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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.G., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

E.G.,

Defendant and Appellant.

E054952

(Super.Ct.No. INJ1100518)

OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant
and Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

When K.G. was about a year and a half old, she sustained a “pinch mark” to her ear. Photographs of the injury show a bruise no wider than a pencil eraser. How this happened and whether she was in the care of her mother, E.G. (the mother), or her father, A.S. (the father), when it happened could not be determined.

The juvenile court asserted dependency jurisdiction because it found, based on this “unexplained injury,” that “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness” (Welf. & Inst. Code, § 300, subd. (b).)

The mother appeals. We will reverse. There was insufficient evidence that that the ear injury constituted “*serious physical harm.*” If this injury could qualify as serious, we find it hard to imagine what injury would *not* qualify. There was also insufficient evidence that the child had a substantial risk of serious physical harm in the future.

I

FACTUAL BACKGROUND

The parties introduced into evidence all of the social worker’s reports filed in the case, plus the social worker’s testimony at the hearing. This evidence showed the following.

When the mother and the father were both about 19 years old, they dated for nearly a year. As the father later admitted, he was verbally abusive and a “bad boyfriend.” They broke up when the mother was about six months pregnant.

When the child was about eight months old, the father filed a custody and visitation proceeding. Interim visitation was fraught with conflict. The mother's family court declarations are in the record; the father's are not. However, it is evident that they each blamed the conflict on the other. For what it is worth, two of the monitors who supervised the visitation filed declarations supporting the father.

In July 2011, the family law court gave both parents joint legal and physical custody and gave the father unsupervised visitation. At first, he had visitation for four hours at a time, but the length of the visits was supposed to increase over time, starting in October 2011.

The maternal grandmother videotaped all exchanges of the child. According to the social worker, who reviewed these videotapes, they showed both parents "making derogatory and disrespectful comments to one another" However, they also showed that both the mother and the maternal grandmother had a high "level of anger . . . toward the father."

On September 1, 2011, when K.G. was about one and a half, the mother noticed an injury to the child's left ear immediately after a visit with the father.¹ She called 911; a police officer responded. The mother described the injury as a "scratch." The officer looked at it and described it as "a small scratch . . . with the surrounding area red/irritated." The officer noted that manipulating the child's ear did not seem to bother her.

¹ K.G. had been born deaf in her left ear.

On the officer's recommendation, the mother took the child to an urgent care clinic. A doctor there concluded that the child's ear had been pinched. The doctor recommended taking the child to the emergency room at Loma Linda University Medical Center for further evaluation.

Doctors at Loma Linda reported that the injury "appear[ed]" to have been caused "by someone pinching/pulling the left ear causing a small laceration" They performed a complete bone survey and found "[m]ild scalp soft tissue swelling near the vertex" They described the swelling as "[n]on-[a]ccidental."

The social worker met with the mother, the maternal grandparents, and the child at Loma Linda. The social worker described the ear injury as a "quarter moon bruise" She photographed it. The photographs show a bruise no wider than a pencil eraser.

The mother and the maternal grandfather both told the social worker that, about a week earlier, after another a visit with the father, they had noticed a bump on the child's head.

When the father was questioned, he "adamantly denie[d]" causing the ear injury. He said that he checked the child at the beginning and the end of every visit, and her ear had been fine. He admitted that, a few weeks earlier, the mother had asked him about a bump on the child's head, but he denied seeing it or knowing anything about it. He believed that the mother (or the maternal grandmother) had caused the ear injury and was blaming him to gain an advantage in the family law proceedings.

II

PROCEDURAL BACKGROUND

The Riverside County Department of Public Social Services (the Department) filed a dependency petition. The petition, as subsequently amended, alleged serious physical injury (Welf. & Inst. Code, § 300, subd. (a)), failure to protect (*id.*, subd. (b)), and severe physical abuse (*id.*, subd. (e)). The factual allegations of failure to protect included the following:

Allegations b-1 and b-4: While in the custody of the father (allegation b-1) and/or the mother (allegation b-4), “the child . . . suffered from serious physical harm in that . . . a skeletal survey of the child’s skull elicited [*sic*] mild scalp soft tissue swelling near the vertex. The injuries [*sic*] were found to be a result of nonaccidental trauma.”

Allegation b-5: “While in the care and custody of the parents, the child . . . sustained an unexplained injury to her left ear”

At the detention hearing, the child was nominally detained but placed with the mother. Initially, the father was allowed supervised visitation once a week. In October 2011, however, the juvenile court began allowing him overnight visits.

At the jurisdictional/dispositional hearing, the father submitted on the social worker’s reports, but the mother contested jurisdiction. The juvenile court struck all allegations of serious physical injury and severe physical abuse. It also struck the factual allegation that the child had a scalp injury. It sustained the petition based solely on failure to protect, which in turn was based solely on the factual allegation that the child

had an injury to her left ear. It concluded, “We do have an unexplained injury, and I think for the protection of the child I am going to take jurisdiction.”

The juvenile court placed the child in the physical custody of both parents and ordered that the child spend alternate weeks with each parent. It required both parents to participate in family maintenance services.

III

THE SUFFICIENCY OF THE EVIDENCE

The mother contends that there was insufficient evidence to support the juvenile court’s jurisdictional finding.

The juvenile court found jurisdiction based on failure to protect under Welfare and Institutions Code section 300, subdivision (b). This subdivision applies when “[*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, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse. . . . *The child shall continue to be a dependent child pursuant to this*

subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.” (Italics added.)

“We review the juvenile court’s findings under section 300 for substantial evidence and will affirm the judgment based on those findings if they are supported by reasonable, credible evidence of solid value. [Citation.]” (*In re X.S.* (2010) 190 Cal.App.4th 1154, 1160.) “In considering a claim of insufficient evidence to support a jurisdictional finding, we review the evidence most favorably to the court’s order — drawing every reasonable inference and resolving all conflicts in favor of the prevailing party — to determine if it is supported by substantial evidence. [Citation.] If it is, we affirm the order even if other evidence supports a contrary conclusion. [Citation.]” (*In re N.M.* (2011) 197 Cal.App.4th 159, 168.)

The mother argues that there was insufficient evidence of serious physical harm. We agree. “[D]eep, purple bruises” can constitute serious physical harm (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 438-439; see also *id.* at p. 433); so can the combination of “bruises, red marks, welts, and broken skin” (*In re David H.* (2008) 165 Cal.App.4th 1626, 1644.) Here, however, the record shows only a tiny bruise and scratch, which caused the child no apparent discomfort. If this could support a finding of serious physical harm, we cannot imagine any physical injury that would not be “serious.”

The Department argues that the injury was severe enough for the mother to call 911. However, her 911 call invoked the police, not an ambulance or paramedics. She

took the child to urgent care only because the officer suggested it, and she took the child to Loma Linda only because the urgent care doctor suggested it. It does not appear that any of the doctors *treated* the injury. The evident purpose of these visits was to determine whether the child had injuries indicating abuse.

The Department points out that the child also had “[m]ild scalp soft tissue swelling near the vertex” — i.e., a bump on the head. The juvenile court, however, struck all of the allegations regarding the scalp injury. The only allegation that it found true was an allegation regarding the ear injury. The juvenile court is required to “determine whether the allegations in the petition are true.” (Cal. Rules of Court, rule 5.684(a).) Our role is to determine whether there is substantial evidence to support the juvenile court’s actual findings (see *In re Christopher C.* (2010) 182 Cal.App.4th 73, 84), not whether there is substantial evidence to support the judgment generally. Given the juvenile court’s express factual finding, the doctrine of implied findings does not apply in this case. (*In re J.S.* (2011) 196 Cal.App.4th 1069, 1078.) We note, however, that even if we were to consider the scalp injury, there is insufficient evidence that it was serious.²

² There was also insufficient evidence that the scalp injury was due to failure to protect. The Loma Linda doctors never explained *why* they concluded that it was nonaccidental, and nobody ever asked them. “[A]n expert’s opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. [Citations.]” (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; see also *People v. O’Dell* (2005) 126 Cal.App.4th 562, 572 [opinion stated in letter from hospital, unsubstantiated by any facts, was insufficient evidence to support trial court’s finding].)

The mother also argues that there was insufficient evidence that the child was at risk of serious physical harm in the future. Again, we agree. “[P]ast conduct may be probative of current conditions’ if there is reason to believe that the conduct will continue. [Citation.]” (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) Here, because there was no evidence of how the injuries occurred, and because they were not serious, it would not be reasonable to infer that the parents would fail to protect the child from future serious harm. Moreover, during the dependency, the child had been in the mother’s physical custody and had been having visitation with the father and there had been no further incidents. The trial court apparently agreed, too, as it allowed her to live with both parents on a “one week on, one week off” basis.

The Department argues, however, that under *In re J.K.* (2009) 174 Cal.App.4th 1426, it was not required to show a risk of future harm. This is a misreading.

Before *J.K.*, decisions had uniformly held that jurisdiction under Welfare and Institutions Code section 300, subdivision (b) requires a showing of a substantial risk of future harm; past harm alone is not enough. (*In re Carlos T.* (2009) 174 Cal.App.4th 795, 803; *In re Veronica G.* (2007) 157 Cal.App.4th 179, 185; *In re David M.* (2005) 134 Cal.App.4th 822, 829; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397; *In re Janet T.* (2001) 93 Cal.App.4th 377, 388; *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134; *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379; *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

In *J.K.*, however, the court held that, under Welfare and Institutions Code section 300, subdivisions (a), (b), and (d), “a showing of prior abuse and harm is sufficient, standing alone, to establish dependency jurisdiction” (*In re J.K., supra*, 174 Cal.App.4th at p. 1435, fn. omitted.) It reasoned that each of these subdivisions uses “the disjunctive ‘or’” and thus provides that either past harm or a risk of future harm is sufficient for jurisdiction. (*Ibid.*)

In a footnote, the court acknowledged that under Welfare and Institutions Code section 300, subdivision (b) — unlike subdivision (a) or subdivision (d) — “prior abuse and harm may be sufficient to support the *initial* exercise of jurisdiction, but ‘[t]he child shall *continue* to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.’” (*In re J.K., supra*, 174 caa4 at p. 1435, fn. 5.)

We need not choose between *J.K.* and prior cases. Under the prior cases, the Department was required to show a risk of future harm to establish dependency jurisdiction. Even under *J.K.*, however, while a risk of future harm was not necessary to establish dependency jurisdiction, it was necessary to continue jurisdiction. Thus, at a minimum, the juvenile court erred by going on to enter the dispositional order.

Finally, the mother argues that the juvenile court improperly asserted jurisdiction in response to the parents’ “family law issues.” Because we are reversing the jurisdictional order on other grounds, we need not reach this issue. In fairness to the juvenile court, however, we note that while there is some indication that the *Department*

was seeking jurisdiction, at least in part, so it could referee the conflict between the parents, the record does not indicate that this was why the *juvenile court* asserted jurisdiction.

In sum, we conclude that the jurisdictional order must be reversed.

IV

DISPOSITION

The jurisdictional order is reversed. Accordingly, the dispositional order must also be reversed. (See *In re Maria R.* (2010) 185 Cal.App.4th 48, 71.) Unless the Department files an amended petition alleging that new circumstances would justify a new finding of jurisdiction, the juvenile court must dismiss the petition. (See *In re V.M.* (2010) 191 Cal.App.4th 245, 254.)

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.