Filed 5/21/12 In re M.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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 M.M., a Person Coming Under the Juvenile Court Law.	B234649 (Los Angeles County Super. Ct. No. CK84746)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KEVIN M., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Marguerite D. Downing, Judge. Reversed.

Thomas S. Szakall, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Dennis M. Hippach, Deputy County Counsel, for Plaintiff and Respondent.

Kevin M. (Father) appeals from the juvenile court's January 18, 2011 jurisdictional order adjudging minor M.M. a dependent of the court pursuant to Welfare and Institutions Code section 300, subdivision (b) (failure to protect) and subdivision (d) (sexual abuse).[1] Father also appeals from the court's dispositional orders of June 27, 2011. Father, whose arrest for possession of child pornography led to the filing of the section 300 petition, contends that there was insufficient evidence to support the jurisdictional and dispositional orders. We agree because there was no substantial evidence in the record to show that as a result of Father's possession of child pornography, M.M. suffered or will suffer serious physical harm because of Father's failure to supervise or protect him adequately within the meaning of section 300, subdivision (b); and, there was no substantial evidence in the record to show that as a result of Father's possession of child pornography, Father had sexually abused or sexually exploited M.M. or that there was a substantial risk that Father will sexually abuse or exploit M.M. as defined in section 11165.1 of the Penal Code.

The jurisdictional and dispositional orders are reversed.

BACKGROUND

On October 20, 2010, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition on behalf of M.M. (born in 2001) pursuant to section 300, subdivision (b) and section 300, subdivision (d). As amended and sustained, the petition alleged under section 300, subdivisions (b) and (d) that "[o]n prior occasions, [Father] created a detrimental and endangering home environment for the child in that [Father] possessed Child Pornography on the computer in the child's home, within access of the child. On or about 10/15/10, [Father] was arrested and ultimately convicted for Possession of Child Pornography. The possession of Child Pornography in the child's home by [Father] endangers the child's physical and emotional health, safety and well-

[1] Undesignated statutory references are to the Welfare and Institutions Code.

being, creates a detrimental home environment and places the child at risk of physical and emotional harm and damage and sexual abuse."[2]

The events leading up to the filing of the petition were as follows. On October 15, 2010, Father was arrested by the United States Secret Service for possession of child pornography after a search warrant was executed at his residence. A forensic search of a computer found in the room which Father used for his work as a massage therapist revealed child pornography in his computer files. Doors on opposite sides of the massage room had locks and "'Do Not Disturb'" signs.

Father told the agents that he was sexually aroused by child pornography and had masturbated while watching it on the computer. He preferred watching pornographic material depicting nine- and ten-year-old boys engaging in sexual activity. Father knew that downloading child pornography was illegal. He had downloaded pornographic material for at least the past five years, and seven to eight years ago he had "'burned'" child pornography files to CDs. Father used various search terms such as "'incest,'" "'Kiddy,'" "'hussy fan,'" and "'young'" to locate child pornography. Father currently had an active search running on his computer for child pornography using the term "'incest. '" Two weeks previously, Father had masturbated while watching a video that depicted two prepubescent males engaging in oral copulation with an adult male. Father admitted that he had files on his computer that depicted an adult woman being raped by an adult man, which he had viewed approximately eight times. Father understood that others could download files from his computer when he left them in his "share" folder. Father sometimes left files in his "share" folder for "'days or months.'"

Father's massage therapy clients were children, who were always accompanied by their parents, and adults. Father denied engaging in any type of sexual relations or touching in an inappropriate manner M.M. or any child. Father admitted to a

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[2] A stricken section 300, subdivision (b) allegation alleged that Father demonstrated mental and emotional problems, including suicidal ideation, that he was hospitalized on October 17, 2010, for the evaluation and treatment of his psychiatric condition, and that he was unable to provide care for M.M.

homosexual relationship with an older male child when he was 12 to 14 years old. He believed he had been physically abused by paternal grandmother and paternal grandfather, "'but he could not remember if he really was or was not.'"

M.M. appeared "in good well being as evidenced by his overall positive demeanor"; interacted positively with law enforcement; was excited about school; was comfortable and candid during the interview; denied corporal punishment; stated that he is "'good'" at school and home and rarely gets punished; denied inappropriate touching but stated he would feel comfortable telling Suzan M. (Mother) and Father about any inappropriate touching; denied bedwetting or nightmares; and had no marks or bruises suspicious of abuse or neglect. M.M. stated that both Father and Mother treat him nicely, Father takes him to school and helps him with homework, and Father massages his neck and clothed body. After initially stating that he takes a shower with Father, he said that Father would stand at the door and give him instructions. He also stated that he plays games on the computer. After Father was removed from the family home, M.M. said that he missed Father. M.M. did not know why Father moved out.

Mother, who is not a party to this appeal, said she felt anger and sadness when she found out about the pornography. She denied knowledge that Father had downloaded child pornography or of any inappropriate sexual relations between M.M. and Father. Mother had not had sex with Father "'in a while'" because he experienced pain when sexually aroused due to prostate problems. At one point she believed Father was having an extramarital affair because they did not have sexual relations. She believed Father had been physically abused by paternal grandmother, paternal grandfather, and great-grandmother. She also suspected sexual abuse of Father by paternal grandmother and paternal grandfather and believed that Father had a "'reenactment compulsion.'" When he was a child, Father had been threatened by paternal grandfather when he had walked in on paternal grandfather showering with another man. After Father was arrested, he told Mother of a sexual relationship he had as a child with a nine-year-old boy. Father has always been loving and caring toward M. M. and a good caregiver for him, Father

and M.M. have a good relationship, Mother does not view Father as a predator or a pedophile, and M.M. was always supervised when he was given access to the computer. After Mother identified Father's suicidal ideation and made a report, Father had been hospitalized in December 2010. He was currently on depression medication.

At the October 20, 2010 detention hearing, the juvenile court detained M.M. from Father's custody and released M.M. to Mother. The court ordered monitored visits for Father, which Mother was permitted to monitor. Father had been unable to attend the hearing because he was hospitalized on a psychiatric hold due to suicidal thoughts.

On November 10, 2010, Father entered into a plea agreement in federal court in which he admitted the following. Between February 14 and March 14, 2010, Father publicly offered to share 28 child pornography files through peer to peer networks, such as Gnutella Network. On October 15, 2010, Father possessed at least three images of child pornography and admitted to possessing more child photography images on his computer. He admitted to using software to download child pornography from the Internet. Father knew the computer contained visual depictions of minors engaged in sexually explicit conduct and that production of such visual depictions involved the use of minors in sexually explicit conduct, including prepubescent minors younger than 12 years old. In exchange for a total term of imprisonment of no more than 71 months, Father gave up the right to appeal the term of imprisonment and fines imposed by the court. Provided that all portions of the sentence were at or above the statutory minimum of five years of supervised release and at or below the statutory maximum of 10 years imprisonment and the court imposed a term of imprisonment of no less than 57 months, the United States Attorney's Office gave up the right to appeal any portion of the sentence.

Father's counsel submitted letters from Father's friends, a therapist, and psychiatrists to the juvenile court. Psychiatrist Dr. Lukas Alexanian stated that Father had been under his care from June 21, 2004, and did not exhibit any signs of being a sexual predator or having tendencies of being sexually attracted to minors. Dr. Alexanian

stated that M.M. was safe with Father. Family therapist Avo Soltanian stated that Father had been under his care from November 3, 2010, that Father was motivated to understand why he downloaded inappropriate sexual material, deeply regretted his conduct, and was willing to do anything to rejoin his family.

At the adjudication hearing, which began on January 18, 2011, and continued to February 24, 2011, Father's counsel argued that DCFS had not proven that M.M. had been sexually abused or that there was a substantial risk that he would be sexually abused; there was no evidence that Father had touched M.M. or any other child in an inappropriate manner; M.M. denied sexual abuse and stated he would feel comfortable telling either parent if he had been sexually abused; there was no evidence that M.M. had unsupervised access to Father's computer; and neither Mother nor M.M. had knowledge of any of the pornographic material contained in the computer. DCFS argued that "the court can take judicial notice" that nine-year-old children are inquisitive. DCFS argued that M.M. might have tried to search Father's computer, and that possession of child pornography in the home is a substantial risk to M.M. The court sustained the amended section 300 petition.

At the contested disposition hearing, which began on May 9, 2011, and continued to June 27, 2011, all counsel stipulated that M.M. missed Father and would feel safe if Father returned home. Hy Malinek, Ph.D., a clinical and forensic psychologist retained by Father as an expert, testified that he had interviewed Mother, evaluated Father, spoken to Father's therapists over the phone, and reviewed documents from the federal public defender's office, including the information, the plea agreement, and information regarding the discovery of child pornography in Father's home. Dr. Malinek reviewed Father's medical records, including psychological reports, but did not interview M.M. Dr. Malinek had not yet prepared a report on Father in connection with the federal criminal charges, pending forensic analysis of Father's computer by the federal public defender. Dr. Malinek opined that although evidence of the amount of adult pornography compared to the amount of child pornography Father downloaded might have a bearing

on Father's area of sexual interest, he had enough information to determine that Father did not pose a risk to M.M. He based his opinion on his review of Father's case as well as his knowledge of the relationship between possession of pornography and "hands-on" offenses. He stated that Father acknowledged responsibility, sought treatment, expressed remorse, and was reported by his therapists to be a motivated patient. Father had no prior history of criminal activity, had never attempted to make hands-on contact with a child, and Father and Mother were motivated to stay together and work things out. Dr. Melinek testified that studies do not show a link between the possession of child pornography and hands-on contact with a child, but there is a link between "child pornography and hands-on recidivism when the person had a prior conviction for a hands-on offense." And he stated that "[t]here are cases where people who possess pornography also are caught trying to make a connection online with a child for the purpose of hands-on offense. This has also not been part of this charge." In forming his opinion, Dr. Malinek did not watch any of the videos on Father's computer.

Father's counsel, Mother's counsel, and M.M.'s counsel urged that Father poses no risk to M.M. and requested the juvenile court to make a home of parents order. Counsel argued that Father had taken full responsibility for his actions; was on antidepressant medication; had complied with the juvenile court's orders; had done well with the visitation order of one overnight visit per week; had completed a parenting program and a group program for sexual abuse offenders; and was enrolled in family therapy with Mother, individual therapy for himself, and group therapy for sexual abuse offenders. Counsel also argued that Father had never abused M.M. or any other child, Dr. Malinek testified that Father did not pose a risk of hands-on recidivism to M.M., and DCFS had not met its burden of proving there would be a substantial danger to M.M. if Father moved back to the family home. Counsel urged that there were reasonable means to protect M.M. without removing him from Father's care, pointing out that Mother resides at the family home. DCFS argued that M.M. was at risk because Father was interested in nine- and ten-year olds. The court stated that it was not convinced "that

there isn't a risk in light of the fact that [M.M.] is the same age as the pornography that [Father] was reviewing." The court had "some issues" with Dr. Malinek's testimony because his report was not complete, he had not interviewed M.M., and he was "going on reports." The court adjudged M.M. a dependent of the court, ordered Mother to retain physical custody of M.M., and ordered DCFS to provide family maintenance services and family reunification services to Father. The court ordered Father to comply with the conditions of probation or parole in his criminal case, to participate in individual counseling to address inappropriate viewing of child pornography and his role as a parent, and twice-weekly overnight monitored visits.

Father appeals the jurisdictional and dispositional orders.

DISCUSSION

A. Standard of Review

The juvenile court's jurisdictional finding that the minor is a person described in section 300 must be supported by a preponderance of the evidence. (§ 355; Cal. Rules of Court, rule 5.684(f).) "'"When the sufficiency of the evidence to support a finding or order is challenged on appeal, the reviewing court must determine if there is any substantial evidence, that is, evidence which is reasonable, credible, and of solid value to support the conclusion of the trier of fact. [Citation.] In making this determination, all conflicts [in the evidence and in reasonable inferences from the evidence] are to be resolved in favor of the prevailing party, and issues of fact and credibility are questions for the trier of fact. [Citation.]"' [Citation.] While substantial evidence may consist of inferences, such inferences must rest on the evidence; inferences that are the result of speculation or conjecture cannot support a finding. [Citation.]" (*In re Precious D.* (2010) 189 Cal.App.4th 1251, 1258–1259.)

B. There was insufficient evidence to support jurisdiction under section 300, subdivision (b)

Father contends that there was insufficient evidence to support jurisdiction under section 300, subdivision (b) because DCFS did not show that Father failed to supervise or

protect M.M. adequately causing him to suffer or that he will suffer serious physical harm or illness. We agree.

Section 300, subdivision (b) provides a basis for juvenile court jurisdiction if "[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, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left . . . ."

"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 James R.* (2009) 176 Cal.App.4th 129, 135.) DCFS has the burden of showing specifically how the minor has been or will be harmed. (*Id*. at p. 136.)

Father possessed and publicly offered to share child pornography, including depictions of nine- and ten-year-old boys performing oral sex on an adult. Nevertheless, we conclude that DCFS has failed to show that Father failed to supervise or protect M.M. adequately causing him to suffer physical harm or illness or that he will suffer serious physical harm or illness. The undisputed evidence shows that Mother and Father did not allow M.M. unsupervised access to the computer, notwithstanding DCFS's argument to the juvenile court that M.M. may have attempted to search Father's computer outside their presence. And there was no evidence of serious physical harm to M.M. To the contrary, M.M. was reported to be in "good well being"; enjoyed school; appeared comfortable during the interview; denied inappropriate touching but stated he would feel comfortable telling Mother and Father of any abuse; had no history of enuresis or nightmares, which can be indicative of sexual abuse; and exhibited no marks or bruises

that would indicate abuse or neglect. M.M. reported a good relationship with Mother and Father, stated he was a good child and was rarely punished, and said that he missed Father. And DCFS did not show that Father's possession of and publicly offering to share child pornography would cause a substantial risk of serious physical harm to M.M. in the future. Dr. Alexanian opined that Father did not exhibit any signs of being a sexual predator or having tendencies of being sexually attracted to minors, and therapist Soltanian opined that Father was motivated to understand why he downloaded inappropriate sexual material, deeply regretted his conduct, and was willing to do anything to rejoin his family. By the time of the adjudication hearing, Father had entered into a plea agreement admitting possession of and publicly offering to share pornography, expressed remorse, was in individual and joint counseling and sex abuse counseling, had been released from a psychiatric hold, and was on antidepressant medication.

DCFS offered no evidence that Father was likely to commit a hands-on sexual offense against any child, let alone M.M. We reject as speculative DCFS's argument that "[s]imply because [F]ather had not yet committed a hands-on sexual offense, it did not necessarily mean he would not." (See *In re James R.*, *supra*, 176 Cal.App.4th at p. 137 [insufficient evidence to support jurisdiction under section 300, subdivision (b) where record lacked evidence of specific, defined risk of harm to minors resulting from mother's mental illness or substance abuse, and risk of harm was mere speculation].)

Accordingly, we conclude there was insufficient evidence to support jurisdiction under section 300, subdivision (b).

C. There was insufficient evidence to support jurisdiction under section 300, subdivision (d)

Father contends that there was insufficient evidence to support jurisdiction under Welfare and Institutions Code section 300, subdivision (d). We agree because DCFS did not show that Father had sexually abused or sexually exploited M.M. or that there was a substantial risk that Father will sexually abuse or exploit M.M. as defined in section 11165.1 of the Penal Code.

Welfare and Institutions Code section 300, subdivision (d) provides a basis for juvenile court jurisdiction if "[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 . . . ."

Penal Code section 11165.1 provides that "'sexual abuse'" means *sexual assault or sexual exploitation*. Penal Code section 11165.1, subdivision (a) defines *sexual assault* as "conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation)."

Penal Code section 11165.1, subdivision (c) defines *sexual exploitation* as referring to any of the following: "(1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts). [¶] (2) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, 'person responsible for a child's welfare' means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution. [¶] (3) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law

enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3."

DCFS argues that because Father viewed, possessed, and shared child pornography files, jurisdiction was properly asserted over him, claiming that he sexually abused M.M. within the meaning of Welfare and Institutions Code section 300, subdivision (d) by engaging in sexual exploitation. DCFS points to Penal Code section 11165.1, subdivision (c), which defines sexual exploitation as including "[c]onduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) . . . ." In turn, Penal Code section 311.2, subdivision (c) criminalizes the possession for distribution of child pornography to persons over 18 years of age, with knowledge that the matter depicts a person under 18 years of age engaging in sexual conduct. Thus, DCFS argues that, by downloading child pornography, sharing files, and possessing the child pornography, Father engaged in sexual exploitation of M.M.

Although Penal Code section 11165.1 and Penal Code section 311.2, subdivision (c) prohibit the distribution of child pornography, and Father admitted in federal court that he publicly offered to share 28 pornographic files, Welfare and Institutions Code section 300, subdivision (d) requires that the minor must be the object of sexual abuse or exploitation. Section 300, subdivision (d) provides that a child comes within the jurisdiction of the dependency court if "*[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 . . . ." (Italics added.) We are not persuaded by DCFS that Father's possession of and publicly offering to share child pornography, without more, brings M.M. within the jurisdiction of the dependency court under Welfare and Institutions Code section 300, subdivision (d). The undisputed evidence showed Father had never sexually abused M.M.; M.M. had never seen the child pornography files; M.M. did not have unsupervised access to the computer on which the files were stored; Father and M.M. had a good relationship; M.M. was not even aware of why

Father had been removed from the home; M.M. missed Father after Father was removed from the home; Father was remorseful, admitted his guilt, participated in individual, joint, and sexual abuse counseling; Father was motivated to reunite with his family; and a letter from a psychiatrist indicated Father was not a risk to M.M. Nor has DCFS shown that there is a link between the possession of and publicly offering to share child pornography and sexual abuse of one's own child. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 67 [in the absence of evidence demonstrating that the perpetrator of the abuse may have an interest in sexually abusing male children, brother of sexually abused sisters may not be deemed to face risk of sexual abuse within meaning of Welfare and Institutions Code section 300, subdivision (d)].) As loathsome as is the exploitation of the children in the pornography Father possessed and publicly offered to share, that, by itself, does not support jurisdiction under section 300, subdivision (d).

We conclude that there was insufficient evidence to support jurisdiction under section 300, subdivision (d). Accordingly, we reverse both the January 18, 2011 jurisdictional order and the June 27, 2011 dispositional orders.

DISPOSITION

The January 18, 2011 jurisdictional order adjudging minor M.M. a dependent of the court pursuant to Welfare and Institutions Code section 300, subdivision (b) (failure to protect) and subdivision (d) (sexual abuse), and the June 27, 2011 dispositional orders are reversed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.