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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re E.J. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. T.J. et al., Defendants and Appellants.	D052595 (Super. Ct. No. SJ11842A-C)

APPEAL from a judgment of the Superior Court of San Diego County, Richard Kossow, Judge (Retired Judge of the Mendocino Anderson J. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and William E. Lehnhardt, Judge (Retired Judge of the Imperial Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

T.J. (mother) and Eric J. appeal a judgment declaring their minor children E.J., T.J. and A.J. (collectively, the minors) dependents of the juvenile court under Welfare and Institutions Code section 300, subdivisions (b) and (j).[1] The mother challenges the sufficiency of the evidence to support the court's jurisdictional findings. She also contends the court violated her due process right to a fair hearing when it did not declare a mistrial or set a special hearing after granting her *Marsden*[2] motion. Eric joins in these arguments to the extent they benefit him and further contends the court erred by: (1) denying him the opportunity to present evidence at the disposition hearing; and (2) not removing the minors from their mother's custody. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2007 the San Diego County Health and Human Services Agency (Agency) filed petitions in the juvenile court on behalf of 15-year-old E.J., 13-year-old T.J and 10-year-old A.J. The petitions alleged the mother's boyfriend, Kelvin C., excessively disciplined T.J. by striking her repeatedly with a belt, leaving welts on her arms, shoulders, torso and legs. The petitions also alleged E.J. and A.J. were at risk of serious physical harm because of the abuse to T.J. The court detained the minors in out-of-home care.

A.J. told the social worker he witnessed the incident of physical abuse by Kelvin. The mother was asleep in her bedroom at the time. A.J. had seen Kelvin hit T.J. many

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1 Statutory references are to the Welfare and Institutions Code.

2 *People v. Marsden* (1970) 2 Cal.3d 118.

times, leaving marks and bruises on her. Kelvin also hit A.J. with a belt a few times. According to A.J., his mother was aware that Kelvin disciplined the minors with a belt, and she sometimes gave him permission to do so. The mother told the social worker Kelvin gave T.J. a "whipping" because she was being disrespectful. The mother acknowledged the beating went too far.

The family had an eight-year history of prior referrals, including domestic violence between the mother and Eric during their marriage and several incidents of physical abuse of the minors by Kelvin. The minors visited Eric in Arizona during the summer and on school breaks, and had telephone contact with him every two weeks. Eric told the social worker he wanted custody of the minors.

The mother denied any abuse had occurred, claiming the police and social workers lied and conspired in an attempt to take her children away. Kelvin was still living in the family home. The social worker informed the mother that the minors could not be returned to her as long as Kelvin lived there. The mother said Kelvin was her only source of income and she could not support herself and the minors if he had to leave. She was not willing to participate in parenting classes.

Kelvin told the social worker he disciplined T.J. for being disrespectful and refusing to do chores. He said this was the first time he had disciplined T.J. this way and claimed the welts on her arms were self-inflicted.

Eric requested placement of the minors with him as a nonoffending, noncustodial parent. The court granted him presumed father status and gave Agency discretion to detain the minors with him. The minors said they would be comfortable living with Eric,

but preferred to stay in San Diego. According to the social worker, there was no evidence the minors could not be safely placed with Eric.

By November 2007 Kelvin had moved out of the home, and the mother requested the minors be returned to her care. The mother maintained Kelvin had not abused T.J., saying he justifiably disciplined her for being lazy and disrespectful. The social worker explained that the mother needed to participate in services, including therapy, parenting classes and in-home support, before the minors could return home.

According to a psychological evaluation, the mother harbored anger and resentment toward T.J. for causing Kelvin to leave. The evaluator believed T.J. would be at risk in her mother's care and recommended against returning the minors to her until she acknowledged that Kelvin had abused T.J.

The social worker recommended the court place E.J. and A.J. with their mother, and place T.J. with Eric. She also recommended the mother participate in reunification services.

At a contested jurisdiction hearing, E.J. testified he was not at home and did not witness Kelvin hit T.J. with a belt the day the minors were removed from their mother's custody. He did, however, see Kelvin hit T.J. with a belt many times in the past. On several occasions, E.J. did not do his chores and Kelvin hit him in the mother's presence, leaving red marks. The mother sometimes made E.J. use the belt to discipline his siblings. E.J. said he did not want to live with Eric. In the past, Eric beat the mother and the other children.

T.J. testified she was removed from her mother's home when Kelvin hit her with a belt and caused welts. Kelvin had hit her on previous occasions. T.J. said she wanted to live with her mother. If she could not return home to her mother, T.J. wanted to stay in foster care rather than live with Eric in Arizona.

A.J. testified Kelvin hit him with a belt one time, and he hit T.J. four times. A.J. wanted to live with his mother rather than Eric because he did not know Eric well.

Social worker Katie Maldonado testified the welts on T.J. showed the beating she received was abuse, not discipline. Because the mother knew about the beatings and gave Kelvin permission to discipline the minors, she failed to protect them or prevent the abuse. Throughout the proceedings, the mother denied Kelvin's actions constituted abuse. Consequently, Maldonado believed the mother needed parenting education on appropriate forms of discipline. Maldonado verified that Kelvin was no longer living in the family home. The mother promised she would never again allow T.J. to be physically disciplined.

The mother testified she never saw Kelvin physically discipline T.J. However, she saw photographs of T.J.'s injuries and admitted Kelvin had not disciplined T.J. appropriately. She acknowledged previously saying there was no abuse in the home. Although the mother allowed Kelvin to temporarily return home after he was released from jail, she told him he had to leave so the minors could be returned to her.

After considering the evidence and hearing argument of counsel, the court sustained the allegations of the petition under section 300, subdivision (b) as to T.J. and subdivision (j) as to E.J. and A.J.

The court held a *Marsden* hearing after the mother expressed her displeasure with her attorney. The court granted the mother's *Marsden* motion, discharged her attorney and appointed new counsel for her.

The mother and her new attorney appeared at a pretrial status conference in preparation of the disposition hearing. Agency announced it was now recommending the court return the minors to their mother with family maintenance services. Over Eric's objection, the court ordered the minors returned to their mother and ordered her to comply with family maintenance services. The court found Eric's request for custody of the minors was not properly before it because the minors had not been removed from their mother's custody.

DISCUSSION

I

The mother contends the court violated her right to a fair jurisdiction hearing when it failed to provide her with an adequate remedy after granting her *Marsden* motion. She asserts the court "implicitly" agreed with her claim of ineffective assistance of counsel and thus should have either: (1) appointed substitute counsel to more fully develop the claim of inadequate representation; or (2) declared a mistrial and conducted a new jurisdiction hearing.

A

After the court made its jurisdictional findings but before disposition, the mother expressed her displeasure with appointed counsel, and the court held a *Marsden* hearing. Among her complaints was counsel's failure to obtain the original tapes of telephone

messages she left for social worker Maldonado. The transcription of those tapes showed the mother continued to deny that the minors had been abused. The mother said she wanted to have the tapes analyzed because she believed they had been improperly transcribed or spliced. Counsel responded by saying he did not know whether those tapes existed or were available, and in any event, he and the mother had a basic disagreement on what was helpful to her case. Counsel explained that the mother wanted to concentrate on issues that he believed were either inappropriate or not likely to result in a favorable outcome. The court granted the mother's *Marsden* motion and appointed new counsel, who represented her throughout the rest of the proceedings.

B

The mother asserts that by granting her *Marsden* motion, the court implicitly found she received ineffective assistance of counsel at the jurisdiction hearing. However, the court made no such finding, explicitly or implicitly, nor does the record support one. Rather, the court allowed the mother to articulate the basis for her dissatisfaction with counsel (*People v. Marsden, supra*, 2 Cal.3d at pp. 123-124) and substituted counsel because of a breakdown in the attorney-client relationship, and the mother's disagreement with counsel's tactical decisions. (See *Strickland v. Washington* (1984) 466 U.S. 668, 689 [in reviewing claim of ineffective assistance of counsel, courts must be cautious in reviewing counsel's trial tactics].) The mother did not raise a " 'colorable claim' " that trial counsel failed to perform with reasonable competence. (*People v. Bolin* (1998) 18 Cal.4th 297, 346.) At most, the mother and her counsel became "embroiled in such an irreconcilable conflict that ineffective representation [was] likely to result [citation]."

(*People v. Smith* (1993) 6 Cal.4th 684, 696.) By substituting counsel, the court was attempting to avoid future conflicts between the mother and counsel that could have resulted in ineffective assistance during the dispositional phase of the proceedings. There is no indication the fairness and reliability of the jurisdiction hearing were affected by counsel's claimed deficiencies.

The remedies the mother seeks—a new jurisdiction hearing or a remand for substitute counsel to more fully develop a claim of ineffective assistance—apply only when *Marsden* error occurs. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400 [court erroneously failed to hold requested *Marsden* hearing]; *People v. Minor* (1980) 104 Cal.App.3d 194, 197-198 [defendant's due process right violated when court summarily denied request for substitute counsel].) Because the court granted the mother's *Marsden* motion and gave her the relief she requested, those remedies are not available to her.

Moreover, nothing prevented substitute counsel from more fully developing the mother's claim of inadequate representation or seeking a mistrial based on that claim. (See *People v. Stewart*, *supra*, 171 Cal.App.3d at pp. 395-396.) No due process violation occurred.

II

The mother challenges the sufficiency of the evidence to support the court's jurisdictional findings. She asserts that at the time of the jurisdiction hearing, she acknowledged T.J. had been inappropriately disciplined by Kelvin and thus, the minors were no longer subject to the defined risk of harm.

A

In reviewing the sufficiency of the evidence on appeal, we consider the entire record to determine whether substantial evidence supports the juvenile court's findings. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or weigh the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if other evidence supports a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

B

Section 300, subdivision (b) provides a basis for juvenile court jurisdiction if the child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness as a result of the parent's failure to adequately supervise or protect the child or provide adequate medical treatment. The court may also assume jurisdiction under section 300, subdivision (j) when a child's sibling has been abused, or is at substantial risk of being abused, as defined in various subdivisions of section 300, including subdivision (b). In enacting section 300, the Legislature intended to protect children who are currently being abused or neglected, "and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.) The court need not wait until a child is seriously abused or injured to assume jurisdiction

and take the steps necessary to protect the child. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194-196.)

The court may consider past events when determining whether a child presently needs the juvenile court's protection. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) A parent's past conduct is a good predictor of future behavior. (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169.)

C

Here, the evidence showed that the mother was unable to protect T.J. from physical abuse by Kelvin. Kelvin hit T.J. with a belt on many occasions. During the most recent incident, neighbors called the police when Kelvin struck T.J. repeatedly, leaving marks on her arms, shoulders, legs and torso. The mother was at home sleeping at the time and heard T.J.'s screams. E.J. and A.J. witnessed some of T.J.'s beatings in the past. Kelvin also disciplined E.J. and A.J. with a belt in their mother's presence. The mother knew that Kelvin disciplined the minors with a belt and she sometimes gave him permission to do so. She defended Kelvin's actions in giving T.J. a "whipping" and blamed T.J. for being lazy and disrespectful. During most of the proceedings, the mother remained in denial and did not consider Kelvin's use of corporal punishment to be child abuse.

At the time of the jurisdiction hearing, Kelvin was no longer living in the family home, and the mother testified she now knew the beatings were inappropriate physical discipline. However, the mother had not yet engaged in individual counseling to address

her feelings of blame toward T.J. and to assist her in accepting parental responsibility to protect the minors from abuse. Because the mother allowed the minors to be physically disciplined with a belt and she only belatedly acknowledged this conduct was abuse, a reasonable inference could be drawn that the minors remained at risk of serious physical harm in the future. Substantial evidence supports the court's jurisdictional findings.

III

Eric contends the court violated his due process rights by denying him an opportunity to present evidence at the disposition hearing. He asserts he was a noncustodial, nonoffending parent entitled to seek custody of the minors under section 361.2, subdivision (a).

Under section 361.2, the court must place a dependent child with a noncustodial, nonoffending parent who requests custody, unless the placement would be detrimental to the child's safety, protection, or physical or emotional well-being. Section 361.2 applies only when the court orders a dependent child removed from the custodial parent at disposition. (§ 361.2, subd. (a); *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.)

Here, the court declared the minors dependents but did not remove them from their mother's custody at disposition. Because the minors were returned to parental custody, the legislative goal of reunifying the family was met. (See *In re Erika W.* (1994) 28 Cal.App.4th 470, 478 [when child is placed in parental custody, reunification services are not necessary because goal of reunification has been met].) Whether Eric, as the noncustodial, nonoffending parent, was entitled to custody of the minors under section 361.2, subdivision (a) was not a proper inquiry at disposition. In this regard, Eric was not

"competing" for custody of the minors and thus was not denied the right to a contested hearing.

IV

Eric challenges the sufficiency of the evidence to support the court's dispositional orders. He asserts the minors would be at substantial risk of harm if returned to their mother's custody.

A

Before the court may order a child physically removed from his or her parent, it must find, by clear and convincing evidence, the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) Section 361, subdivision (c) "embodies 'an effort to shift the emphasis of the child dependency laws to maintaining children in their natural parent's home where it was safe to do so.' " (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) This balance between family preservation and child well-being "serves not only to protect parents' rights but also children's and society's best interests. 'Our society does recognize an "essential" and " basic" presumptive right to retain the care, custody, management, and companionship of one's own child, free of intervention by the government. [Citations.] Maintenance of the familial bond between children and parents—even imperfect or separated parents—comports with our highest values and usually best serves the interests of parents, children, family, and community. Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship

only for strong reasons and subject to careful procedures.' " (*In re Henry V.* (2004) 119 Cal.App.4th 522, 530-531.) To further protect the presumptive, constitutional right of parents to care for their children, the court must consider reasonable alternatives to removal from parental custody. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.)

B

Despite the need for juvenile court intervention here, there was no showing of substantial risk of harm to the minors if they were returned to their mother's custody. At the time of disposition, Kelvin had been out of the family home for four months. The minors were having weekend visits with their mother. The visits went well and the minors felt safe. The social worker made an unannounced home visit and found the minors happy and healthy. They wanted to return home rather than move to Arizona with Eric. Further, the mother had been making progress with parenting education and in-home services. She showed increased insight into her responsibility to protect the minors from physical and emotional harm. Thus, the minors could be adequately protected without depriving the mother of custody. (*In re Henry V.*, *supra*, 119 Cal.App.4th at pp. 529-530.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.