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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re B.E., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

G049237

(Super. Ct. No. DP024037)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Marisa L. D. Conroy, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

J.E. appeals the juvenile court's assertion of jurisdiction over his four-year-old son B.E. (son), based on J.E.'s sexual abuse of son's 11-year-old half-sister (stepdaughter). J.E. also challenges the dispositional order, which declared son a dependent of the court and removed son from J.E.'s physical custody. We affirm the judgment.

FACTS¹

Son and stepdaughter were taken into protective custody at the end of July 2013. They had been living with their mother and J.E.. Early in July, mother and J.E. reported to a social worker that J.E. had touched stepdaughter's vagina "over her clothes on at least two to three occasions over the past two months." "Both were crying as they talked about this and the mother was angry. The mother stated she found out . . . when she came out of the bathroom and saw [J.E.] hugging the child and the child running. The mother said she asked the child what happened and the child disclosed that [J.E.] has hugged her and touched her vagina over her clothes." Stepdaughter reported to mother that the incident mother witnessed had occurred after swimming; stepdaughter "asked [J.E.] for a hug because she wanted to get him wet and he tried to kiss her on the mouth." Mother indicated to the social worker that she asked J.E. to move out of the home.

Stepdaughter confirmed these details in a separate interview. Stepdaughter added, "she told [J.E.] to stop, but he still did it anyway and it got her lips wet" when J.E. kissed her. Stepdaughter described another incident in further detail: "[S]he was in her room playing with her iPad and he walked into her room. [J.E.] said 'Hi,' to her and went over to her and touched her vagina. She remembers it happened one time and it was

¹ No testimony was presented at the contested jurisdictional and dispositional hearings. The parties submitted the matter based solely on the information contained within the Orange County Social Services Agency (SSA) reports.

over her clothes. During that time, he tried to kiss her, but she pushed him and told him to stop. . . . [H]e stopped and walked out of her room.”

Subsequently, mother failed to appear with stepdaughter for a scheduled police interview. Mother took the position that “nothing happened” and she had overreacted by reporting the incident in the first place. It appeared J.E. was still present at the family home. Mother refused to cooperate with SSA. At this point, the children were taken into protective custody.

On July 30, 2013, SSA filed a Welfare and Institutions Code² section 300 petition to bring stepdaughter and son within the jurisdiction of the juvenile court. The petition alleged stepdaughter came within section 300, subdivision (d),³ based on sexual abuse, and son came within section 300, subdivision (j),⁴ based on the abuse of his sibling. The following facts were alleged in support of both claims: (1) the instances of sexual touching and kissing of stepdaughter by J.E.; (2) mother’s failure to comply with a safety plan pursuant to which J.E. was to remain out of the family home and not have any contact with stepdaughter; (3) mother’s failure to appear with stepdaughter for her

² All statutory references are to the Welfare and Institutions Code.

³ “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 or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.” (§ 300, subd. (d).)

⁴ “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. 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 or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” (§ 300, subd. (j).)

scheduled police interview; and (4) lack of cooperation from mother and J.E. with additional SSA involvement and service of a protective custody warrant.

At the September 2013 jurisdictional hearing, the court sustained the petition, finding the allegations to be true by a preponderance of the evidence (§ 355, subd. (a)), thereby bringing both children within the jurisdiction of the juvenile court.⁵ The court released stepdaughter to her biological father and authorized the release of son to mother with conditions and intensive supervision.

At the October 2013 dispositional hearing, the court ordered son declared a dependent child of the court.⁶ The court found clear and convincing evidence pursuant to section 361, subdivision (c)(1),⁷ that to vest custody of son with J.E. would be detrimental to son. The court terminated dependency proceedings with regard to stepdaughter, vesting sole physical custody with her biological father.

⁵ The petition also alleged a failure to protect (§ 300, subd. (b)) the children based on J.E.'s prior arrests and convictions for driving under the influence of alcohol and driving with a suspended license. The court dismissed the section 300, subdivision (b) allegations.

⁶ “If the court finds that the child is a person described by Section 300, it may order and adjudge the child to be a dependent child of the court.” (§ 360, subd. (d).)

⁷ “A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” (§ 361, subd. (c)(1).)

DISCUSSION

As he did at both juvenile court hearings, J.E. contends there is insufficient evidence to sustain the petition with regard to *son* or declare *son* a dependent based on the evidence of J.E.'s sexual abuse of *stepdaughter*. J.E. does not challenge the court's findings with regard to *stepdaughter*. We apply the deferential substantial evidence standard of review to the court's findings. (*In re I.J.* (2013) 56 Cal.4th 766, 773 (*I.J.*.)

Of course, J.E. is not really challenging the court's factual findings (e.g., J.E. engaged in sexual misconduct with *stepdaughter*). Instead, the real question presented by J.E. is whether the allegations set forth in the petition and found to be true by the court support the exercise of dependency jurisdiction over *son* and designation of *son* as a dependent child of the court, notwithstanding the lack of any allegations or evidence suggesting father mistreated *son* in any way or had any sexual interest in boys.

Our Supreme Court recently addressed this precise issue, albeit in a case with significantly more egregious sexual misconduct on the part of the father. (*I.J.*, *supra*, 56 Cal.4th at p. 771 [over the course of three years, father raped, orally copulated, and digitally penetrated eldest daughter; no evidence, however, "that father sexually abused or otherwise mistreated his three sons, and the evidence indicates that they had not witnessed any of the sexual abuse and were unaware of it before this proceeding began"].) After reviewing relevant statutes and discordant case law, *I.J.* held that substantial evidence supported the juvenile court's judgment exercising jurisdiction over siblings of the eldest daughter pursuant to section 300, subdivision (j). (*I.J.*, at pp. 772-780.) The broadest statement of the *I.J.* holding is that "when a father severely sexually abuses his own child, the court may assume jurisdiction over, and take steps to protect, the child's siblings." (*Id.* at p. 780.)

J.E. essentially asserts *I.J.*'s holding is limited to its sordid facts. In support of his position, father can point to an alternative, more narrowly tailored statement of the

I.J. holding. (See *I.J.*, *supra*, 56 Cal.4th at p. 770 [“We conclude that a father’s prolonged and egregious sexual abuse of his own child may provide substantial evidence to support a finding that all his children are juvenile court dependents”].) Moreover, *I.J.* explicitly cited the “serious and prolonged nature of father’s sexual abuse” as support for the “finding that the risk of abuse was substantial as to all the children.” (*Id.* at p. 778.) J.E. suggests a few instances of lewd touching and kissing stepdaughter over the course of several months are insufficient to support an inference of a “substantial risk” to son. (§ 300, subd. (j).)

We disagree. The extent of sexual abuse of female siblings need not rise to the level perpetrated in *I.J.* to affirm the exercise of jurisdiction over male siblings pursuant to section 300, subdivision (j), or to affirm a dispositional order disallowing the perpetrator of the abuse to retain physical custody of a son. (See, e.g., *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1407-1410 [abuse consisted of father fondling one sister’s breast, fondling the other sister’s vagina, exposing his penis, and exposing one sister to a pornographic movie and masturbating in her presence]; *In re P.A.* (2006) 144 Cal.App.4th 1339, 1340-1343 [father touched daughter’s vagina on two occasions].) Both of these cases were cited in *I.J.* without any indication of disapproval. (*I.J.*, *supra*, 56 Cal.4th at pp. 775-776.) *I.J.* does not establish a minimum threshold of horror in the application of section 300, subdivision (j), and ensuing dispositional orders.

Rather, the broad guidance of *I.J.* is that appellate courts should not draw bright lines around categories of conduct in these cases. “In upholding the assertion of jurisdiction in this case, we are not holding that the juvenile court is compelled, as a matter of law, to assume jurisdiction over all the children whenever one child is sexually abused. We merely hold the evidence in this case supports the juvenile court’s assertion of jurisdiction.” (*I.J.*, *supra*, 56 Cal.4th at p. 780.) In other words, the juvenile court could have reasonably decided not to exercise dependency jurisdiction over the sons in the *I.J.* case. To illustrate this point, *I.J.* cited as illustrative a case which upheld the

juvenile court's refusal to assert jurisdiction over the son of a man who had sexually abused his niece. (*Ibid.*; see *In re Jordan R.* (2012) 205 Cal.App.4th 111, 115, 137-139 [rejecting claim juvenile court "abused its discretion"].)

Juvenile courts should first find the relevant facts, then exercise discretion based on the totality of the circumstances as found by the court. Section 300, subdivision (j), provides for dependency jurisdiction over a minor when "[t]he 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. 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 or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." "Subdivision (j) thus allows the court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of [the other] subdivisions. [¶] The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance." (*I.J., supra*, 56 Cal.4th at p. 774.)

It is uncontested for purposes of appeal that stepdaughter was sexually abused by J.E. (§ 300, subd. (d)). It is also undisputed that the other facts alleged in the petition are true. In determining whether there was a substantial risk son would be abused or neglected in the future, certain factors therefore suggested son was at risk, including J.E.'s reprehensible behavior with stepdaughter, son's young age, his parents' denial of J.E.'s misdeeds, his parents' uncooperative behavior with SSA, and J.E.'s

history of driving under the influence offenses. There were also factors suggesting son might not have been at risk, including son's gender (i.e., no indication father would sexually abuse his son as opposed to his stepdaughter), the initial commendable behavior of mother in addressing J.E.'s abuse of stepdaughter, and the lack of any evidence son had been abused or neglected in any way. The court certainly would have been within its discretion had it declined jurisdiction over son or entered a more favorable dispositional order toward J.E.. But in our view, the sexual abuse of stepdaughter and the subsequent actions of J.E. and mother amounted to substantial evidence supporting the judgment. Given the existence of substantial evidence, it is not our role to interfere with the juvenile court's exercise of discretion.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.