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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re E.M., JR., a Person Coming Under the
Juvenile Court Law.

B262580
(Los Angeles County
Super. Ct. No. CK96047)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.M., SR.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Julie Fox
Blackshaw, Judge. Reversed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and
Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant
County Counsel, Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

E.M., Sr. (father) appeals from the juvenile court's order of dependency jurisdiction over E.M., Jr. (E.M.), age nine, under Welfare and Institutions Code section 300, subdivision (b)¹ (failure to protect), on the ground that no substantial evidence supports the order. Because the evidence was insufficient to show a substantial risk of serious physical harm or illness to E.M., we reverse.

BACKGROUND

On September 17, 2014, the Los Angeles Department of Children and Family Services (DCFS) received a referral from E.M.'s school, reporting M.M. (mother) had forced E.M. to come to school but could not force him to stay. She was verbally abusive to E.M., slapped him on the arm, and reportedly said to him, "I'm going to whip your ass at home."

The next day, September 18, 2014, DCFS received a second referral from LAC+USC Medical Center, about an incident that occurred while E.M., his younger brother (brother), and mother were waiting for a medical appointment. The caller reported the boys were "running around" and "out of control." Then brother got into a parked maintenance cart, pressed the accelerator, and hit E.M. E.M. was not injured. Mother reportedly yelled at the children, saying she was tired of them and was "out of there."

A DCFS social worker visited the family home later that day in response to the two referrals. E.M. denied anyone was hurting him and stated he was happy at home with his mother.

A social worker visited the family home again five days later, on September 23, 2014, and interviewed E.M. He was in good physical health, well-groomed and appropriately dressed, showed no signs of physical abuse, and appeared fully functional in regards to emotional, cognitive and behavioral capacity. The social worker observed no behavioral indicators that might impact E.M.'s mental health; there was no evidence

¹ Undesignated section references will be to the Welfare and Institutions Code.

of domestic violence or drug use in the home. E.M. told the social worker he felt safe at home.

When DCFS spoke with mother on September 23, 2014, she declined to participate in services. In late September, mother removed E.M. from public school and enrolled him in a home school program. On November 10, 2014, E.M.'s medical provider informed DCFS that E.M. was in good physical health and up to date on his immunizations. E.M.'s psychiatrist told DCFS mother sometimes canceled or missed appointments and refused to follow the doctor's recommendations for additional therapy. On November 17, 2014, DCFS contacted mother to initiate a Voluntary Maintenance Case, but mother declined to participate.

On November 20, 2014, DCFS filed a non detained petition under section 300, subdivision (b) for E.M. and his brother, alleging E.M. was at risk of suffering serious physical harm or illness because his parents failed to supervise him adequately or provide him with medical treatment. DCFS alleged mother and father were unable to provide appropriate care for E.M.'s mental and emotional problems and refused to ensure regular recommended psychiatric treatment and therapy for the child, which endangered his physical health and placed him at risk of harm. DCFS alleged that mother abused and inappropriately disciplined E.M., refused to administer Ritalin for his diagnosed Attention Deficit Hyperactivity Disorder (ADHD), sometimes missed his psychiatric appointments, disenrolled him from school to homeschool him, and declined DCFS services for him.

In support of the petition, DCFS reported that in 2012, when E.M. was in foster care, a psychiatrist diagnosed him with ADHD and prescribed Ritalin. Mother refused to give E.M. Ritalin because she feared its harmful side effects and believed E.M.'s behavioral problems were due to emotional trauma from being separated from his parents. She wanted him reevaluated before giving him psychotropic medication.

DCFS also reported E.M. was hospitalized on a psychiatric hold twice, on October 17, 2012, and March 5, 2014. In the first instance, when E.M. was six years old and had been removed from his parents' custody two days prior, DCFS reported he cried for his

mother and father and would not calm down. In the second instance, E.M.'s school referred him to a psychiatric hospital after he exited his classroom by climbing out of a ground floor window. To explain that event, father testified at the jurisdictional hearing that the teacher and other students had been verbally abusing E.M., and when he attempted to leave the room to report this to the principal the teacher blocked the doorway. So E.M. climbed out a ground floor window.

At the jurisdictional hearing, father testified that in February 2015, he and mother enrolled E.M. in a new school and obtained behavioral and psychiatric care for him through an Individual Education Plan (IEP) that included counseling with the school psychiatrist and a behavior instructor, who accompanied him in the classroom. Father testified the school sends him daily reports about E.M., and he meets with E.M.'s behavior instructor once a week. The parents made additional efforts to seek appropriate therapy for E.M.'s behavioral issues, including having him evaluated by a UCLA psychiatrist and a state social worker. E.M. has never tried to hurt himself and has never said he wants to hurt himself.

The juvenile court found E.M. has no serious psychological issues and has received many of the services that he needs through his IEP. The court found "a lot of parents, a lot of very good, conscientious parents have a problem with giving their children Ritalin." The court also found the LAC+USC maintenance cart incident was typical of rambunctious young boys, and father's testimony about E.M.'s leaving the classroom through a window and not wanting to hurt himself was "very credible." However, the court also stated, "jumping out of the window is really not stable, appropriate behavior" and found E.M. was "at risk of falling back into a situation where the parents really just deny that there [are] any problems."

On February 18, 2015, based on the parents' history of neglecting E.M.'s mental health needs and mother's testimony that E.M.'s behavioral problems were DCFS's fault, the juvenile court sustained the amended petition, finding mother and father were "unable to provide appropriate parental care and supervision of [E.M.] due to [his] mental and emotional problems. The mother and father have failed and refused to ensure that the

child is regularly participating in recommended necessary psychiatric treatment and therapy for the child. The parents' inability to provide appropriate parental care and supervision of the child and the parents' failure and refusal to cooperate with the psychiatric treatment to ensure the child's necessary mental health treatment endangers the child's physical health and safety and places the child at risk of harm, damage and danger."

The court ordered mother, father and E.M. to participate in wraparound family maintenance services, and ordered E.M. to submit to a psychiatric evaluation and participate in individual counseling. The court declined to remove E.M. from the parents' home.

Father timely appealed.

DISCUSSION

A. Standard of Review

We review the dependency court's jurisdictional findings for substantial evidence. (*In re John M.* (2013) 217 Cal.App.4th 410, 418.) "The term 'substantial evidence' means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value." (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) We review the evidence in the light most favorable to the dependency court's findings and draw all reasonable inferences in support of those findings. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

B. Jurisdictional Findings

Father contends evidence showing he and mother neglected E.M.'s mental health by refusing to administer Ritalin and failing to secure mental health therapy is insufficient to support jurisdiction under section 300, subdivision (b). We agree.

Section 300, subdivision (b)(1) provides for dependency jurisdiction where "[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" "The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the

child from risk of suffering serious physical harm or illness.” ““A jurisdictional finding under section 300, subdivision (b) requires: ““(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the child, or a ‘substantial risk’ of such harm or illness.” [Citation.]’ [Citations.] 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).’ [Citation.]””” (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111, citing *In re A.G.* (2013) 220 Cal.App.4th 675, 683 & *In re James R.* (2009) 176 Cal.App.4th 129, 135.) Section 300, subdivision (b) requires a showing of “concrete harm or risk of physical harm to the child.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 821.) “As appellate courts have repeatedly stressed, “[s]ubdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial risk of serious physical harm or illness.*””” (*In re Jesus M., supra*, 235 Cal.App.4th at p. 111, quoting *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399 and *In re Rocco M., supra*, 1 Cal.App.4th at p. 823.)

Here, the juvenile court found parents’ failure to secure mental health therapy for E.M. and to supervise him appropriately endangered his physical health and safety because E.M. exhibited inappropriate and unstable behavior at LAC+USC Medical Center and at school, mother refused to administer Ritalin for his ADHD, she sometimes missed his psychiatric appointments, she removed him from school to homeschool him, and she declined DCFS services for him.

Jurisdiction under section 300 requires more than a showing that parents failed to enroll their child in school and refused to cooperate with DCFS. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 390; *In re Jesus M., supra*, 235 Cal.App.4th at p. 109.) Here, E.M. suffered no injuries from his brother bumping him with the LAC+USC maintenance cart, and no evidence showed running around with his brother placed him in serious physical danger. The juvenile court found the incident was typical of rambunctious young boys. Likewise, mother’s slap on E.M.’s arm and threat to “whip” him at home when he

refused to go to school are not enough for jurisdiction because section 300, subdivision (b) requires a *substantial* risk of *serious* physical harm, and DCFS verified E.M. was not at risk of harm the very next day.

Although E.M. was diagnosed with ADHD and prescribed Ritalin, and his parents refused to give him the psychotropic medication because mother was concerned about harmful side effects, the juvenile court found “a lot of parents, a lot of very good, conscientious parents have a problem with giving their children Ritalin.” No evidence suggested failure to give E.M. his medication placed him at risk of physical harm. Likewise, no evidence suggested missing psychiatric appointments caused physical harm.

DCFS interviewed E.M. and found no signs of physical abuse. On the contrary, the department reported he was in good physical health, well-groomed and appropriately dressed, and he told DCFS he felt safe at home. DCFS found no evidence of domestic violence or drug use in the home, and E.M.’s medical provider reported E.M. had no medical concerns and was up to date on his immunizations.

Respondent contends E.M. is at a substantial risk of “illness” under section 300, subdivision (b) because his parents failed to provide adequate medical treatment for his ADHD. In support of this contention respondent argues the word “illness” in section 300 includes mental illness, and E.M.’s ADHD is a mental illness. We disagree.

Section 300, subdivision (b)(1) authorizes dependency jurisdiction where “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious *physical harm or illness*.” (Italics added.) As noted, the statute requires a showing of “concrete harm or risk of physical harm to the child.” (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 821.) Respondent overlooks the word physical in section 300, subdivision (b)(1), which modifies illness. Because ADHD is not a physical illness, it does not come within the meaning of illness in section 300.

Respondent contends E.M.’s two past psychiatric hold hospitalizations are evidence of a current risk of physical harm.

E.M. was placed on psychiatric hold by school staff one year ago and by foster parents three years ago, but no evidence indicated he was considered to be a suicide risk

at either time or at the time of the jurisdiction hearing. The juvenile court found E.M. had no serious psychological issues. No evidence showed E.M. will attempt to harm himself in the future. At most these incidents are evidence of past emotional trauma.

Respondent argues *In re J.K.* (2009) 174 Cal.App.4th 1426 and *In re J.N.* (2010) 181 Cal.App.4th 1010 stand for the proposition that a parent's past conduct is sufficient to support jurisdiction under section 300. Respondent is mistaken.

Evidence of past conduct is sufficient to support a jurisdictional finding under section 300 only if the conduct physically harmed or physically endangered the child. (*In re James R.* (2009) 176 Cal.App.4th 129, 136.) In *In re J.K.*, a father physically and sexually abused his nine-year-old daughter, raping her and beating her so severely that he dislocated her shoulder. (*In re J.K.*, *supra*, 174 Cal.App.4th at p. 1433.) The court held there was substantial evidence of a current risk of serious physical harm to the daughter based on the father's past conduct. (*Ibid.*) In *In re J.N.*, two toddlers were seriously injured when their highly intoxicated parents drove with the children in the car without seatbelts and crashed into a light pole. (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 482.) The 14-month old "flew under a seat, head first" and sustained head lacerations. (*Ibid.*) The court reversed the jurisdictional order because the parents had no history of substance abuse, the accident was an isolated incident, and all evidence suggested the harmful conduct was unlikely to reoccur. (*Id.* at pp. 490-491.)

Here, no evidence shows E.M. suffered any prior serious physical harm. Respondent argues mother has neglected E.M.'s mental health, but this is not evidence of serious physical harm or danger.

Respondent argues this case is like *In re John M.* (2012) 212 Cal.App.4th 1117. In that case, the mother left her blind, autistic child, who had limited ability to communicate, "alone in a car, dirty, disheveled, and in a state of undress, while she hid to avoid the police after violating a restraining order." (*Id.* at p. 1124.) The court affirmed the jurisdictional order because the mother's past conduct physically endangered the child, and her subsequent comments and conduct showed she would likely place the child in physical danger again if he was left in her custody. (*Id.* at pp. 1124-1125.)

Respondent compares mother's failure to treat E.M.'s ADHD to the neglect in *John M.* However, E.M. was not physically neglected or homeless. Quite the opposite, DCFS interviewed him at the family's home and found he was physically healthy, well-groomed and appropriately dressed.

Instead, this case is similar to *In re Jesus M.*, *supra*, 235 Cal.App.4th 104, in which prior family trauma and lax parenting caused the children to suffer emotionally, and the father refused to cooperate with DCFS, but the children showed no signs of physical abuse and denied that either parent abused them or made them feel unsafe. (*Id.* at p. 112.) Jurisdiction was held to be improper because "no obvious threat to the children's physical safety" existed. (*Id.* at p. 107.) Here, like in *In re Jesus M.*, there is evidence of lax parenting and prior family trauma, which may have contributed to E.M.'s disorderly behavior, but no evidence suggests a threat to his physical safety exists. "Dependency proceedings are designed not to prosecute a parent or 'for the reproof and improvement of erring parents,' but to protect children." (*Id.* at p. 113, quoting *In re A.J.* (1969) 274 Cal.App.2d 199, 202.)

Finally, Respondent contends mother denies that E.M. needs therapy and will not properly care for him without court intervention. Respondent relies on *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044, in which the court held the parents' state of "denial is a factor often relevant to determining whether [they] are likely to modify their behavior without court supervision." (*Id.* at p. 1044.) Evidence of a parent's state of denial is relevant only once a concrete risk of physical harm to the child has been shown. As the court stated in *In re Esmeralda*, evidence of a parent's state of denial is merely one factor showing past physical harm is likely to persist. Here, the juvenile court found E.M. was "at risk of falling back into a situation where the parents really just deny that there [are] any problems." But, because no evidence suggested E.M. had suffered physical harm in the past or was at current risk of physical harm, mother's mental state of denial is irrelevant.

The evidence was insufficient to support the juvenile court's finding of dependency jurisdiction over E.M. under section 300, subdivision (b) because there was

no risk of physical harm or illness to E.M. Without proper jurisdiction, the juvenile court had no authority to issue a dispositional order. (*In re Precious D.* (2010) 189 Cal.App.4th 1251, 1261; see § 362.4.)

DISPOSITION

The jurisdictional and dispositional orders are reversed.

NOT TO BE PUBLISHED.

CHANNEY, J., Acting P. J.

We concur:

JOHNSON, J.

LUI, J.