Filed 11/20/17 In re S.M. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT-

In re S.M. et al., Persons Coming Under the Juvenile Court Law.	B280314 (Los Angeles County Super. Ct. No. DK19675)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Lisa R. Jaskol, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Tracey F. Dodds, Deputy County Counsel, for Plaintiff and Respondent.

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J.M. (father) appeals from the juvenile court's jurisdictional and dispositional orders regarding his children and the children of his girlfriend S.G. (mother). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the events giving rise to these proceedings, father and mother lived together with their two children, Sa.M. (born in November 2009) and J.M. (born in November 2010), and mother's two children from a prior relationship, S.M. (born in January 2005) and C.M. (born in August 2006).[1]

1. Detention evidence and proceedings

On August 8, 2016, respondent Los Angeles County Department of Children and Family Services (DCFS) received a referral alleging that father had sexually abused S.M. The reporting party stated that mother had brought S.M. to the emergency room. Mother reported she had found a pair of S.M.'s underwear in the laundry and noticed dried blood on them, although S.M. had not begun to menstruate. Mother questioned S.M. and S.M. disclosed that father had been putting cream on her vagina for the past week, and had told S.M. not to tell mother about it.

On August 30, 2016, a DCFS social worker met with S.M., who reported the following: She had told father, whom she

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[1] The father of C.M. and S.M. was nonoffending and is not a party to this appeal.

referred to as her "stepdad," that she had a rash on her vaginal area. Later, father told her to come to his room. He instructed her to remove her pants and sit on a chair. He squatted on the floor in front of her, rubbed cream on her vagina, and inserted his index finger into her vagina. S.M. told the social worker that "it hurt." Father told S.M. not to tell mother or he would hurt mother and the other children. S.M. said this happened on at least five separate occasions. S.M. reported being fearful of father and frightened that he might "do something to me again."

The social worker also spoke with S.M.'s siblings. C.M. denied being abused sexually, but said father had hit him with a paddle several times and would leave marks. Sa.M. and J.M. denied all forms of abuse.

S.M.'s account to the social worker largely matched what she had told a deputy sheriff and, separately, a sheriff's department detective on August 8, 2016, the day she went to the hospital, as reflected in two reports. Although both reports indicated that father had rubbed cream on S.M.'s vagina, there was some ambiguity as to whether father had inserted his finger; S.M. reported the digital penetration to the deputy sheriff but did not confirm this with the detective (although she said it hurt). S.M. told the deputy sheriff she had told father to stop because it hurt, and father said he had to continue to make her rash go away. S.M. told both the deputy sheriff and the detective that father had instructed her not to tell mother, but the reports do not indicate that father threatened to hurt anyone if she did.[2]

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[2] Father was charged with five counts of lewd or lascivious acts with a child under the age of 14 years (Pen. Code, § 288, subd. (a)). Father pled not guilty. The record does not indicate whether or how the criminal proceedings were resolved.

A forensic medical examination of S.M. on September 7, 2016, revealed an "[a]bnormal anal-genital exam" that was "[c]onsistent with history." The "[i]nterpretation" of these findings was "[n]on specific" in that they could have been "caused by sexual abuse or other mechanisms." The medical report included a history given by S.M. that again largely matched her report to the social worker. S.M. said the abuse went on for two weeks. She could not say whether father inserted his finger in her vagina, but said "it hurt." She reported that father had threatened to hurt her mother and siblings if she told. S.M. also said father would spank the children with his hand for "no reason."

In an addendum report, a social worker reported that mother had described an incident in which father had hit J.M. in the face when J.M. wanted a piece of cake. Mother said father had no patience with J.M., but denied domestic violence in the home.

On September 28, 2016, DCFS filed a juvenile dependency petition under Welfare and Institutions Code section 300 seeking to detain the four children.[3] It alleged under section 300, subdivision (a) that father had physically abused C.M. with a paddle. It alleged under section 300, subdivision (d) that father had sexually abused S.M. by "digitally penetrat[ing]" her vagina and threatening to harm the family if she disclosed the sexual abuse. The petition further alleged under section 300, subdivision (j) that the abuse of C.M. and S.M. created a substantial risk that the other children would be abused as well. The petition also included a "failure to protect" allegation under

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[3] Unspecified statutory references are to the Welfare and Institutions Code.

section 300, subdivision (b), repeating the language in support of the physical and sexual abuse allegations.

The juvenile court found a prima facie case for detaining the children and ordered them released to mother.

2. Jurisdiction and disposition evidence and proceedings

According to the jurisdiction and disposition report filed by DCFS, S.M. again spoke to a social worker and reported that she had told father about her rash, and he said he would get a cream to treat it. Later, he told her to come to his room. He locked the door and told her to pull her pants down. Father put cream on his finger and applied it. S.M. said, "I felt cold and then it was burning, but it didn't hurt the first time he put the cream but a couple of times afterwards, it did hurt." S.M. said father kept the cream in one of his boots in the closet. Father told S.M. not to say anything "or he would hurt my mom and the kids." S.M. said father put the cream on her on more than three occasions, and she was "too scared to tell my mom."

The social worker also spoke with father, who said he had purchased Vagisil medication and wipes after S.M. told him she was itchy in her vaginal area. Father said that when he presented the cream to S.M., she asked him to help her with it. Father noted that S.M. had the opportunity to go to her mother, but came to him for help instead. Father acknowledged putting the cream on, and lifting the labia in order to do so. Father said he applied the cream to S.M.'s vagina on three occasions, but stopped after she said she was no longer itching. He denied threatening to harm the family if S.M. told her mother. He explained he did not talk to mother about the rash because a month earlier mother had "whooped" C.M. for staining his

underwear, and he wanted to avoid getting S.M. in trouble as well.

The other children denied being abused sexually or observing their siblings be abused sexually. All of the children reported father hitting some or all of them with a paddle or wooden stick. C.M. said father hit J.M. the most and "was terrorizing" J.M. by hitting him "non-stop," putting him in timeout, threatening not to feed him, and chasing him with a belt.

Father acknowledged he struck the children with a paddle, but said he only struck the buttocks, and any resulting redness would fade by the end of the day. He said he used the paddle only after warnings or taking items away from the children failed.

S.M. testified at the jurisdiction hearing. As she had in the earlier reports, she stated that she had told father she was itching in her vaginal area, and he had said he would get her something for it. Later he told her to come into his room, lock the door, and take off her pants and underwear. He then applied cream to her vagina as she sat on a chair with her legs spread. This happened on more than three occasions. Only once did father offer S.M. the opportunity to put the cream on herself "because he was really busy with something." Father kept the cream in his boot and told her he was hiding it from mother. S.M. testified that on every occasion where father applied the cream, the other children were in the house.

At some point the itching diminished, but father said he needed to keep putting the cream on. The last time he put the cream on was the day before mother found out what was happening.

S.M. testified that father had told her not to tell her mother about him putting the cream on. Father's counsel asked why, and S.M. said, "Because he said . . . that she would get mad or something." Later, father's counsel asked whether S.M. had told mother about the itching she was feeling, and S.M. said, "No, because he was always around and watching me." When asked by her own attorney whether father had said anything to her when putting the cream on, S.M. said, "He told me not to tell my mom." Counsel asked if he ever said anything else, and S.M. said, "Or he would hurt her or the kids."

S.M. also testified that father hit C.M. and J.M. with a paddle "a lot." J.M. testified that father hit him on the shoulder and bottom with a paddle or his hand.

The juvenile court sustained the petition on all counts, based on S.M.'s and C.M.'s statements to the social worker in the jurisdiction and disposition report and S.M.'s testimony at trial. As to the sexual abuse, the court "f[ound] persuasive S.M.'s testimony that (1) [father] told S.M. to close and lock the door, (2) he hid the cream in his boot, (3) he told S.M. not to tell her mother, and (4) he threatened to harm S.M.'s family if she disclosed the abuse." The court found S.M.'s testimony credible, but did not rely on J.M.'s testimony, "which appeared coached."

Following a disposition hearing, the court ordered that Sa.M. and J.M. be removed from father's custody and all children be released to mother.

Father timely appealed.

DISCUSSION

Father argues the evidence was insufficient to sustain the dependency petition or the dispositional order removing his son J.M. from his custody. We disagree.

" 'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ' "[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]." ' " ' " (*In re I.J.* (2013) 56 Cal.4th 766, 773 (*I.J.*).) Under the substantial evidence standard, "[t]he appellate court 'accept[s] the evidence most favorable to the order as true and discard[s] the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.' " (*In re J.F.* (2014) 228 Cal.App.4th 202, 209.)

The juvenile court asserted jurisdiction under four subdivisions of section 300: (a), (b), (d), and (j). " '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.' " (*I.J., supra*, 56 Cal.4th at p. 773.) With this in mind, we focus on the juvenile court's findings under section 300, subdivisions (d) and (j), which we find to be supported by substantial evidence and determinative of this appeal. We do not reach father's challenge to the findings under section 300, subdivisions (a) and (b).

1. Section 300, subdivision (d)

As relevant here, section 300, subdivision (d) allows a juvenile court to assert jurisdiction upon a finding that "[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 or guardian or a member of his or her household . . . ." Penal Code section 11165.1 defines "sexual abuse" to include conduct in violation of Penal Code section 288, subdivision (a), the statute under which father was criminally charged. (Pen. Code, § 11165.1, subd. (a).) The definition also includes "[t]he intentional touching of the genitals or intimate parts . . . of a child . . . for purposes of sexual arousal or gratification." (*Id.*, subd. (b)(4).) It excludes, however, "acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose." (*Ibid.*)

Father argues there was insufficient evidence that he "had an intent to gratify or arouse his or S.M.'s sexual desires"; instead, he asserts, the evidence supports the innocent conclusion that he was helping S.M. address a medical problem "without involving her strict, disciplinarian mother." He notes that it was S.M. who approached him about the rash, and he only took action to help her. He claims that he locked the door when applying the

cream to ensure her privacy. He hid the cream in his boot and instructed S.M. not to tell her mother so that mother would not be angry with S.M. "for not cleaning herself properly." The "touching" was brief when it occurred, and the whole episode lasted only a few days. He never undressed or asked S.M. to touch him. On at least one occasion he offered to let her apply the cream herself. Father had no prior history of "inappropriate sexual interest or contact" with S.M. S.M. was inconsistent as to whether he inserted his finger in her vagina, and "the bulk of the evidence supports a conclusion" that he did not.

But even were we to accept the above, father does not, and cannot, offer an innocent explanation for threatening to hurt mother and the other children if S.M. revealed his conduct, a fact asserted by S.M. that the court found both credible and key to its jurisdictional findings. There is simply no reason for such threats unless, as the court found, father knew that what he was doing was wrong. Although S.M. may not have consistently mentioned the threats when recounting these events, it was for the juvenile court to weigh any contradictory or inconsistent evidence and resolve the conflicts; we cannot disturb those conclusions on appeal.[4] (*I.J., supra*, 56 Cal.4th at p. 773.)

Even absent the threats, the juvenile court's conclusion is supported by other uncontradicted evidence, including father locking the door, hiding the cream in his boot, and instructing S.M. not to tell her mother, all of which suggests he was

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[4] Father argues that even if he threatened S.M., "this does not ipso facto establish that Father had the requisite sexual intent." To the extent he is suggesting he may have had an unlawful purpose other than sexual gratification for touching S.M., we are at a loss to conceive of what that might be.

attempting to conceal his wrongful actions. While father offered innocent explanations for his conduct, the court implicitly rejected those explanations as not credible.

Father also does not explain why, if his concerns were strictly medical, he did not allow S.M. to apply the medicine herself, despite being 11 years old and having, according to DCFS, both the physical and cognitive ability to do so. Father agrees she was capable, having cited S.M.'s testimony that he offered to let her apply the cream on at least one occasion. To the extent she was not, father could have taken her to the doctor if he was uncomfortable involving mother.

Given this evidence, we reject father's claim that he merely acted unreasonably in addressing a medical concern. The evidence was sufficient to support the court's inference that father touched S.M. for the purpose of sexual gratification, thus bringing his conduct within section 300, subdivision (d).

2. Section 300, subdivision (j)

Section 300, subdivision (j) allows a juvenile court to assert jurisdiction if "[t]he 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. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child."

Father argues that even if the court correctly found that he had sexually abused S.M., the evidence was "insufficient to support a conclusion that his son, [J.M.], was at substantial risk

of harm within the meaning of section 300, subdivisions (b), (d), and (j)." Father argues he "did not have a history of sexual interest in his son," and this case "does not involve aberrant sexual conduct."[5]

We reject this argument. In *I.J., supra*, 56 Cal.4th 766, our Supreme Court held that "when a father severely sexually abuses his own child, the court may assume jurisdiction over, and take steps to protect, the child's siblings" (*id.* at p. 780), including siblings not of the same gender as the victim (*id.* at pp. 779-780). In *I.J.*, the juvenile court found that a father had raped and sexually abused his 14-year-old daughter over the course of three years. (*Id.* at p. 771.) There was no evidence, however, that the father had abused or mistreated his three sons, nor that they had witnessed or were otherwise aware of the abuse of their sister. (*Ibid.*) The Supreme Court nonetheless held that the juvenile court properly extended jurisdiction over the sons under section 300, subdivision (j). (*I.J., supra*, at p. 778.)

Quoting the majority decision from the Court of Appeal, the Supreme Court agreed that the father's behavior was " 'aberrant in the extreme' " in that he " ' "fondl[ed] the child's vagina and digitally penetrat[ed] the child's vagina and forcefully raped the child by placing the father's penis in the child's vagina." ' " (*I.J., supra*, 56 Cal.4th at p. 778.) The court also found relevant "the violation of trust shown by sexually abusing one child while the other children were living in the same home and could easily have learned of or even interrupted the abuse." (*Ibid.*) The court

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[5] Father does not challenge the juvenile court's findings under section 300, subdivision (j) as to the other children. Had he done so, we would affirm those findings for the same reason we affirm the findings as to J.M.

concluded that "[t]he serious and prolonged nature of father's sexual abuse of his daughter under these circumstances supports the juvenile court's finding that the risk of abuse was substantial as to all the children." (*Ibid.*) The court acknowledged that the risk to the sons was likely less than the risk to the father's other daughter, but "this does not mean the risk to the sons is nonexistent or so insubstantial that the juvenile court may not take steps to protect the sons from that risk. . . . [Citation.] The juvenile court need not compare relative risks to assume jurisdiction over all the children of a sexual abuser, especially when the abuse was as severe and prolonged as here." (*Id.* at pp. 779-780.)

I.J. is controlling in this case. The evidence supports a finding that father inflicted severe sexual abuse on S.M. She approached him, her de facto stepfather, with an awkward and embarrassing medical problem, and he took advantage of her trust and vulnerability to fondle and manipulate her vagina on multiple occasions.[6] The touching was not incidental, but premeditated and deliberate; he made sure to sequester her in his room with the door closed and locked, positioned her on a chair to ease his access, and carefully concealed the evidence of his guilt. He did so while her other siblings were at home and "could easily have learned of or even interrupted the abuse."[7]

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[6] In its order explaining its ruling, the juvenile court did not expressly find that father had digitally penetrated S.M.'s vagina; and for purposes of this appeal, we assume he did not. This does not affect our holding.

[7] Father argues that because he "ensured that the bedroom door was locked prior to applying the cream," there was no risk that any of her siblings would "walk in on" the sexual abuse. We

(*I.J., supra*, 56 Cal.4th at p. 778.) Most egregiously, he threatened to harm S.M.'s mother and siblings if she revealed what he was doing to her. These threats alone are clear evidence of a "substantial risk" of harm to the other children under section 300, subdivision (j), especially after S.M. defied father's warning and told her mother about the abuse.[8]

While the period of abuse was short relative to the three years of abuse in *I.J.*, this was not because of any forbearance on the part of father. As S.M. testified, the last incident of abuse took place the day before her mother learned what had been happening. The reasonable inference is that father only stopped because he was caught, and the abuse would have continued if not for mother's intervention. Thus, the brevity of the period of abuse is not a factor in father's favor.

We are also unmoved by father's argument that his abuse of S.M. was not "aberrant" because it did not involve "penetration, rape, or oral copulation" as occurred in *I.J.* As discussed, father not only sexually abused S.M. on multiple occasions (and possibly would have continued had he not been

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are dubious father locked the door out of concern for the children as opposed to his own fear of discovery. Regardless, although the court in *I.J.* was concerned that a child might "interrupt[] the abuse" of his or her sibling, the broader concern was that child would "learn[] of" the abuse (*I.J., supra*, 56 Cal.4th at p. 778), which could happen whether or not the child literally witnessed the abuse.

[8] To the extent father's threats increased the risk that J.M. and his siblings would suffer physical, not sexual, abuse, section 300, subdivision (j) does not require that the child be at risk of the same sort of abuse as his or her sibling. (*I.J., supra*, 56 Cal.4th at p. 774.)

discovered), but terrorized her by threatening harm to her family if she told, a factor not present in *I.J.* Given this evidence, the juvenile court did not have to engage in a qualitative comparison of abusive acts to determine if the abuse was aberrant.

As for father's other arguments, under *I.J.*, it is not dispositive that father had no history of sexual interest in his son or boys in general, nor, as father points out, that J.M. was much younger than S.M. *I.J.* affirmed dependency jurisdiction although there was no history of abuse of the male children, and one of them was seven years old, much younger than his 14-year-old sister. (*I.J., supra*, 56 Cal.4th at p. 771.) It is also not dispositive that J.M. was unaware of the abuse of his sister; the brothers in *I.J.* were similarly unaware. (*Ibid.*)

In sum, the juvenile court's findings under section 300, subdivision (j) were supported by substantial evidence.

3. Disposition order

Father argues there was no basis to remove J.M. from his custody and that "less drastic measures" were available.[9] We disagree.

The juvenile court ordered removal under section 361, subdivision (c)(1), which states, "A dependent child shall not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of . . . [¶] . . . a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without

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[9] Father does not challenge the disposition order as to the other children.

removing the minor from the minor's parent's or guardian's physical custody." We review a court's dispositional findings for substantial evidence. (*I.J., supra*, 56 Cal.4th at p. 773.)

Here there was clearly a substantial danger to J.M.'s physical well-being if returned to father, because the juvenile court expressly found that father had threatened to harm J.M. and the other children if S.M. told her mother about the abuse, which she had done. Moreover, the breach of parental norms demonstrated by father's repeated sexual abuse of S.M. while his other children were at home is evidence that, at this point in time, he cannot be trusted with J.M.'s care.

Father argues this was not " 'such an extreme case to warrant removal,' " citing *In re Basilio T.* (1992) 4 Cal.App.4th 155, 171 (*Basilio T.*) (superseded by statute on other grounds), and asserts that, as in *Basilio T.*, "the minor could have been returned to Father under strict supervision." Father notes that the jurisdiction and disposition report stated he was cooperative, willing to comply with court orders and the DCFS case plan, and had support through his family.

Basilio T. is no help to father. In that case, which did not involve sexual abuse, the Court of Appeal found that two incidents of domestic violence between a mother and father were not sufficient to justify removal of the children when the incidents were not directed at the children nor were the children harmed. (*Basilio T., supra*, 4 Cal.App.4th at p. 171.) Because it was "not an extreme case of parental abuse or neglect, and the minors were not physically harmed," the court concluded that the children "could have been returned to the parents under strict supervision." (*Id.* at pp. 171-172.)

Here, in contrast, the abuse and threats *were* directed at the children, including J.M. Father had inflicted great harm on J.M.'s sister and threatened further harm on J.M. and the other children. *Basilio T.* is inapplicable.

The juvenile court heard extensive argument from father's counsel and others prior to issuing its disposition order, and concluded there were "no reasonable means by which [Sa.M.] and [J.M.'s] physical health can be protected without removing them from [father's] physical custody." This ruling is supported by substantial evidence.

DISPOSITION

The orders are affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.