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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Josue M., Jr., a Person Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOSUE M., SR.,

Defendant and Appellant.

B235364

(Los Angeles County
Super. Ct. No. CK87097)

APPEAL from an order of the Superior Court of Los Angeles County.

Timothy R. Saito, Judge. Affirmed.

Frank H. Free, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

Josue M., Sr. (father) appeals from the order adjudging his son, Josue M., Jr. (Josue) a person described by Welfare and Institutions Code section 300, subdivisions (b), (d) and (j).¹ Father contends the jurisdictional findings were not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2011, mother and father were not married but had been living together for six or seven years. Their son, 19-month-old Josue, and mother's child from a prior relationship, 12-year-old Grace C., also lived with them.² Father's 21-year-old nephew, Edwin Martinez, had been living with them since August 2010. The family came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) on March 14, after mother and father reported to police that Grace had been missing since the night before. When Grace was located later that day, she revealed that she had been sexually active with Martinez for many months; a forensic examination confirmed this.³ Grace told a social worker that, in addition to Martinez, Grace had had sexual intercourse with her biological father and her stepfather (i.e., whom she refers to as father, a title we adopt). Grace said that father began having sex with her when she was eight years old, but stopped when she was nine. Father had since apologized and

¹ All future undesignated statutory references are to the Welfare and Institutions Code.

² Although mother and father are not married, father is referred to as Grace's stepfather throughout the record.

³ This was not the family's first encounter with social services. In February 2004, Grace was treated at Children's Hospital for suspected sexual abuse. In 2005, father was arrested for domestic violence against mother. An April 2008 investigation into allegations that father was sexually abusing Grace was closed after the district attorney concluded there was insufficient evidence to prosecute. However, mother entered into a Voluntary Family Maintenance (VFM) agreement to keep father away from Grace and to obtain psychological counseling for her. Mother ultimately violated this agreement.

Grace had forgiven him. Grace told the social worker that she often thinks of killing herself.⁴

At a Team Decision Making Meeting (TDM) on March 16, father denied ever touching Grace and offered to leave the home if that was what was required to have Grace returned to mother's custody.⁵ The social worker concluded that father posed a threat of sexual abuse to 19-month-old Josue because father had sexually abused Grace. "Both parents demonstrate little concern for the emotional and psychological impact of sexual abuse by failing to ensure . . . Grace has access to adequate mental health services as well as by their continual denial of the occurrence of sexual abuse to . . . Grace." Grace and Josue were both detained on March 16. Josue was placed in foster care but released to paternal grandmother a few days later.⁶ Grace was placed on an emergency psychiatric hold and hospitalized for over one month; upon being released from the hospital she was placed in foster care.

On March 21, DCFS filed a section 300 petition alleging that both children were persons described by subdivisions (b) (failure to protect), (d) (sexual abuse) and (j) (abuse of a sibling). As to father, paragraphs b-2, d-2 and j-2 alleged that father began

⁴ Grace later explained that she meant she was afraid of what would happen to her when her parents found out she was sexually active with Martinez.

⁵ Also at the TDM, mother told the social worker that Grace had made up the allegations of sexual abuse against father. She did not worry about Grace or Josue being around father because he was a good provider. Although mother and father separated after Grace made the allegations against him in 2008, mother violated the VFM agreement by reuniting with father (mother claimed she did so at Grace's request) and by not obtaining mental health treatment for Grace (mother explained she thought talking to school officials was enough, especially since Grace seemed happy). Mother also stated that she did not know whether she believed that Martinez was having sexual relations with Grace. She explained that Martinez had denied it and claimed he was helping Grace leave the house because Grace felt that mother and father paid more attention to Josue than to her. By the time of the adjudication hearing, mother acknowledged that Martinez sexually abused Grace, but continued to deny that father had done so.

⁶ To limit the disruption to Josue, paternal grandmother moved into the parents' home and the parents moved out.

sexually abusing Grace when she was eight years old and that he forcibly raped her, among other things. “Such sexual abuse of . . . Grace by . . . father and the mother’s failure to protect [Grace] endangers [Grace]’s physical and emotional health, safety and well-being, creates a detrimental home environment and places [Grace and her sibling, Josue,] at risk of physical harm, danger, sexual abuse and failure to protect.” The court found a prima facie case had been made that the children were persons described by section 300 and set the matter for adjudication.

Grace was the only witness to testify at the jurisdictional hearing on July 11 and 14. Grace was born in October 1998. When Grace was six years old, father began living with her and mother. Mother and father both worked and Grace was always left in the care of paternal grandmother, never father. She was never left alone with father. Grace was in the third grade and father was already living with them when Grace’s friend told Grace about being raped by her father. The friend had to explain to Grace what that meant because Grace did not know. Grace never told anyone else what her friend said. When Grace was eight years old, she began keeping a diary. Sometimes, she wrote made up stories in her diary, including stories about father. Grace did not remember what kinds of stories she wrote about father. She never wrote about anything sexual in her diary (Mother was asked to bring the diaries to court, but she was unable to find them.)

In April 2008, when Grace was nine years old, she got mad at father for grounding her. She wanted to get father in trouble so that he would move out of the house and she could live alone with mother. So at recess that day, she falsely told a friend that father had sexually abused her. Grace’s friend repeated the story to a school staff member. When the staff member questioned Grace, Grace said it was not true but the staff member did not believe Grace. The staff member told the principal, who also questioned Grace. Grace told the principal that it was not true, but the principal did not believe Grace, either. The principal called the police. Two police officers came to the school with mother. The officers questioned Grace, who told them that what she had said about father was not true, but the officers also did not believe her. The officers took Grace and mother to a child abuse center. Grace told the people at the center that she had been

lying. Eventually, Grace was allowed to go home with mother. Later, when a social worker questioned Grace about her accusation against father, Grace told him it was not true; Grace did not remember telling the social worker details of how father had sexually abused her. Grace maintained that father never touched her in a way that made her feel uncomfortable and that she told all of the adults that she had lied, but no one believed her.

In 2008, father moved out of the house for about four weeks, but then moved back in. Grace told father that she was sorry she had lied and promised never to do it again. Father told her it was okay, that she was just a little girl and did not know what she was talking about.

When Martinez (father's nephew) moved into the family home two years later, he became Grace's boyfriend. Grace had sexual relations with Martinez. Grace initially testified that she never told Martinez that father had done anything to her and if Martinez said that Grace had done so, he was lying to get father in trouble. But later, Grace testified that she falsely told Martinez that father had sexually abused her because she was jealous that mother and father were paying more attention to Josue than to Grace; but later Grace told Martinez that she had lied. Grace recalled talking to several social workers and the police in 2011, but did not remember telling any of them that father sexually abused her when she was eight or nine years old. Grace told the social workers that she lied about father sexually abusing her because she did not like him and because he punished her. Grace told the social workers that father was a good man who takes good care of his family. Grace told them that the family had been destroyed by the separation and she wanted to live with mother, father and Josue again.

The court sustained paragraphs b-2, d-2, and j-2 of the petition, finding Grace and Josue to be persons described by subdivisions (b), (d) and (j) of section 300.⁷ The court

⁷ The court dismissed paragraphs b-1, d-1 and j-1 of the petition, finding insufficient evidence that mother knew or should have known about Grace's sexual relationship with Martinez, and consequently insufficient evidence that mother failed to protect Grace from

credited Grace's statements to the police and social workers that father began sexually abusing her sometime prior to April 2008, not her testimony that she made up the story because she was angry at father.

At the dispositional hearing, DCFS maintained that Josue was at risk of sexual abuse if placed with father. Father countered that a finding of sexual abuse of a young girl is not clear and convincing evidence that a one-year-old boy would be at risk. Observing that "sexual abuse could occur in different forms at different ages," the court placed Josue with DCFS and gave father monitored visits. Father timely appealed.

DISCUSSION

A. *Standard of Review*

As usual, we begin with the standard of review. On appeal, jurisdictional and dispositional findings are reviewed for substantial evidence. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) "The term 'substantial evidence' means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value." (*Ibid.*)

B. *The Jurisdictional Order Is Supported by Substantial Evidence*

Father contends the order adjudicating Josue a dependent child under subdivisions (b), (d) and (j) is not supported by substantial evidence. As he did in the trial court, father argues that the evidence he sexually abused Grace is not enough to support the finding that Josue was at risk of "physical harm, damage, danger, sexual abuse and failure to protect," because evidence that a father sexually abused a female child is insufficient to support a finding that the father may sexually abuse a male child. We find no error.

Martinez. It also dismissed paragraphs b-3 and j-3, finding insufficient evidence that mother failed to obtain appropriate mental health treatment for Grace.

In relevant part, section 300, subdivision (b) allows the dependency court to take jurisdiction where the 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 [the parent] to adequately supervise or protect the child” Subdivision (d) allows the court to take jurisdiction if “there is a substantial risk that the child will be sexually abused . . . by his or her parent” Finally, subdivision (j) allows the dependency court to take jurisdiction where “[t]he child’s sibling has been abused or neglected, as defined in [specified subdivisions of section 300], and there is a substantial risk that the child will be abused or neglected, as defined by 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 . . . , and any other factors the court considers probative in determining whether there is a substantial risk to the child.” Jurisdiction under subdivision (j) does not require a finding that that child will be abused or neglected in the same manner as his or her sibling was abused or neglected. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 64 (*Maria R.*) “[S]ubdivision (j) was intended to expand the grounds for the exercise of jurisdiction as to children whose sibling has been abused or neglected [S]ubdivision (j) directs the court to consider whether there is a substantial risk that the child will be harmed under subdivisions (a), (b), (d), (e) or (i) of section 300, notwithstanding which of those subdivisions describes the child’s sibling”].)

In *In re Andy G.* (2010) 183 Cal.App.4th 1405, we held that aberrant sexual behavior by a parent created a risk that other siblings who remain in the home will also be abused, even if their gender differs from that of the abused sibling. In that case, the father sexually abused his daughter in the presence of her two-and-one-half-year-old brother. Although the boy was too young to be aware of what was happening, this evidence showed a complete lack of concern for whether the son might witness the father’s aberrant sexual behavior. (*Id.* at pp. 1414-1415.) A parent’s failure to acknowledge the abuse or harm caused by the abuse makes it more likely that the parent would abuse the child again if given access to the child. (*In re Carlos T.* (2009)

174 Cal.App.4th 795, 806.) We are aware that there is a split of authority in this area and resolution of the issue is often fact specific. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 68 [speculation that a father may sexually abuse a male child because the father abused a female child is insufficient to support jurisdiction over the male child]; see *In re P.A.* (2006) 144 Cal.App.4th 1339, 1347 [“[A]berrant sexual behavior by a parent places the victim’s siblings who remain in the same home at risk of aberrant sexual behavior”]; *In re Karen R.* (2001) 95 Cal.App.4th 84, 90-91 [finding that brother was a victim of sexual abuse was supported by evidence that he saw his parents beat his older sister, and later saw his sister crying as she reported that the father had raped her]; *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 198-199 [father’s abuse of daughters did not constitute substantial evidence that his sons were at risk of sexual abuse].)

There is no evidence that Josue saw father abuse Grace. But father has never admitted that he sexually abused Grace. On the contrary, Grace and both parents have suggested that Grace made up the story either because she was mad at father for disciplining her, or jealous of the attention being shown to her baby brother, Josue. Although the evidence was in conflict, we are of course bound by the juvenile court’s finding that abuse did occur as it is supported by substantial evidence. It is also significant that the acts of abuse found by the trial court include rape and oral copulation of a young girl, not some touching that might be considered less severe. Under these circumstances, we find the evidence that father sexually abused Grace on innumerable occasions over at least one year is sufficient to support dependency court jurisdiction over Josue as father’s aberrant sexual behavior creates a risk that Josue will suffer from sexual abuse.

DISPOSITION

The jurisdictional order is affirmed.

RUBIN, J.

I CONCUR:

BIGELOW, P. J.

Flier J., Dissenting

I respectfully dissent from the majority's conclusion that "father's aberrant sexual behavior creates a risk that Josue will suffer from sexual abuse." (Maj. opn. *ante*, at p. 8.) I find no evidence supports jurisdiction over Josue, Grace's half brother, who was more than 10 years younger than Grace.

There was *no* evidence that father had an interest in engaging in sexual activity with a male child or engaging in an incestuous relationship. Speculation that a father may sexually abuse a male child is insufficient to support jurisdiction. (*In re David M.* (2005) 134 Cal.App.4th 822, 830 [speculative harm insufficient to support jurisdiction]; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 198-199 [same].) Evidence that a parent sexually abused a female child does not automatically demonstrate that a male child left in the home is at risk of similar abuse. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 68; *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 199; see also Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings* (2002) 51 Emory L.J. 241, 263-266 [empirical evidence suggests that the majority of fathers who sexually abuse daughters do not abuse male siblings].) And no additional evidence exists in this case. The Los Angeles County Department of Children and Family Services presented no evidence that father acted inappropriately towards Josue or any male child.

Even assuming that cases holding a male child who remains in the house is at risk of sexual abuse when his female sibling was sexually abused were correctly decided, they are distinguishable from the present case. In *In re Karen R.* (2001) 95 Cal.App.4th 84, 90, the court found jurisdiction was proper over a male sibling who witnessed a beating of his female sibling that was so severe his sister was kept out of school until the bruises faded. (*Id.* at p. 87.) The abuse that took place in the brother's presence "clearly was sufficient to warrant the conclusion that a normal child . . . would have been greatly disturbed and annoyed at having witnessed these events." (*Id.* at p. 90.) Similarly, in *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1414, the father exposed himself to the female sibling while the male sibling was in the same room. In *In re P.A.* (2006) 144

Cal.App.4th 1339, 1347, the court held that “any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual abuse.” In contrast, here, no evidence showed Josue witnessed any abuse as in *Karen R.*, or that any abuse occurred in his presence as in *Andy G.* Nor was Josue approaching the age of Grace when she had been abused, distinguishing this case from *P.A.*

I would reverse the court’s jurisdictional finding over Josue.

FLIER, J.