ability to control his behavior during an angry outburst. The Department expressed concern that father was not receiving adequate services from the Regional Center, and recommended that a restraining order be issued to prevent contact between father and C.D. until they were provided with appropriate services, including a training program on co-parenting without conflict.

The Department also was concerned that father was taking "Respirodol and Ritalin for his ADHD and ADD," but was refusing to take his prescribed anti-depressant, Zoloft, because of side-effects. Father admitted that he was self-medicating with marijuana, which the Department believed was inappropriate. The Department recommended that father be provided with individual counseling for depression and a different psychotropic medication with fewer side effects. The report stated that father was "very determined to reunify with his child but it is apparent that he may need more assistance due to being MMR."

Father testified at the jurisdictional hearing that, contrary to the allegations in the petitions, C.D. initiated the January 2017 incident by hitting him on the chest when he asked to hug his son. He denied pushing C.D. or breaking the buckle on J.'s seat belt. He also described previous instances when C.D. had thrown objects at him. He admitted that he smoked marijuana to

relieve pain in his back and knees, and to treat his "stress disorder."

During his testimony, father was admonished to keep his voice down. The court stated: "Sir I want you to not shout. Just answer the question, Sir, please."

C.D. also testified at the jurisdictional hearing. She stated that father used marijuana and was under psychiatric care, but was not taking his prescribed medications. She testified that before the January 2017 incident, they were having problems with visitation because she "had to call police to get [her] son back." This led her to tell father that he could not visit J. without a court order.

C.D. testified that during the January 2017 incident, father slapped her in the face, grabbed the hood of her sweater, and punched her face with his fist. It was only after two men stepped forward that father became "scared" and "dropped" J. on the train tracks as they were pulling J. back and forth. C.D. also testified that because father had threatened to kill her, she obtained a 10-year restraining order against him. She explained that when they were living together, they "would argue all the time, and his idea to calm me down was push me and hold me down."

Juvenile Court's Findings

After considering the evidence presented at the jurisdictional hearing, the court made slight modifications to the allegations regarding the January 2017 domestic violence incident. As to the allegation regarding father's removal of J. from the stroller, the court struck the words "forcibly" and "breaking the belt." As to the allegation that father dropped J., the court assigned the blame to both parents and amended the allegation to read, "they dropped the child."

The court sustained the allegation that father used force against C.D. during the January 2017 domestic violence incident. It sustained the allegations that father struck C.D. on the face with his hands, grabbed her and pulled her from behind, and struck her on the face with his fists, leaving marks and bruises on her face. In explaining its ruling, the court cited father's demeanor on the stand as indicative of his anger issues.

The court also found that father's marijuana use impaired his ability to care for J., stating that because marijuana is a known hallucinogen that is not regulated, it is not a proper substitute for a prescription anti-depressant.

After declaring J. and A. to be dependent children under section 300, subdivisions (a), (b), and, as to A., (j), the court turned to dispositional issues. It placed the boys with their respective mothers under the Department's supervision, and granted both mothers family maintenance services. It also granted father enhancement services, including domestic violence counseling and drug testing. The minute orders for the dispositional hearing contained language removing both J. and A. from father's custody even though he did not have custody of either child when the petitions were filed.

Father separately appealed from the dispositional orders and jurisdictional findings for each child. On our own motion, the appeals were consolidated under case No. B287184.

DISCUSSION

I

Father contends the evidence is insufficient to establish dependency jurisdiction over J. and A. based on the January 2017 domestic violence incident and his use of marijuana.[3]

"The standard of review in juvenile dependency cases is the same as in other appeals on grounds of insufficiency of the evidence." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) "In reviewing the sufficiency of the evidence on appeal, we consider the entire record to determine whether substantial evidence supports the juvenile court's findings. Evidence is "'[s]ubstantial'" if it is reasonable, credible and of solid value. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary finding. [Citations.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support

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[3] The Department seeks to dismiss the appeal for lack of a justiciable issue, arguing that because father does not challenge the alternative grounds for exercising jurisdiction over the minors, there is no viable relief available to him. (See *In re I.A.* (2011) 201 Cal.App.4th 1484 ["jurisdictional finding involving one parent is "'good against both'"'].) Because we have discretion to review findings that are prejudicial to the appellant and have the potential to impact future dependency proceedings (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762–763), the motion to dismiss is denied.

the findings or order. [Citation.]" (*In re T.V.* (2013) 217 Cal.App.4th 126, 133.)

A. January 2017 Domestic Violence Incident

A child is within the jurisdiction of the juvenile court under subdivision (a) of section 300 if he or she "has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." (*Ibid.*) Jurisdiction under subdivision (b) of that section exists if the child has suffered or is at substantial risk of suffering serious physical harm because of the parent's failure or inability to adequately supervise or protect the child.

The purpose of juvenile dependency proceedings is to protect not only those children who are currently being abused or neglected, but also those who are at substantial risk of physical harm. The past conduct of a parent "is a good predictor of future behavior," and may be considered in determining whether the children need protection. (*In re T.V.*, *supra*, 217 Cal.App.4th at p. 133.) The "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 re R.V.* (2012) 208 Cal.App.4th 837, 843.)

It was well within the juvenile court's discretion to find that father's violent behavior against C.D. in the presence of his child posed an ongoing concern that placed J. and A. at substantial risk of physical harm. (See *In re E.B.* (2010) 184 Cal.App.4th 568, 576 [even if not physically harmed, children are endangered by witnessing domestic violence, and past violent behavior is a predictor of future violence].) J. not only was present during the January 2017 incident, but was physically pulled in opposite directions before being dropped onto the train tracks. (See *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 600

[domestic violence is nonaccidental].) Because the mutual endangering behavior by his parents placed J. at immediate and substantial risk of serious injury, the record supports the jurisdictional finding as to J. under subdivision (a) and (b) of section 300, and as to his sibling A. under subdivisions (a), (b), and (j).

The cases cited by father are distinguishable. None involved domestic violence between the parents while the children were present. (See e.g., *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717 [no evidence children were present during domestic violence episodes]; *In re Savannah M.* (2005) 131 Cal.App.4th 1387 [no evidence of domestic violence between parents]; *In re Rocco M.* (1991) 1 Cal.App.4th 814 [same].)

Father provides no support in the briefing for his assertion that J. and A. are not at risk of physical harm during future incidents of domestic violence. Not only are the couple's previous domestic violence episodes a good predictor of future episodes, the evidence is undisputed that the root cause of their conflict—their problems with visitation—will not be resolved without judicial intervention. The juvenile court was entitled to consider the Department's legitimate concern that father was not receiving appropriate services from the Regional Center and needed assistance to establish safe and meaningful visitation with his children. By correctly focusing on the purpose of section 300, which is to avert a substantial risk of harm to the children (*In re T.V.*, *supra*, 217 Cal.App.4th at p. 133), the juvenile court properly sustained counts a-1 and b-1 of J.'s petition and counts a-1, b-3, and j-1 of A.'s petition.

B. Marijuana Use

Father also challenges the sufficiency of the evidence to support a finding that his marijuana use poses a risk of harm to J. Given our determination that the domestic violence allegations were properly sustained against father, we decline to consider this additional basis for establishing jurisdiction. "When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence. [Citations.]" (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

Even were we to consider the issue on the merits, we would find no abuse of discretion. Because father concedes that he began using marijuana to medicate himself without a prescription when it was illegal to do so, his marijuana use constituted substance abuse. (See *In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 451 [using marijuana without a prescription constitutes substance abuse].) Assuming the issue was not waived by the failure to raise it in the opening brief, the reliance in father's reply brief on recent legislation legalizing marijuana use does not require a different result. Even though marijuana use, like alcohol use, is now legal, the paramount purpose in dependency actions is the protection of the child, and the controlling issue is not whether the parent is entitled to use marijuana, but whether doing so has negative consequences for the child. (See *id.* at p. 452.) In this case, the court ordered

father to undergo domestic violence counseling and drug testing because his unresolved anger issues and use of marijuana in lieu of a prescribed psychotropic medication negatively impacted his ability to care for J. Where, as here, there is no basis to conclude the trial court "exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination" (*id.* at p. 454), the jurisdictional finding will be affirmed.

II

Father contends the juvenile court erred by removing J. and A. from his custody at the dispositional hearing, and because it was undisputed the boys were not living with him when the petitions were filed, the legal standard for removal was not met. (Citing § 361, subd. (c) [necessary findings that must be made by clear and convincing evidence standard for removal of dependent child from physical custody of parent or guardian with whom child resided when petition was filed].)

The parties concur that the juvenile court did not in fact remove either child from father's custody at the dispositional hearing, notwithstanding language to the contrary in the minute orders. The parties agree that due to clerical error, the minute orders fail to accurately reflect this aspect of the court's dispositional orders.

In light of the concession by the Department that "the judge made no [removal] findings and issued no such order," its alternative assertion that the issue was forfeited by father's failure to object is unavailing. Where, as here, the error was not apparent until some later time when the minute orders were issued, there was no basis for father to object at the hearing.

Because the record is otherwise clear that neither child was removed from father's custody at the dispositional hearing, we conclude the minute orders must be corrected to reflect that no removal orders were issued. (See *In re Goldberg's Estate* (1938) 10 Cal.2d 709, 715 [court has authority to determine whether error was clerical or judicial in character, and, if clerical, to set aside and correct the error].)

DISPOSITION

The matter is remanded with directions to correct the clerical error in the minute orders to reflect that neither child was removed from father's custody at the dispositional hearing. In all other respects, the jurisdictional findings and dispositional orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MICON, J.*

We concur:

MANELLA, P. J.

COLLINS, J.

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