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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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

B240881
(Los Angeles County
Super. Ct. No. CK91568)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

F.R.,

Objector and Appellant.

APPEAL from orders of the Superior Court of the County of Los Angeles, Steven R. Klaif, Temporary Judge. Affirmed.

Cristina Gabrielidis Lechman, under appointment by the Court of Appeal for Objector and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Kim Nemoy, Principal Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

F.R. (father) appeals from the juvenile court’s jurisdiction and disposition orders finding his children, B.R. and J.R., dependent children of the juvenile pursuant to Welfare and Institutions Code section 300, subdivision (d)¹ because he sexually abused J.M., and removing B.R. and J.R. from the custody of R.M. (mother). Father contends that there was not substantial evidence to support the juvenile court’s jurisdictional finding that he sexually abused J.M., and to support the order removing B.R. and J.R. from mother’s custody. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 2012, the Department of Children and Family Services (Department) filed a detention report stating that on January 22, 2012, then nine-year-old J.M., and her siblings, J.E., then fifteen years old, J.V., then five years old, B.R., then two years old, and J.R., then about one and one-half years old, came to the attention of the Department because of a referral alleging that father sexually abused J.M. Father is the father of B.R. and J.R.; the other children—including J.M.—have different fathers; and mother is the mother of all five of the children.

The January 26, 2012, detention report states that while J.M. was visiting G.H., her father, J.M. disclosed to G.H.’s girlfriend, G.C., that father had been having “sexual intercourse” with her for the past five years and threatened to kill J.M.’s family if she told anyone about the sexual abuse. G.C. said that J.M. appeared to be very somber and “began to sob uncontrollably” when J.M. disclosed that father had been “touching her.”

The January 26, 2012, report stated that one of the Department’s children’s social workers (CSW) interviewed J.M. Although J.M. was initially “reluctant” to discuss the matter with the CSW, J.M. said that not long after father moved into their home father began “to touch her ‘in a bad way;’” father touched her breast and rubbed her crotch with

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

his hand; she was “too scared to tell” mother; father had “sex with her;” father would take her into mother’s bedroom and have her remove all of her clothing and he would remove his clothing; when they were both naked, father would force her to lie on the bed and father would lay on top of her and “put his private part (penis) inside of her private part (vagina);” each time she had “sex” with father it was very painful; father would place his hand over her mouth so she could not scream; her younger sibling often beats on the door and demands that father stop hurting J.M.; each time father and J.M. had “sex” there was a “white substance that oozes out of his private part;” father told her if she told anyone about the abuse she would kill her and mother; and the last time father “raped her” was on January 18, 2012.

J.E. stated that he does not believe that J.M. would ever lie about being sexually molested. The Department attempted to interview J.V., but the child was “too traumatized to answer questions posed to her”

According to the report, J.M.’s father, G.H., said that father has ties to the 18th Street Gang, and G.H. feels that mother is responsible for the abuse because mother “allowed a known criminal to live in the home.” Mother said that the sexual abuse allegations against father “are absolutely untrue,” and J.M. was a “habitual liar who is likely to say anything just so that she could live with [G.H.,] her father.”

The January 26, 2012, report stated that, “Presently, [father] is under the care of a psychiatrist that requires him to take a psychotropic medication (Lexapro) once a day to control mood swings.” Father has a criminal history dating back to April, 2000, including arrests for kidnapping, inflicting corporal punishment on a spouse, willful cruelty to a child, and battery.

On January 23, 2012, J.M. underwent a forensic medical examination. The January 26, 2012, detention report attached a forensic medical report stating that J.M. said, “[Father] touches me where he is not suppose to. When [I] am at home with the little kids [father] touches [me]. . . . [Father] touches me with his private parts and puts his [*sic*] into my front private part. Sometimes it hurts. [Father] takes off [my] clothes and gets on top of [me]. . . . [Father] covers my mouth, so that I can’t scream.

[¶] . . . Sometimes stuff comes out [of father's penis], white stuff. [Father] tells me not to tell, or he will kill me and my family." The forensic medical report states, "[J.M.] states she has never told her mom because [J.M.] was afraid [mother] would not believe her. . . . [J.M.] describes being touched since she was 5 years old. The last incident was Wednesday 01-18-12." J.M.'s medical examination was "normal," and revealed "[n]o evidence of injury." The findings were "[c]onsistent with history," and the interpretation of the findings was, "Normal exam; can neither confirm nor negate sexual abuse."

The detention report stated that in September 2011, father physically assaulted mother and attempted to strangle J.E. while J.E. attempted to protect mother; father was arrested; mother "filed" a restraining order against father and agreed not to allow father back into the home; and "once the referral was closed" mother allowed father to move back into the home.

The Department detained J.M. and J.V. with their respective fathers, and the remaining children, J.E., B.R. and J.R., were detained in foster care. On January 25, 2012, the Department filed a petition on behalf of the children pursuant to section 300, subdivisions (a), (b), (d), and (j) alleging, inter alia, that father slapped mother and pulled her hair in the presence of J.E., and attempted to choke J.E. when J.E. attempted to intervene, in violation of subsections (a), (b) and (j); and father sexually abused J.M. by placing his penis in her vagina, and mother knew or reasonably should have known of the ongoing sexual abuse and failed to protect J.M.

At the January 25, 2012, detention hearing, the juvenile court found father to be the presumed father of B.R. and J.R. The juvenile court found a prima facie case for detaining the children and showing that the children were described by section 300, subdivisions (a), (b), (d), and (j), and detained the children from mother and father, released J.M. and J.V. to their respective fathers, and detained J.E., B.R. and J.R. in the Department's custody for suitable placement.

On March 5, 2012, the Department filed a jurisdiction/disposition report stating that, "On 2/07/12 a forensic interview was conducted in which [J.M.] recanted her statements of [father] placing his penis inside her vagina. She reported only that he

digitally penetrated her When [J.M. was asked] to clarify her statements she denied reporting to law enforcement [and the Department] that their [*sic*] was any penetration by . . . father's penis and stated that they must have misunderstood because she was crying." J.M. stated that she tried telling J.E. about father's sexual abuse but J.E. "thought I was just playing."

The jurisdiction/disposition report stated that on February 21, 2012, father said mother would occasionally leave him home with the children, but he denied that he sexually abused J.M., stating, "I've been a gangster, a dope dealer, a drug addict but I've never been no rapist." Father said he has been incarcerated for assault, battery, attempted murder, and attempted kidnapping, and he killed a man in prison who had raped a young girl. He said he suffers from mental retardation and at times has been prescribed Lexapro, but is currently not taking any medication.

The report stated that J.E., then 15 year old, said that J.M. never seemed afraid of father and never disclosed any sexual abuse to him, even though they were close and she would tell him "a lot of stuff." J.V., then five years old, denied witnessing J.M. being led into father's bedroom, or telling J.M. not to go. J.M. said that father hits her and her siblings on their backs with a belt, mother sees it "but she doesn't do anything."

The March 5, 2012, jurisdiction/disposition report attached a Los Angeles County Department investigative report stating that J.M. said, inter alia, that father would grab her by the hair and drag her into his bedroom, "put his private parts in my private parts," and that while father was sexually abusing her she often heard J.V. knocking on the door to come in but she could not because the door was locked. J.V. said she does not recall knocking on the bedroom door. Mother said J.M. is known in J.M.'s school as a compulsive liar.

The March 5, 2012, report states that father had a prior child welfare history. In 2003, the juvenile court sustained petition allegations that father disciplined his children (who are not involved in the present proceeding) with a belt, his nine-month-old child was hospitalized because he was emaciated, and the home was unsanitary.

On April 17, 2012, the Department filed an interim review report stating that J.M. had been diagnosed with post traumatic stress disorder and depressive disorders not otherwise specified. J.M. was participating weekly in individual therapy, but “experienced difficulty coping with the emotional distress triggered by seeing her alleged perpetrator, [father,] in court [¶] [J.M.] has . . . verbalized depressive symptoms such as suicidal ideations triggered by thoughts of visitation, reunification and seeing the alleged perpetrator[, father,] and his acquaintances.”

The contested adjudication and disposition hearing was held on April 18 and 19, 2012. J.M., then nine years old, testified in chambers. J.M. explained that after mother and G.H., her father, separated, she initially lived with G.H. When J.M. was five years old, her school intervened and said she “was going dirty,” so she then went to live with mother and father.

J.M. testified that father started to molest her the first day she moved into the home with mother and father. She could not recall how many times father sexually abused her when she was between the age of five and nine years old, but it was on more than one occasion—every time mother left the house. Father would take her to his and mother’s bedroom, lock the door, and take off her clothes. Father would take off his clothes, throw J.M. on the bed, and get on top of J.M.. At this point in J.M.’s testimony, she paused and said she was scared. J.M. continued her testimony, stating that she would scream but father covered her mouth. Father touched her front “private” by putting his finger “on it,” which was painful. Father would ejaculate after masturbating. J.M. testified that mother would not have believed her if she told mother that father was “touching her.” J.M. thought mother would not believe her because mother believed father instead of her when she told mother that father use to smoke, and mother “always” told J.M. that J.M. was “a liar.”

J.M. said that father “would get on top of me, and he will move up and down.” She said father “did the—that thing. He would do that. He did that two times and then he stopped. He would stop—he would start putting his finger inside.” When J.M. was asked when father “moved up and down,” did anything go inside of her, she responded,

“His—his—his private. He would put it like on the side [on her leg], and he would put his finger inside of me.”

J.M. testified that she told the CSW that J.M. had “sex” with her, but she does not recall telling the CSW that father “puts his private . . . into my front part;” she said father “would put his finger inside my private.” “I said his finger. I have said his finger a lot of times.” J.M. does not remember if father ever put his “private into” her “private.” J.M. later testified that father never put his “penis” in her vagina.

According to J.M., she cried when she knew mother was going to leave, and asked mother to take her along with her, but mother would refuse. J.M. never told mother why she wanted to go with mother.

Mother testified that she did not plan to continue a relationship with father because she wanted her children to be returned to her. Mother was willing to abide by an order forbidding father to return to the home, and to obtain and enforce a restraining order against father. Mother does not currently have in place a restraining order against father.

Mother said that, “I don’t believe [J.M.], and I don’t believe [father], because they both lie.” When mother was asked whether she thinks that J.M. was lying about being sexually abused by father, she stated, “I am not sure.” Although mother “want[s] to believe” J.M., she does not believe her. Mother explained, “I am getting classes so I can try to believe in my daughter. But I can’t believe” When mother was asked whether father is lying by denying the abuse, mother responded, “No.”

At the adjudication and disposition hearing, father submitted to jurisdiction based on the allegations of domestic violence, but asked the juvenile court to dismiss the allegations against him of sexual abuse. Father’s counsel stated that she did not believe J.M. was credible because, inter alia, J.M. recanted her earlier statements that father had put his penis in her vagina; J.M. was now contending that father placed his finger in her vagina. The juvenile court stated, “I found [J.M.] to be very credible. Very detailed. Very willing witness. Not so anxious to get her story out. She is nine years old. Kids get some details confused; especially when you’re talking about events that occurred since she was five years old and moved around so much. I would be surprised if she

were not confused. It was very consistent. [¶] The forensic interview was done with great . . . expertise. Not in a leading or suggestive fashion. And she was consistent then. She . . . seemed calmer then. But she is in the midst, in chambers with a whole group of people having to tell this very embarrassing story. Full of shame. And she broke down on numerous occasions. It has been suggested that there is a . . . motive for fabrication due to the fact that she wanted to be with her father. [¶] I did find that she preferred to be with her father. But this wasn't a custody battle. I didn't see a suggestion that father was coaching her. This was too elaborate a story. She can't be that good an actor that this nine-year-old has come up with this detailed, elaborate story. To tell you the truth I was close to finding this true, if I needed to find it beyond a reasonable doubt. But our standard is preponderance of the evidence. And this is clearly more likely than true." The juvenile court stated, "Mother created . . . an atmosphere of distrust . . . Kids come up with lies, but [J.M.] was made to feel that all she was was a liar and whatever she said wasn't going to be believed."

Regarding disposition, mother asked that only J.E. be returned to her immediate custody. Father made no requests with regard to the placement of his children, B.R. and J.R.

The juvenile court amended and sustained the petition, found that the children were described by section 300, subdivisions (a), (b), (d) and (j), and declared the children dependants of the court, finding true that mother had inappropriately disciplined J.M. by striking J.M. with a hanger, mother and father engaged in domestic violence during which father choked J.E., and father had sexually abused J.M.

With regard to the sexual abuse findings, the juvenile court sustained the following language: "On numerous occasions for the past four years . . . [father] . . . sexually abused . . . [J.M.], by forcibly raping the child by placing [father's] penis in the child's vagina, inflicting pain to the child. [Father] fondled the child's breasts and vagina, and inserted his finger into the child's vagina. [Father] removed the child's clothes and his own clothes prior to sexually abusing the child. The father ejaculated in front of the child. [Father] frequently covered the child's mouth while sexually abusing

the child. [Father] threatened to kill the child and [mother] if the child disclosed [father's] sexual abuse of the child. [Mother] knew or reasonably should have known of [father's] ongoing sexual abuse of the child and failed to protect the child. The child is afraid of [father] and does not wish to reside in the mother's home due to [father's] sexual abuse of the child. Such sexual abuse of the child by [father] and the mother's failure to protect the child, endangers the child's physical health and safety, and places the child and the child's siblings[, J.E., J.V., B.R. and J.R.,] at risk of physical harm, damage, danger, sexual abuse and failure to protect."

The juvenile court removed custody of the children from mother and father pursuant to section 361, subdivision (c); ordered J.M. and J.V. home with their respective fathers; placed J.E., B.R. and J.R. in the Department's custody; ordered that father is not to have contact with J.M. and J.V.; granted father monitored visits with B.R. and J.R.; granted the Department discretion to allow monitored visits between father and J.E.; and ordered unmonitored visits between mother and J.E., monitored visits between mother and J.V., B.R. and J.R., and suspended visits between mother and J.M. until there was further input from J.M.'s therapist. The juvenile court ordered father to participate in parenting, sexual abuse for perpetrators, alcohol and drug, and domestic violence counseling, and ordered mother to participate in parenting, sexual abuse, child safety and healthy relationships with men, and domestic abuse counseling, and to participate in a domestic violence support group.

DISCUSSION

A. Jurisdiction

Father contends that there was not substantial evidence to support the juvenile court's sustained jurisdictional allegation that he sexually abused J.M. Father does not challenge the other findings that the juvenile court had jurisdiction over the children. Father's appeal is nonjusticiable.

“[I]t is necessary only for the court to find that one parent’s conduct has created circumstances triggering section 300 for the court to assert jurisdiction over the child. [Citations.] Once the child is found to be endangered in the manner described by one of the subdivisions of section 300[,] the child comes within the court’s jurisdiction, even if the child was not in the physical custody of one or both parents at the time the jurisdictional events occurred. [Citation.] For jurisdictional purposes, it is irrelevant which parent created those circumstances. A jurisdictional finding involving the conduct of a particular parent is not necessary for the court to enter orders binding on that parent, once dependency jurisdiction has been established. [Citation.] As a result, it is commonly said that a jurisdictional finding involving one parent is “‘good against both. More accurately, the minor is a dependent if the actions of either parent bring [the minor] within one of the statutory definitions of a dependent.’” [Citation.] For this reason, an appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence. (E.g., *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [90 Cal.Rptr.3d 44] [addressing remaining findings only ‘[f]or [f]ather’s benefit’]; *In re Joshua G.* [(2005)] 129 Cal.App.4th [189,] 202 [when a jurisdictional allegation involving one parent is found supported, it is ‘irrelevant’ whether remaining allegations are supported]; . . . *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 72 [74 Cal.Rptr. 770] [same].)” (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492.)

When “issues raised in [an] appeal present no genuine challenge to the court’s assumption of dependency jurisdiction[,] . . . any order we enter will have no practical impact on the pending dependency proceeding, thereby precluding a grant of effective relief. For that reason, we find [such an] appeal to be nonjusticiable.” (*In re I.A., supra*, 201 Cal.App.4th at p. 1491.) “The many aspects of the justiciability doctrine in California were summarized in *Wilson v. L. A. County Civil Service Com.* (1952) 112 Cal.App.2d 450 [246 P.2d 688]: “‘A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition. . . . [A]s a general rule it is not within the function of the court to act upon

or decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition. . . .” (*Id.* at pp. 452-453.) An important requirement for justiciability is the availability of ‘effective’ relief—that is, the prospect of a remedy that can have a practical, tangible impact on the parties’ conduct or legal status. ““““It is this court’s duty ““to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.”””” [Citations.]” (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1490.)

Here, the juvenile court had jurisdiction over the children under section 300, subdivisions (a), (b), (d) and (j), even if, as father argues, the finding that father sexually abused J.M. was not supported by substantial evidence. Father’s appeal therefore is nonjusticiable. (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1491.)

B. Disposition

The Department contends that father “waived” his contention that there was not substantial evidence to support the juvenile court’s order removing his children, B.R and J.R., from mother because father never requested that they be returned to mother’s care. Father forfeited² his contention.

“When a party does not raise an argument [before the trial court], he may not do so on appeal. [Citations.]” (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13, disapproved on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.” [Citation.]” (*Expansion Pointe Properties*

² As father notes, the correct term here is “forfeited” instead of “waived.” Forfeiture “refers to a failure to object or to invoke a right, whereas [waiver] conveys an express relinquishment of a right or privilege. [Citations.] As a practical matter, the two terms on occasion have been used interchangeably. [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal.App.4th 42, 54-55; *In re Michael L.* (1985) 39 Cal.3d 81, 88 [“Objections not presented to the trial court cannot be raised for the first time on appeal”]; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.)

Father did not request that the juvenile court return his children, B.R and J.R., to mother. Furthermore, mother did not request the immediate return to her of B.R and J.R.; mother only asked for J.E.’s immediate return.

Father argues that he did not forfeit his contention because whether the juvenile court’s removal of B.R and J.R. from mother’s custody deprived father of his fundamental liberty interest is a question of law and, therefore, the doctrine of forfeiture does not apply. We disagree.

Despite arguing that whether the juvenile court erred in removing B.R. and J.R. from mother’s custody is a question of law, father contends that the juvenile court erred because B.R and J.R. would have been safe with mother because father is no longer in the home, mother said she was willing to secure and enforce a restraining order against father, mother was participating in a parenting and domestic violence classes, and mother was undergoing individual therapy. Whether B.R and J.R. would have been safe with mother is a question of fact. (See *In re D.G.* (2012) 208 Cal.App.4th 1562, 1574 [“We review a dispositional order removing a child from parental custody for substantial evidence”].)

DISPOSITION

The juvenile court's orders are affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.