Filed 3/21/17 In re Luis M. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re LUIS M. et al., Persons Coming Under the Juvenile Court Law.	B270978 (Los Angeles County Super. Ct. No. DK00701)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOSE G., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Phillip L. Soto, Judge. Affirmed.

Andre F.F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Jose G. (father) appeals from the jurisdictional finding that his twin sons, Luis M. and Jose M. (minors), were at risk of sexual abuse pursuant to Welfare and Institutions Code section 300, subdivisions (d) and (j)[1] because he molested their six-year-old half-sister. Father also appeals from the dispositional order releasing minors to Hortencia M. (mother) and giving her sole legal and physical custody.

We find no error and affirm.

FACTS

Mother had four children with Alvaro E. With father, mother had the minors in April 2015.

In February 2016, the Department of Children and Family Services (Department) filed a two count section 300 petition on minors' behalf. At the time of the filing, minors were nine months old.

In count 1 pursuant to section 300, subdivision (d), the petition alleged that in January 2016, father sexually abused minors' half-sibling, N.M. (born Jan. 2010), by fondling her vagina and kissing her on the mouth. On prior occasions, he had kissed her on the mouth. "Such sexual abuse of [minors'] sibling by the father endangers [minors'] physical health, safety and well-being[,] and places [minors] at risk of serious harm, damage, danger and sexual abuse." In count 2 pursuant to section 300, subdivision (j), the petition repeated the allegations.

The matter proceeded to a jurisdictional hearing on March 10, 2016. The juvenile court received the Department's detention report and jurisdiction/disposition report into evidence, and took judicial notice of all its prior findings and orders. No witnesses testified.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The record established that mother informed a social worker that on January 9, 2016, she saw N.M. get on "the bed" and give father a kiss on the mouth. When mother asked father what was going on, he ignored her. The next day, mother observed father and N.M. laying under a blanket on the couch in the living room. After mother stood in front of them, father got up and eventually left. Later that day, N.M. indicated that father touched her vagina over her clothes. She told law enforcement that when father touched her, she moved his hand away. After that happened, she was scared and did not know why.

N.M. told law enforcement and a social worker that father touched her vagina, and told the social worker that father kissed her on the mouth three times on the day they were under the blanket on the couch. N.M. told her therapist father had kissed her on the mouth on a previous occasion.

Am. E., N.M.'s 13-year-old sister, reported that N.M. was "clingy with [father]." Upon seeing N.M. sitting on father's lap, Am. E. would tell mother to tell N.M. to get off and go to her room. Ad. E., N.M.'s nine-year-old sister, told a social worker she is not comfortable being alone with father and therefore avoided being alone with him. If father touched N.M. inappropriately, Ad. E. blamed N.M.

Father was interviewed. He said N.M. is always getting close to him and sitting on his lap. He denied touching her inappropriately, and indicated that he had made a mistake by not setting boundaries. The reason he did not set boundaries is that he did not want to hurt her feelings. He claimed that on January 9, 2016, N.M. kissed him on the mouth while on a bed.

In a subsequent interview, N.M. stated that father touched her vagina over her pants while they were in the living room with Am. E., Ad. E. and Jose.

Father's counsel argued there was no evidence that N.M. was sexually abused, and maintained there was no evidence that anything that might have occurred was for father's sexual gratification.

The juvenile court noted that father kissed N.M. three times on the day she laid on the couch with father, and stated, "That's not an innocent little peck on the cheek or even on the lips. That, in particular, is definitely sexual gratification and grooming this child, and touching this child while that activity was obscured by the blanket. [¶] The fact that he was hiding it under the blanket is evidence that he knew it was wrong and he was taking advantage of this child, who is merely six years old, by fondling her vagina . . . over the clothing, and the child had to stop him and moved [his] hand, according to her statements to the police officer. . . . This is sexual abuse. [¶] . . . I don't blame the District Attorney's Office for not bringing this allegation to court in criminal law, [but] that is of no consequence here. It is not a criminal law standard. We don't have to have proof beyond a reasonable doubt. [¶] A preponderance of the evidence is enough. I don't accept the notion that he was fumbling for a remote control for the television or accidentally touch[ed] her vagina. The kissing and the touching together under the blanket indicates his true intent. He intended to sexually molest and annoy this child. He is a sexual predator who can sexually molest and annoy the two younger children, Luis and Jose, especially if there is no protection for them. . . . [¶] This court finds it was not innocent. It was not accidental. He was taking advantage of a six year old child." The juvenile court sustained the petition.

Father's counsel said father "would not object to closing the case with a custody order."

Minors were released to mother on the condition that father not be permitted to visit minors in the family home, or reside there. Father was ordered to do a sex abuse program for perpetrators and obtain individual counseling. The juvenile court entered a custody order giving mother sole legal and physical custody of minors, and granted father monitored visitation.

Jurisdiction was terminated.

This appeal followed.

DISCUSSION

Though father appeals from both the jurisdictional findings and the disposition, he offers no argument regarding the disposition. Thus, it is apparent he requests reversal of the disposition only if jurisdiction is reversed.

The sole question presented is whether there is substantial evidence that Luis and Jose are at risk of being sexually abused within the meaning of section 300, subdivision (d), or at risk of being abused or neglected within the meaning of section 300, subdivision (j).[2] As we shall explain, the answer is yes.

I. Legal Standards.

A child is a dependent if the "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" (§ 300, subd. (d)), or if the "child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions" (§ 300, subd. (j)).

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[2] Father is challenging the juvenile court's jurisdictional findings. The parties agree that we must apply the substantial evidence standard of review. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

Sexual abuse under Penal Code section 11165.1 includes "sexual assault" in violation of Penal Code sections 288[3] or 647.6.[4] (Pen. Code, § 11165.1, subd. (b)(4).) Conduct described as sexual assault includes but is not limited to the "intentional touching of the genitals . . . or the clothing covering them[] of a child . . . for purposes of sexual arousal or gratification[.]" (Pen. Code, § 11165.1, subd. (b)(4).)

In Penal Code section 647.6, "The words 'annoy' and 'molest' are synonymous and 'refer to conduct designed "to disturb or irritate, esp[ecially] by continued or repeated acts" or "to offend" [citation]; and as used in this statute, they ordinarily relate to "offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender." [Citation.] [¶] Ordinarily, the annoyance or molestation which is forbidden is "not concerned with the state of mind of the child" but it is "the objectionable acts of defendant which constitute the offense," and if his conduct is "so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would 'annoy or molest' within the purview of" the statute. [Citation.]' [Citation.] The primary purpose of [Penal Code] section 647.6 'is the "protection of children from interference by sexual offenders . . . ." [Citations.]' [Citation.] 'The deciding factor for purposes of a Penal Code [section] 647.6 charge is that the defendant has engaged in

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[3] Penal Code section 288, subdivision (a) provides: "[A]ny person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony[.]"

[4] Penal Code section 647.6, subdivision (a)(1) provides: (1) Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment."

offensive or annoying sexually motivated *conduct* which invades a child's privacy and security, conduct which the government has a substantial interest in preventing . . . .' [Citation.] '[T]here can be no normal sexual interest in any child and it is the sexual interest in the child that is the focus of the statute's intent.' [Citation.]" (*In re D.G.* (2012) 208 Cal.App.4th 1562, 1571.)

II. Relevant Precedent.

Our Supreme Court recognized that "[s]everal Court of Appeal cases have considered, in varying factual contexts, whether sexual abuse of a daughter supports finding a son to be a dependent of the court, with sharply conflicting results. [Citations.]" (*In re I.J.* (2013) 56 Cal.4th 766, 774–775 (*I.J.*).)

The father in *In re Karen R.* (2001) 95 Cal.App.4th 84 (*Karen R.*) beat, threatened, raped and attempted to rape his teenage daughter. The juvenile court exercised jurisdiction over the daughter as well as her younger brother and sister. (*Karen R.*, *supra*, at pp. 86–88.) The reviewing court affirmed jurisdiction over the younger brother pursuant to section 300, subdivision (d) because he heard his sister report that she had been raped and saw her crying after her head had been forcibly shaved; he was present when mother refused to believe the daughter's report and humiliated her; and he was present when mother and father physically abused their daughter, and forced her to exercise late into the night. (*Karen R., supra*, at p. 90.) According to *Karen R.*, these facts would have disturbed and annoyed a child in the brother's position, and which supported a finding that he had been a molestation victim. (*Ibid.*)

Further, the court concluded that "a father who has committed two incidents of forcible incestuous rape of his minor daughter reasonably can be

said to be so sexually aberrant that both male and female siblings of the victim are at substantial risk of sexual abuse within the meaning of section 300, subdivision (d), if left in the home. To the extent other cases suggest only female siblings are in substantial danger of sexual abuse after a sexually abused female sibling has been removed from the home due to sexual abuse by a father, we respectfully disagree. [Citations.] Although the danger of sexual abuse of a female sibling in such a situation may be greater than the danger of sexual abuse of a male sibling, the danger of sexual abuse to the male sibling is nonetheless still substantial. Given the facts of this case, the juvenile court reasonably could conclude every minor in the home, regardless of gender, was in substantial danger of sexual abuse by father." (*Karen R.*, *supra*, 95 Cal.App.4th at pp. 90–91.)

In re P.A. (2006) 144 Cal.App.4th 1339 (*P.A.*) required the juvenile court to consider evidence that father touched his nine-year-old daughter's vagina on two occasions, once over her clothes and once under them. The father's two sons had not been molested, nor was there evidence that they were aware that their sister was being molested. At the time of the proceedings, the two sons were approaching the age at which the daughter had been victimized by her father. (*Id.* at pp. 1340–1343.) Two amended counts in the section 300 petition alleged that "on one occasion, father 'sexually abused [his daughter] consisting of but not limited to . . . touching [her] vagina under her clothes on top of her underwear. Such abuse by the father places the children at risk.'" (*P.A.*, *supra*, at p. 1343.) The juvenile court sustained the petition as to the daughter and two sons. (*Ibid.*)

The *P.A.* court affirmed, noting it was "convinced that where, as here, a child has been sexually abused, any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual

abuse." (*P.A.*, *supra*, 144 Cal.App.4th at p. 1347.) As the court "intimated in *Karen R.*, aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior." (*P.A.*, *supra*, at p. 1347.)

Following the lead of *P.A.*, the court that penned *In re Andy G.* (2010) 183 Cal.App.4th 1405 (*Andy G.*) upheld jurisdictional findings under section 300, subdivisions (d) and (j) with respect to the two-year-old half brother of 12- and 14-year-old sisters who had been molested by his father. The court said, "Here, the only significant difference from [*P.A.*] is the fact that [the son] was only two and one-half years old at the time of the [juvenile] court's orders, so he was not 'approaching the age at which [his sisters were] abused.' [Citation.] . . . But other factors convince us that the evidence was sufficient to support the [juvenile] court's findings that [the son] was at substantial risk of sexual abuse. While [he] may have been too young to be cognizant of [the father's] behavior, [the father] exposed himself to [one of the half sisters] while [the son] was in the same room (albeit apparently facing in the other direction). Indeed, the [juvenile] court could infer, as the Department suggests, that [the father] used [the son] to get [the half sister] to approach him so he could expose himself to her, by asking her to take [the son] to the store and holding out the money to do so. This evinces, at best, a total lack of concern for whether [the son] might observe his aberrant sexual behavior." (*Andy G.*, *supra*, at p. 1414.)

Other cases have rejected a molester's challenge that his male offspring are not at risk after he molested a female family member. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1215 [the father molested his daughter and had one or two homosexual affairs with adult partners]; *In re R.V.* (2012) 208 Cal.App.4th 837 [the father sexually abused his son's 10-year-old half sister

on multiple occasions, and the son both tried to prevent the abuse and witnessed the abuse]; *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1319, 1330–1332 [the father molested an 11-year-old girl with moderate disabilities in a place where her siblings could observe the molestation and therefore posed a risk to the girl's siblings, including her brothers].)

In contrast to the preceding cases, *In re Rubisela E.* (2000) 85 Cal.App.4th 177 (*Rubisela E.*) reversed a jurisdictional finding regarding two brothers under section 300, subdivision (j). There, the evidence established that the father had molested his oldest daughter. (*Rubisela E.*, *supra*, at pp. 179, 198.) The court did not "discount the real possibility that brothers of molested sisters can be molested [citation], or in other ways harmed by the fact of the molestation within the family." (*Id.* at p. 198.) And it acknowledged that "[b]rothers can be harmed by the knowledge that a parent has so abused the trust of their sister. They can even be harmed by the denial of the perpetrator, the spouse's acquiescence in the denial, or their parents' efforts to embrace them in a web of denial." (*Ibid.*) Nonetheless, the court held that there was no showing of a substantial risk that the brothers would be molested. (*Id.* at p. 199.)

In re Maria. R. (2010) 185 Cal.App.4th 48 (*Maria R.*) disagreed with prior cases "to the extent that they have held or implied that the risk that the brothers face may—in the absence of evidence demonstrating that the perpetrator of the abuse may have an interest in sexually abusing male children—be deemed to be one of 'sexual abuse' within the meaning of [section 300] subdivision (d)." (*Maria. R., supra,* at p. 67.) The court pointed out that none of the cases finding a substantial risk of harm "cited any scientific authority or empirical evidence to support the conclusion that a person who sexually abuses a female child is likely to sexually abuse a male

child. [Citations.]" (*Id.* at p. 68.) As a result, the court reversed a finding of jurisdiction over the brother of a molested sister. (*Ibid.*) It explained that "[i]n the absence of evidence demonstrating that a perpetrator of sexual abuse of a female child is in fact likely to sexually abuse a male child, we are not persuaded that the rule of general applicability enunciated in *P.A.*, and repeated by the *Andy G.* court, is grounded in fact. For this reason, we decline to adopt the reasoning of *P.A.* and *Andy G.*" (*Maria R.*, *supra*, at p. 68.)

The *I.J.* court upheld the juvenile court's finding of jurisdiction over a male sibling based on evidence that the child's father that sexually abused his own daughter by fondling her vagina, digitally penetrating her vagina, and raping her. (*I.J.*, *supra*, 56 Cal.4th at p. 778.) It noted that cases such as *Maria R.* criticized *P.A.* for "not citing scientific authority or empirical evidence to support the conclusion that a father who abuses his daughter is likely to abuse his son" but then concluded that "nothing in the statutes suggests a legislative intent to *require* a court to consult scientific authority or empirical evidence before it makes the 'substantial risk' determination. The specific factors the Legislature stated in section 300, subdivision (j) do not include such evidence. Rather, after considering the nature and severity of the abuse and the other specified factors, the juvenile court is supposed to use its best judgment to determine whether or not the particular substantial risk exists. As the [Court of Appeal in this case] noted, '"It is of course impossible to say what any particular sexual predator—and here a predator who has raped his own daughter—is likely to do in the future in any particular instance. But in our view that very uncertainty makes it virtually incumbent upon the juvenile court to take jurisdiction over the siblings . . . ." (*I.J.*, *supra*, at pp. 778–779.) The court disapproved *Maria R.* and

Rubisela E. to the extent that they were inconsistent its opinion. (*I.J.*, *supra*, at p. 778.)

Regarding section 300, subdivision (j), *I.J.* stated that it requires a juvenile court to consider "the circumstances surrounding, and the nature of, [a] father's sexual abuse of his daughter." (*I.J.*, *supra*, 56 Cal.4th at p. 778.) Subdivision (j) "implies that the more egregious the abuse, the more appropriate for the juvenile court to assume jurisdiction over the siblings. [Citation.] 'Some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great. . . . [¶] . . . [¶] . . . Conversely, a relatively high probability that a very minor harm will occur probably does not involve a "substantial" risk. Thus, in order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of potential harm . . . .' [Citation.] In other words, the more severe the type of sibling abuse, the lower the required probability of the child's experiencing such abuse to conclude the child is at a substantial risk of abuse or neglect under section 300. If the sibling abuse is relatively minor, the court might reasonably find insubstantial a risk the child will be similarly abused; but as the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse." (*I.J.*, *supra*, at p. 778.)

I.J. further stated, "Also relevant to the totality of the circumstances surrounding the sibling abuse is 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. '[S]exual or other serious physical abuse of a child by an adult constitutes a fundamental betrayal of the appropriate relationship between the generations. . . . When a parent abuses his or her own child, . . . the parent also abandons and

contravenes the parental role. Such misparenting is among the specific compelling circumstances which may justify state intervention, including an interruption of parental custody. [Citation.]' [Citation.]" (*I.J.*, *supra*, 56 Cal.4th at p. 778.)

III. Jurisdiction Supported by Substantial Evidence.

Father does not dispute that the sufficiency of the evidence to establish that he sexually abused N.M. He contends, however, that jurisdiction over minors must be reversed because his sexual abuse of N.M. "occurred only once and was not nearly as severe and aberrant as in" other cases, minors are much younger than N.M., they have a different gender than N.M., and father relocated to Sacramento with no plans to reunify with mother and minors.

We reject father's implicit suggestion that because father did not rape N.M., or otherwise molest her over a long period of time, that what he did was not severe or aberrant. N.M. was six years old, and therefore extremely vulnerable, when he molested her. He took advantage of his parental role in her life, betraying his position of trust. He kissed her on the mouth on multiple occasions, and the juvenile court found this to be perpetrated by father for sexual gratification and grooming of N.M. The kissing, by itself, was enough to violate Penal Code section 647.6. Father did not stop there. He touched N.M. on the vagina over her clothes while they were on the couch together. They were covered by a blanket at the time, which demonstrates that he knew his conduct was criminal. N.M. was forced to remove father's hand from her vagina. This incident occurred while Am. E, Ad. E. and Jose were in the same room, potentially exposing them to the molestation of their sibling.

Though father suggests that the abuse was isolated, there was more than one incident of kissing. Also, he admitted that he did not set

appropriate boundaries, and the family regularly saw N.M. on his lap. In our view, the record strongly indicates that he was grooming N.M.

While some nonsexual form of physical abuse, like inappropriate spanking, might be considered minor in a particular case, we do not accept that inappropriate sexual abuse of a six year old can ever be described as minor.

Pointing to the circumstances of the case, father posits that "it remains undisputed that [minors] were not at substantial risk of being sexually abused or suffering any harm by father." We reject this idea. Because father's behavior was so aberrant, we conclude that his young sons were at risk. As *I.J.* explained "'some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great.'" (*I.J.*, *supra*, 56 Cal.4th at p. 778.) That is what we have here. It may be true that there is a low degree of probability that father would molest his sons, but there is a possibility because a person who would molest a six-year-old girl has unnatural and unchecked impulses. And because the magnitude of harm would be great if minors were molested, the risk is substantial.

Father attempts to downplay the risk because he no longer lives with the family, he "made it clear" to the Department "he would abide [by] the juvenile court's orders made in [this] case," and mother was protective of her children, having believed N.M. and having reported the abuse. We fail to see the point. Without jurisdiction, the juvenile court could not have protected minors from him by entering the custody orders and restricting father to monitored visitation. Thus, the exercise of jurisdiction was necessary in this case.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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