Filed 9/27/19 In re Dallas M. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DALLAS M. et al., Persons Coming Under the Juvenile Court Law.	B294649 (Los Angeles County Super. Ct. No. 18CCJP04357)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARCOS B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Martha Matthews, Judge. Affirmed.

John P. McCurley, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Marcos B. (Father), who was incarcerated at the time of the dispositional hearing, appeals from the juvenile court's denial of reunification services[1] with his children, then 13-year-old Dallas M. and 11-year-old Michael B., and denial of face-to-face visitation. His appeal rests on two basic contentions: (1) the juvenile court erred in finding that his prior conviction was a violent felony and in relying on Welfare and Institutions Code section 361.5, subdivision (b)(12)[2] to deny reunification services; and (2) the juvenile court therefore applied the wrong standard in finding that face-to-face visitation with his children would be to their detriment.

We agree the trial court erred in relying on section 361.5, subdivision (b)(12) to deny reunification services. That error, however, was harmless. Under the correct statutory authority applicable to incarcerated parents, and given the largely undisputed facts of, among other factors, Father's abuse of his children and their well-founded fear of him, the juvenile court did not err in denying reunification services. We also conclude substantial evidence supported the juvenile court's finding that

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[1] Father does not challenge the juvenile court's jurisdictional findings. Mother did not appeal.

[2] All subsequent unspecified statutory references are to the Welfare and Institutions Code.

face-to-face visitation would be detrimental to Dallas M. and Michael B. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[3]

The Department of Children and Family Services (DCFS) detained Dallas M. and Michael B. in June 2018 after their mother, Valerie M. (Mother), was arrested and made no provision for the children's care. At that time, Father was incarcerated. The children were staying with their maternal grandmother, Lydia A. (Grandmother).

The children's social worker (CSW) spoke to the children and Grandmother. They reported Mother and Father used methamphetamine. Mother spent all her money on drugs. She and the children were homeless; the children reported that sometimes they went without food for days, and did not regularly attend school. Mother and Father had exposed the children to drug use and domestic violence. The children wanted to stay with Grandmother, because they felt safe with her.

Dallas M. stated she was afraid of Father. He told the children he was not their father and was going to take them to the police station and leave them there. Michael B. confirmed these events. Dallas M., but not Michael B.,[4] recounted that Father almost drove them into a wall during an argument with Mother. Dallas M. described a video on Mother's phone depicting

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[3] Because Mother did not appeal, our focus is on the facts regarding Father.

[4] Michael B. denied that this incident happened.

Father pointing a gun at Mother.[5] Dallas M. further reported that in her presence, Father and Mother's ex-boyfriend were sorting pistols and rifle bullets on the floor, and told her they " 'were going to shoot someone up.' " Mother offered her a pistol "to protect [her]self," but Dallas M. demurred. Dallas M. also saw guns and rifles in the home. Michael B. confirmed that in his presence, Mother threatened to kill Father with a gun that was housed in a glove compartment. Michael B. observed Father hitting Mother with a closed fist several times.

The CSW also spoke to family friends and relatives, who echoed reports of Mother's and Father's drug use and neglect, and described Father's gang activities. The children repeatedly told the CSW that they did not want to live with their parents.

The juvenile court signed an authorization for removal of the children from the parents on July 10, 2018. DCFS filed the section 300 petition on July 12, alleging the children were at risk of serious physical harm due to the parents' domestic violence and drug abuse. The court held the detention hearing the following day. It found a prima facie case for detention. It also issued temporary restraining orders to keep the parents away from the children and Grandmother. It ordered that no visitation take place until the parents contacted DCFS; after that, monitored visitation at the DCFS office could take place.

In the September 10, 2018 jurisdiction/disposition report, DCFS reported that Father had been released from custody; Mother was in custody in Orange County. Father failed to attend a scheduled interview with the dependency investigator (DI). According to Dallas M. and Michael B., Father had been arrested

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[5] Michael B. stated that he had not seen that video.

for going to Grandmother's house in violation of the temporary restraining order.

DCFS reported that when the DI went to the Orange County jail to interview Mother, she learned Mother had been released on September 2. The DI thereafter made several unsuccessful attempts to contact Mother. Father again failed to attend a scheduled interview with the DI. Father and Mother subsequently submitted to interviews and denied the allegations in the petition. Specifically, they denied any physical altercations or current drug use.

By the next hearing on September 27, 2018, Father was again in custody: On September 10, 2018, Father was sentenced to 32 months in state prison for possession of a firearm by a felon (Pen. Code, § 29800); he was due to be transferred to the prison in Delano. He requested visitation with the children. The juvenile court ordered monthly in-person visitation and weekly phone contact if someone not protected by the restraining order could serve as a monitor. The court then reissued the temporary restraining orders.[6]

In a last minute information for the court dated October 24, 2018, DCFS reported that the CSW had attempted to schedule a visit with Father, but the children stated that they did not wish to visit with either of their parents. DCFS recommended visits "in a therapeutic setting as it appears that these children are fearful of their parents attempting to kidnap them once they are released."

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[6] The court reissued the temporary restraining orders on October 24 and November 8, 2018.

On November 7, 2018, DCFS filed a last minute information for the court in which it noted Father's "extensive criminal history," including possession of a controlled substance while armed (Health & Saf. Code, § 11370.1, subd. (a)), vandalism (Pen. Code, § 594, subd. (a)), two convictions of possession of a firearm by a felon or addict (*id.*, § 29800, subd. (a)), two counts of assault with a deadly weapon not a firearm (*id.*, § 245, subd. (a)(1)), and infliction of corporal injury on a spouse/cohabitant (*id.*, § 273.5). DCFS recommended that pursuant to section 361.5, subdivisions (b) and (e) family reunification services not be offered to Father.

At the jurisdiction hearing on November 8, 2018, the juvenile court sustained the allegations of the petition as amended and found that the children were persons described by section 300, subdivisions (a) and (b). It also accepted into evidence Father's documentary evidence, indicating that since September 25, 2018, he had been enrolled in the MERIT program, and was taking classes covering domestic violence, drug education, anger management, and parenting, and attending alcoholics anonymous/narcotics anonymous meetings twice a week. He had attended the Parents In Partnership parent orientation. On October 9, 2018, he enrolled in anger management/domestic violence and parenting classes. The documents also contained information that Father had been interviewed for admission into the Jericho Project Drug and Alcohol Treatment Program and determined to be a suitable candidate for that program.

In reissuing the temporary restraining order until the contested disposition hearing, the juvenile court ordered no contact between Father and the children. The court found "at

this point, given the level of fear expressed by the children, I'm going to order that it would be detrimental for Father to have any contact with the children."

The contested disposition hearing took place on November 26, 2018. DCFS recommended no reunification services for Father pursuant to section 361.5, subdivision (b)(12) because Father "has been convicted of a violent felony." Father's counsel responded: "Currently, Father's conviction does not fall under any one of those categories under Penal Code [section] 667.5, sub[division] (c), in which the code describes the violent felonies that this court can consider in bypassing family reunification services to a parent. If [DCFS] is referring to an older conviction, which may or may not fall under this category, I would ask that this court find that it is in the best interest of these children to offer Father family reunification services." Counsel pointed to the exhibits showing Father's efforts and commitment to reunification with his children. Counsel argued that reunification services should be offered to Father; "he's already engaged."

The children's counsel agreed with DCFS, saying that it was "nice that [Father] is doing programs now. But . . . when he was interviewed [he] denied any kind of" behavior alleged in the petition. The other interviewees agreed with the children as to the allegations of domestic violence, and the children were afraid of him. Counsel thought Father was "not somebody who should have reunification with the children at this time," because "it would be harmful for the [children]."

The court asked counsel for DCFS to identify the conviction supporting DCFS's request to deny reunification services. DCFS responded that it was a 2015 conviction of assault with a deadly

weapon, not a firearm, in which great bodily injury was likely, for which Father was sentenced to three years in prison.

The juvenile court agreed with DCFS that section 361.5, subdivision (b)(12) "applies in this case." Father's 2015 conviction was "one of those crimes listed in [Penal Code section] 667.5. So the bypass applies." The court added that it "nonetheless can order reunification services if it is found to be in the children's best interest. In this case, in addition to" prior incidents, there was "a much more recent incident in which the father came and essentially threatened—in violation of the restraining order, came to the maternal grandmother's house and threatened to abduct the children. That, coupled with his recent conviction for having the firearm, that . . . is not the behavior of someone who understands the impact of his activities on his children."

The court found the "children are frightened and . . . [t]hey have a perfectly rational reason to be frightened; that Father has actually done things that are dangerous. . . . So . . . I cannot find that it would be in the children's best interest to order reunification services in this case." The court added that it wanted to encourage Father to "turn his life around and set a better example for his children," "regardless of what happens in this case." Even if he did not reunify with the children, his example would be beneficial for them.

The court then found, "as to visitation, because I am bypassing reunification services, I will find that it would be detrimental to order visitation while Father is in custody. Once Father is released from custody, I would be willing to revisit the issue of visitation, depending on how the kids are doing and, obviously, what progress the father has made while in prison.

But as of this point, I am making a detriment finding. I'm not ordering reunification."

The court ordered reunification services for Mother and visitation at the DCFS office or in a therapeutic setting.

Father's counsel objected to the finding of detriment, adding that Father was still "requesting visits, even if it means through phone calls or letter writing." The children's counsel had no objection to letter writing. The court ordered DCFS to assist Father and the children in communicating by letter, with "discretion to liberalize to phone calls if and when the children's therapists believe that it's appropriate for them."

The court then declared the children to be dependents of the court and removed them from the parents' custody. It ordered that the children remain placed with Grandmother. Father timely appealed.

DISCUSSION

I. Denial of Reunification Services

Father contends the juvenile court erred in denying him reunification services pursuant to section 361.5, subdivision (b)(12) because assault with a deadly weapon not a firearm is not a violent felony within the meaning of Penal Code section 667.5, subdivision (c). Father further contends that absent this error, the juvenile court would have awarded him reunification services and visitation just like Mother received.

DCFS acknowledges that Father's conviction was not a violent felony. It argues, however, that Father forfeited this contention on appeal by failing to raise the issue below. DCFS further argues the error was harmless because substantial

evidence supported denying reunification services pursuant to subdivision (e)(1) of section 361.5.

A. *Father Did Not Forfeit Arguing on Appeal that Section 361.5, Subdivision (b)(12) Is Inapposite*

DCFS's forfeiture assertion is not well-founded. First, the argument that substantial evidence does not support a dispositional order is not forfeited on appeal even if not raised below. (*In re R.V.* (2012) 208 Cal.App.4th 837, 848.) "Similarly, to the extent that an error of law appears on the face of the trial court's order, that issue of law may be raised for the first time on appeal." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1067; accord, *In re Marriage of Oliverez* (2019) 33 Cal.App.5th 298, 316 [" 'even where a legal argument was not raised in the trial court, we have discretion to consider it when the theory raised for the first time on appeal is a pure question of law applied to undisputed facts' "].)

Second, the record does not support DCFS's contention. Father did object below when his counsel told the juvenile court that "Father's conviction does not fall under any one of those categories under Penal Code [section] 667.5, sub[division] (c), in which the code describes the violent felonies that this court can consider in bypassing family reunification services to a parent." The court, however, accepted DCFS's erroneous representation that Father's assault conviction was a violent felony. Under these circumstances, we find no forfeiture.

B. *Assault with a Deadly Weapon Not a Firearm Is Not A Violent Felony*

Section 361.5 governs the provision of reunification services. Subdivision (b)(12) provides in pertinent part: "Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence," "[t]hat the parent . . . has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code."

Assault with a deadly weapon not a firearm by means likely to cause great bodily injury is not a violent felony listed in Penal Code section 667.5, subdivision (c). The juvenile court thus erred as a matter of law in denying Father reunification services under the authority of section 361.5, subdivision (b)(12).

C. *The Error Was Not Prejudicial Because Substantial Evidence Supported Denial of Reunification Services Under Section 361.5, Subdivision (e)(1)*

" 'Section 361.5, subdivision (b) "reflects the Legislature's desire to provide services to parents only where those services will facilitate the return of children to parental custody." [Citations.]' [Citation.] In section 361.5, subdivision (b), 'the Legislature "recognize[d] that it may be fruitless to provide reunification services under certain circumstances" . . . . When the court determines a bypass provision applies, the general rule favoring reunification is replaced with a legislative presumption that reunification services would be " 'an unwise use of governmental resources.' " [Citation.]' [Citation.]" (*In re B.H.* (2016) 243 Cal.App.4th 729, 736.)

Once the juvenile court determines that a bypass provision listed in section 361.5, subdivision (b) applies, "it *shall not* order

reunification services for that parent 'unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.' (§ 361.5, subd. (c)(2).)" (*Jennifer S. v. Superior Court* (2017) 15 Cal.App.5th 1113, 1124, italics added.) The parent bears the burden of proving that reunification services would be in the child's best interests. (*Ibid.*)

In contrast to section 361.5, subdivision (b), section 361.5, subdivision (e)(1) provides when a parent is incarcerated, "the court *shall* order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." (Italics added.) The statute lists the following factors relevant to the determination of detriment: "the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration, institutionalization, or detention within the reunification time limitations described in subdivision (a), and any other appropriate factors. . . ." (§ 361.5, subd. (e)(1).)

In sum, under subdivision (e)(1) of section 361.5, "Reunification services must be offered to an incarcerated parent unless the juvenile court finds services would be detrimental to the child. [Citation.] The focus is on the child, and there must be a finding of detriment before an incarcerated parent may be denied services." (*In re Kevin N.* (2007) 148 Cal.App.4th 1339, 1344, italics omitted.)

We review a juvenile court's denial of reunification services for substantial evidence. (*Jennifer S. v. Superior Court*, *supra*, 15 Cal.App.5th at p. 1121.) In conducting our review, "we do not make credibility determinations or reweigh the evidence. [Citation.] Rather, we 'review the entire record in the light most favorable to the trial court's findings to determine if there is substantial evidence in the record to support those findings.' [Citation.]" (*Id*. at pp. 1121–1122.) We will imply necessary findings if supported by the record. (*In re S.G.* (2003) 112 Cal.App.4th 1254, 1260.)

Substantial evidence supported an implicit finding under section 361.5, subdivision (e)(1) that providing reunification services to Father would be detrimental to Dallas M. and Michael B.: (1) Dallas M. reported Father nearly killed her and Michael B. by driving them toward a wall during an argument with Mother; (2) while handling bullets in front of Dallas M., Father threated to " 'to shoot someone up' "; (3) Father threatened Mother with a gun, as depicted in a video Dallas M. saw; (4) Father denied being the children's father and threatened to abandon them at the police station; (5) Father left Dallas M. out at night unsupervised while he looked for drugs; (6) at the time of the dispositional hearing, Father was serving a sentence of 32 months in prison for being a felon in possession of a firearm; (7) Father had a substantial criminal history, including crimes of violence and gun offenses; (8) the children were not strongly bonded to Father; and (9) the children were fearful of him, did not want to live with him, and did not want visitation. Indeed, close to the time of the dispositional hearing, Father had violated a restraining order designed to protect the children by showing

up at Grandmother's house; the children were aware that he violated the restraining order.

Father cites his participation in counseling programs in prison and differences in Dallas M.'s and Michael B.'s testimony as evidence that a finding of detriment would not be supported by substantial evidence. These contentions are of no avail. We do not make credibility determinations on appeal. (*Jennifer S. v. Superior Court*, *supra*, 15 Cal.App.5th at pp. 1121–1122.) The fact that there may be evidence supporting a different finding does not require reversal where there is substantial evidence to support the juvenile court's implicit findings. (*In re S.G.*, *supra*, 112 Cal.App.4th at p. 1260.)

II. Denial of Visitation

Father contends the juvenile court erred in denying visitation based on its erroneous denial of reunification services. DCFS asserts that Father forfeited this challenge by acquiescing in visitation through letter writing. DCFS further argues the juvenile court did not abuse its discretion in denying Father visitation.

DCFS's assertion of forfeiture is not supported by the record or legal authority. Father, in fact, objected to the finding of detriment and denial of visitation. He acquiesced to letter-writing only after the juvenile court denied visitation. " ' "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not [forfeit] the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible." ' [Citation.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212–213; see *Mt. Holyoke*

Homes, LP v. California Coastal Com. (2008) 167 Cal.App.4th 830, 844 [forfeiture occurs when there is " 'a failure to object' "].)

On the merits, we review the juvenile court's order to limit visitation to letter-writing with discretion to liberalize for abuse of discretion. (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.)[7] "We will not disturb the order unless the trial court made an arbitrary, capricious, or patently absurd determination. [Citation.]" (*Ibid.*)

Section 361.5, subdivision (f) provides that when the juvenile court denies reunification services, whether under section 361.5, subdivision (b)(12) or (e)(1), it "may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child."[8] Here, the children did not

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[7] We acknowledge that some courts have reviewed dispositional orders regarding visitation under various statutes for substantial evidence and others have applied a test blending the substantial evidence and abuse of discretion standards of review. (See *In re T.M.* (2016) 4 Cal.App.5th 1214 [summarizing these different authorities].) We conclude that under any of these standards of review, the juvenile court did not err here in denying Father face-to-face visitation.

[8] DCFS argues in its brief that there is a split of authority—albeit sometimes interpreting different statutes—"with respect to whether the detriment to the child when curtailing reunification during reunification efforts must concern the child's safety [citation], or whether it also includes detriment to the child's emotional well-being." (See, e.g., *In re Brittany C.*, *supra*, 191 Cal.App.4th at pp. 1357–1358; *In re C.C.* (2009) 172 Cal.App.4th 1481, 1491–1492.) Father does not dispute that a threat to a child's emotional well-being can support a finding of detriment for denying visitation. Here there was evidence of

want visitation with Father. Although generally, the children's wishes not to visit Father cannot be the *sole* reason for denying visitation, their perspectives and experiences with Father are not irrelevant. (*In re Brittany C.*, *supra*, 191 Cal.App.4th at p. 1358.)

The evidence set forth above supporting a detriment finding under section 361.5, subdivision (e)(1) also demonstrates that the juvenile court did not abuse its discretion in allowing contact by letter writing subject to liberalizing to allow telephone contact pending the next hearing. Nor was the juvenile court's order absolute. In the words of the juvenile court, "I would be willing to revisit the issue of visitation, depending on how the kids are doing and, obviously, what progress the father has made while in prison."

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threats to Dallas M.'s and Michael B.'s safety and emotional well-being so we need not address these competing authorities.

DISPOSITION

The juvenile court's jurisdictional findings and dispositional orders are affirmed.

NOT TO BE PUBLISHED

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.*

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