

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re CARL D. et al., Persons Coming
Under the Juvenile Court Law.

B232220
(Los Angeles County
Super. Ct. No. CK85994)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.D. et al.,

Defendants and Appellants.

APPEALS from findings and orders of the Superior Court of Los Angeles County. Marilyn H. Mackel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed but remanded to the juvenile court with directions.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant A.H.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant C.D.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Deputy County Counsel, for Plaintiff and Respondent.

A.H. (mother) and C.D. (father) appeal the jurisdictional and dispositional orders with respect to their sons Carl D. (Carl) and Cody D. (Cody). We find no grounds for reversal and therefore affirm. However, we conclude that the juvenile court abused its discretion when it abstained from ruling on the merits of a secondary jurisdictional count related to father's history of substance abuse and instead ordered that count stricken if father met certain conditions. On remand, we direct the juvenile court to either dismiss that count or rule on the merits.

FACTS

Background

Father has a long criminal history spanning nearly 30 years. His history includes arrests and convictions for drug, theft, weapon and violent offenses. For many years he abused crack cocaine but reportedly stopped using it in the 1990's. From 1998 to 2001, mother was arrested at least three times, the last time for inflicting corporal injury on a spouse or cohabitant.

In 2005, when Carl was three months old, the police were called to mother and father's home. Mother told the police that she and father had been arguing since the previous night because he accused her of being unfaithful. She said father had a drug problem and gets agitated when he is using, which was another reason for their arguments. Regarding the incident, she reported that father hit her in the back of the head, threw her to the floor and then continued hitting her. He also ripped some of her braids out. Mother's aunt and niece had to pull father away. According to mother, father had been physical with her at least twice before and she was afraid for her safety. In the past, she was too afraid to make a report. After finding a loaded shotgun in father's bedroom closet, the police arrested him. He was charged with spousal abuse and being a felon in possession of a firearm.

The incident; the police investigation

In December 2010, when Carl was five years old and Cody was nine months old, mother called 9-1-1 because father was hitting her. When officers arrived, they could hear father yelling at mother inside of their apartment. The officers knocked and mother

opened the door. She appeared to be crying and upset. Items were thrown on the floor as though a physical altercation had occurred. Father came to the door. The officers observed criminal street gang tattoos on his lower arms. After patting father down, one of the officers asked him to sit on the cemented portion of the walkway of the apartment complex. Father said, "No, I ain't sittin' down [in] no fuckin' dirt." The officer advised father that he should sit on the cemented portion of the walkway, not in the dirt. Father continued to protest. An attempt by the officer to force father to sit resulted in a struggle that ultimately ended up on the ground. The officer and his partner then placed father in handcuffs.

Additional officers arrived and conducted a domestic violence investigation. Mother's right eye was black and swollen. She said that she was afraid of father and did not want him to hear that she had called the police. An investigating officer asked if father hit her. She said, "Yes." She said that they were arguing and both went upstairs to their walk-in closet where she told him to pack his things and leave. She started to explain what happened next when she heard father arguing outside with the other officers in a loud, angry voice. She said, "He didn't hit me." Carl was a few feet away and said, "Uh huh!" Then he said, "He hit her like this!" He demonstrated someone making a punching motion. According to Carl, he was in the bedroom watching his parents in the walk-in closet and witnessed father "socking" mother in the eye. The investigating officer looked askance at mother and she stated, "I'm not cooperating." When the investigating officer was turning on a camera, mother put up her hand and said she would not allow any photos. She claimed she had been with father for seven years and that he never struck her in the past.

Father was arrested and booked. He gave a statement and explained that hitting mother was an accident. He said that they were arguing over a girl on Facebook. Mother was grabbing father's clothes and throwing them on the floor, telling him to get his stuff and leave. He had his back to her. When he suddenly turned around, his elbow accidentally struck her eye.

Mother bailed father out of jail.

Subsequent investigation; detention

Social workers from the Department of Children and Family Services (Department) received a referral from the police and went to the family home. They observed that mother had a black eye. Mother disclosed that father hit her, but then later denied it. She also denied that Carl was a witness to the incident. When asked how father caused the black eye, mother said it was possibly caused by a hanger. The social worker responded by asking mother to tell the truth. She changed her version of the events, this time indicating that her black eye might have been caused by “father’s elbow or something.” Revising history, mother explained that father had never hit her before. A day later, a social worker interviewed father. He said mother was taking his clothes off a hanger in the closet. When he tried to stop her, he grabbed the hanger and it broke. His arm got loose and “touched” mother’s eye. Father denied using his fist to punch mother and said he would never use his fist to punch a woman, that he was sorry for causing mother’s black eye. Regarding Carl’s whereabouts during the incident, father said Carl was taking a nap and not present.

Carl was interviewed at his school. He immediately stated, “I did not see anything” and “I was downstairs with my brother.” A little while later, Carl stated, “[M]y mom doesn’t want me telling you our business.” The social worker assured Carl that it was okay to tell the truth. At that point, he said mother hit father while motioning with a closed fist to the head. Then Carl said—once again demonstrating—that father hit mother in the eye.

At a team decision meeting, father continued stating that his elbow accidentally hit mother’s eye during an argument in their walk-in closet. Mother parroted father’s story about the incident. But she later added that she was the aggressor and that she hit father first before he hit her. Mother and father agreed to participate in a voluntary service plan. Pursuant to that plan, they were supposed to attend various programs for parenting and domestic violence and go to counseling. In addition, father was not supposed to reside in the family home. The parties agreed that father could have unmonitored visitation outside of mother’s presence. But if she was present, his visits had to be monitored.

Father was drug tested. It came back positive for marijuana. As a result, the Department decided to change father's visitation so that it was monitored at all times. He was referred to random drug testing, which upset him. He said he did not use cocaine or methamphetamine anymore. After his positive drug test, father stopped responding to the social worker's phone calls.

The Department concluded that Carl and Cody were at risk of harm due to father's criminal history and substance abuse, and due to his unwillingness to sign and comply with a voluntary service plan. On December 20, 2010, Carl and Cody were detained from father and released to mother.

The petition; the detention hearing

The Department filed a three count petition pursuant to section 300, subdivisions (a) and (b) of the Welfare and Institutions Code.¹ Counts a-1 and b-1 alleged that Carl and Cody were at risk due to father's domestic violence. Count b-2 alleged that they were at risk due to father's substance abuse.

At the detention hearing, father was represented. His attorney stated that there was only one incident of domestic violence, and it was an accident. Regarding the use of marijuana, the attorney said father had a license and never smokes in front of Carl and Cody. The attorney claimed that father is a good husband and parent and should be able to return to the family home.

The attorney for Carl and Cody opined that the case should be handled through a voluntary family maintenance contract.

The juvenile court addressed mother and father and stated: "I am going to say . . . that the social worker didn't do anything wrong. The social worker's job is to make sure that the kids are safe. She goes and offers a plan which meant you don't have to come to court and then you guys don't cooperate and that raises in a reasonable person's mind that you have something to hide, but right now I am not sure. [¶] The more that

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

[the social worker] looked at this [case], the more things came [out about] it. The marijuana, the history of convictions. [¶] All I can say [is that] there is one iffy domestic violence situation. I am not sure by a preponderance [of the evidence that] it's there. Let me talk to the lawyers for a minute.”

The lawyers spoke to the juvenile court and submitted. The juvenile court found that the petition and evidence established a prima facie case of risk.² As a result, the matter was set for further proceedings. Father was permitted to return home and Carl and Cody were released to both father and mother.

The jurisdiction/disposition report and hearing

As a precursor to the next hearing, the Department conducted new investigation and interviews in January 2011. Mother reported that she was not in a domestic violence program because she was told by the West Covina Police Department that she was not a victim of domestic violence. Father said he had smoked marijuana and refused to submit to drug testing until February 7, 2011. A social worker called mother to discuss family preservation services and a new case plan. Mother responded by stating that father and she did not need anything other than couples therapy, and that she was not supposed to be talking to social workers. Subsequently, mother said she would not enroll in any programs unless ordered to do so.

When mother finally submitted to a new interview, she said that Carl and Cody were asleep during the incident. When giving her story, she equivocated. At first she said, “I hit him, but he didn't hit me on purpose.” During the process of tussling over her taking father's clothes out of the closet, and father trying to put his clothes from a hanger back in the closet, he possibly hit her in the eye with his elbow. But then she said, “I don't know if it was an accident.” Father was also interviewed. He stated that the only

² The minute order stated that a prima facie case was *not* established. The minute order must be ignored because the juvenile court's oral pronouncement is controlling. (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1406 [oral pronouncement of judgment controls over a conflicting abstract of judgment]; *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [“The record of the oral pronouncement of the court controls over the clerk's minute order”].)

reason he was asked to remove himself from the family home was because of his past. He explained the incident in the following way: “I had a little incident in a closet. I had my hand on one end of the hanger, and she (mother) had her hand on the other end of the hanger. She pulled and I pulled and my elbow went into her eye.” Father maintained that the incident occurred when Carl and Cody were downstairs. After father said he never hit mother and would never hit a woman, because he was not raised that way, the social worker asked him about his 2005 arrest for spousal abuse. He replied that the incident must have involved someone else because he did not remember it.

With respect to father’s use of medical marijuana, father reported that it had been prescribed to him by a doctor for injuries he suffered while playing basketball. Father produced documentation showing that his license to use medical marijuana was good until January 2012. He explained that he takes medical marijuana as needed. When he smokes it, he generally leaves the family home and smokes it at the home of his sister. He represented that he always made sure that the smell of marijuana was not on his clothes. The social worker asked how much medical marijuana is prescribed at a time, and where he keeps it. He avoided the question and said, “I only get enough to take care of me. I go to my sister[’]s [and] don’t do it around the house.” He indicated he could get a lot of marijuana.

On February 9, 2011, the parties appeared and the matter was set for a contest in March 2011. The juvenile court ordered family counseling and also ordered father to enroll in a fatherhood group.

Prior to the next hearing, the Department reported that father was attending domestic violence counseling and had submitted to two random drug tests, both of which came back negative. In addition, mother and father had been referred to and had accepted family preservation services.

At the contested hearing, the juvenile court entered the Department’s reports and attachments into evidence. No witnesses were called. After closing arguments, the juvenile court sustained count b-1 alleging that father’s domestic violence created a substantial risk of harm to Carl and Cody. The juvenile court struck count a-1 and stated

that it would strike count b-2 relating to father's substance abuse if he agreed to provide six clean random drug tests, and if he attended Narcotics Anonymous meetings, got a sponsor and became a sponsor.³ Both parents were ordered to participate in domestic violence counseling. Finally, as to custody, the juvenile court issued a home of parent order.

These two appeals followed.⁴

STANDARD OF REVIEW

We review jurisdictional and dispositional findings under the substantial evidence standard. (*In re E.B.* (2010) 184 Cal.App.4th 568, 574 (*E.B.*)) Under this standard, we determine whether there is any substantial evidence, contradicted or uncontradicted, which supports the conclusion of the trier of fact. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113.) All evidentiary conflicts must be resolved in favor of the respondent. When there is more than one inference which can reasonably be deduced from the facts, we are without power to substitute our own deductions for those of the trier of fact. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.)

A dispositional order will be upheld unless it is an abuse of discretion. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 454.)

DISCUSSION

I. Father's Appeal.

Father argues that the dispositional and jurisdictional orders should be reversed because (a) there is no substantial evidence to support the finding of domestic violence and (b) there is no substantial evidence that Carl and Cody are at risk due to father's past drug use and present legal use of marijuana. In addition, father contends that the juvenile court abused its discretion because it ordered him to quit using marijuana. We discuss these issues below.

³ At one point the juvenile court ambiguously suggested that it would add the condition that father stop using marijuana. Father contends he was ordered to stop smoking marijuana.

⁴ Father joined in all of mother's arguments.

A. The jurisdictional finding based on count b-1.

A child is a dependent under section 300, subdivision (b) if 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 his or her parent or guardian to adequately supervise or protect the child.”

A petition filed under section 300, subdivision (b) must contain the following elements: “(1) neglectful conduct by the parent in one of the specified forms [i.e., the parent’s failure or inability to adequately supervise or protect the child]; (2) causation; and (3) “serious physical harm or illness” to the minor, or a “substantial risk” of such harm or illness.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194 (*Heather A.*)). At a jurisdictional hearing, the question is whether there is a current risk of harm to the child. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022 (*J.N.*)).⁵

Case law establishes that “domestic violence in the same household where children are living is neglect” that constitutes a failure to protect the children “from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.” (*Heather A.*, *supra*, 52 Cal.App.4th at p. 194.) This is so because children “could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot, or leg, . . .” (*Ibid.*) “Both common sense and expert opinion indicate [that] spousal abuse is detrimental to children.’ [Citations.]” (*E.B.*, *supra*, 184 Cal.App.4th at p. 576.) It is a form of secondary abuse. Children are affected

⁵ The Department points out that jurisdiction under section 300, subdivision (b) may be based on previous harm. Indeed, *In re J.K.* (2009) 174 Cal.App.4th 1426 (*J.K.*) held: “[A]t least with respect to section 300, subdivision (b), 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 [it] is necessary to protect the child from risk of suffering serious physical harm or illness. . . .’ We interpret this language to be consistent and in harmony with the first phrase of subdivision (b) and thus the use of the term ‘continue’ presupposes an initial exercise of jurisdiction either based on a prior incident of harm or a current or future risk.” (*J.K.*, *supra*, at p. 1435, fn. 4, italics in original.) Here, Carl and Cody were not physically harmed in the 2010 incident. As a result, our analysis focuses on whether there was sufficient evidence of a current or future risk.

by what happens around them as well as by direct harm. (*Heather A., supra*, 52 Cal.App.4th at p. 196, fn. 11.)

Substantial evidence established that mother and father have a history of domestic violence. In 2001, mother was arrested for inflicting corporal injury on a spouse or cohabitant. Then, in 2005, father was arrested for spousal abuse after he violently beat mother and pulled out some of her braids. When mother was interviewed regarding the 2005 incident, she indicated that father had been physical before but she was too afraid to report it. Then, regarding the 2010 incident, the officers heard shouting when they first arrived. And when they encountered mother, she was crying and upset. Items were thrown on the floor as though there had been an altercation. She said father hit her. Though she started to explain, she stopped when she heard father shouting at some officers outside. At that point she refused to cooperate with the investigation and did not allow the officers to take photos of her. Then she lied and said that father had never struck her in the past. In later interviews, mother and father admitted that he hit her, but they said it was an accident. Their stories as to what happened evolved over time. Mother admitted that she hit father first and has a problem with anger management. Based on the foregoing, the evidence and inferences support a finding that mother and father have had physical altercations, at least some of the hitting is intentional, and mother is afraid of father.

We note that even if father accidentally hit mother in the eye with his elbow, mother and father still bear the blame for setting the dominoes in motion. It happened after mother questioned father about a girl on Facebook, after mother hit him and after they struggled over father's clothes in the close quarters of a walk-in closet. In other words, they created a dangerous and detrimental home environment regardless of intent. But, in any event, the context of mother's acknowledgment to the police that father hit her supports the inference that he did so intentionally. She called the police, the responding officers heard shouting, she was crying and upset when she answered the door, and she was in fear of father. Those facts are inconsistent with an accident.

Instead, they are consistent with an intentional act by father. This conclusion is bolstered by Carl's statements and demonstrations.

To undermine the admissibility of Carl's statements, father cites the following rule. "[T]he out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that 'the time, content and circumstances of the statement provide sufficient indicia of reliability.' [Citation.]" (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1247–1248.) This rule does not change our analysis. The juvenile court did not rely exclusively on Carl's statements. Moreover, the circumstances bear sufficient indicia of reliability. Carl accurately reported that mother hit father, which suggests that Carl understood what he saw. He spontaneously and vigorously stated that father hit mother after hearing mother deny to the officers that the incident happened. Carl even went so far as to demonstrate what he saw. Though at times he denied that it happened, he also indicated that mother told him not to tell anyone their business. The inference is that mother was coaching and pressuring Carl not to tell the truth, which suggests that mother knew his statements were true. And when the social worker told him it was okay to tell the truth, he said father hit mother. This suggests that when he explained what he saw, he consciously chose the truth over a lie.

We now assess the risk. "[P]ast conduct may be probative of current conditions." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) But there must be some reason to believe that the improper parental conduct will continue in the future. (*Ibid.*) Here, there is. Mother and father both deny or minimize their domestic violence. Mother admits that she has problems with anger management. In addition, we note that father has multiple arrests and at least one conviction for assault with a deadly weapon. He was also arrested for armed robbery. Though these arrests and the conviction happened decades ago, they suggest a man desensitized to violence. Mother and father were initially unwilling to cooperate with the voluntary service plan that they agreed to at the team decision meeting. Indeed, mother indicated that she would not enroll in any programs unless

ordered to do so. By their actions and words, mother and father displayed selfish attitudes indicating that they were prioritizing their own desires over the best interests of Carl and Cody. All these factors point to a substantial risk that domestic violence will reoccur. Indeed, experience shows us that past violent behavior in a relationship is the best predictor of future violence. Once violence occurs in a relationship, studies indicate that it will reoccur 63 percent of the time. (*E.B.*, *supra*, 184 Cal.App.4th at p. 576.) In our view, this was a sufficient basis for the juvenile court to exercise jurisdiction.

Mother and father argue that a single incident of domestic violence is not enough to support jurisdiction. The problem with this argument is twofold: there is evidence of more than one incident and, even if there was only one incident, the facts nonetheless establish a current risk of harm.

“In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent’s current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances.” (*J.N.*, *supra*, 181 Cal.App.4th at pp. 1025–1026.) If we presumed that there was a single incident, we would still conclude that the juvenile court’s ruling was supported by sufficient evidence. As previously indicated, mother and father have denied and minimized their domestic violence. From everything they have stated in the juvenile court and on appeal, it is apparent that they do not believe that their domestic violence is detrimental to Carl and Cody. They have done little to modify their behavior. Under these circumstances, the risk is substantial and glaring.

It is true that the court in *In re Alysha S.* (1996) 51 Cal.App.4th 393, 395 (*Alysha S.*) held that a petition filed under section 300, subdivision (b) was insufficient because it did not allege that the father's domestic violence against the mother was perceived by or affected the child. Mother argues that the evidence was insufficient under *Alysha S.* because Carl and Cody did not perceive any domestic violence. That is not true as to Carl. And while that is most likely true with respect to Cody, we opt not to follow *Alysha S.* because *Heather A.* offers the better rule, i.e., the presence of domestic violence in a home creates a risk that a child will eventually encounter that domestic violence and suffer harm of illness as a result.

B. Count b-2 related to father's alleged substance abuse.

The parties dispute the status of count b-2. The Department contends that the juvenile court dismissed the count. Father contends that it was sustained.

The reporter's transcript and the minute order indicate that the count was stricken subject to conditions. Because count b-2 was not sustained, there is nothing for us to review. And even if it had been sustained, review would be moot. An appellate court can affirm a jurisdictional order if the evidence supports the decision on any one of the enumerated statutory bases for declaring a child a dependent. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875–876.) As we have already indicated, jurisdiction is supported by the findings as to count b-1.

C. The conditional order striking count b-2.

Father contends that the juvenile court erred by ordering him to stop using marijuana when it was ruling at the end of the jurisdictional/dispositional hearing. But the juvenile court made no such order.

The juvenile court stated: "It is a concern to this court that with the prior criminal [history] and drug use of the father that there is a marijuana prescription and use of marijuana. [¶] However, on the condition that father attend [Narcotics Anonymous] meetings and if his medical condition can't be treated with other medications and to stop the marijuana use." What the juvenile court meant by this statement is not decipherable. In response, father's attorney stated: "He has already done that." Presumably she meant

that father had stopped using marijuana. The juvenile court responded by stating: “Six clean random drug screens. If there is a missed one, you do a full program. Attend [Narcotics Anonymous] meetings, be a sponsor and get a sponsor and” the juvenile court will strike the substance abuse count. The ensuing minute order incorrectly stated: “Count B2 is stri[c]ken on condition that father provide 6 clean random drug tests, he attends [Narcotics Anonymous] meetings, gets a sponsor and becomes a sponsor.”

The oral pronouncement controls. What the juvenile court orally pronounced was that it would strike count b-2 if father provided six clean random drug tests. If one of his tests was dirty, the juvenile court would strike count b-2 if father attended Narcotics Anonymous, got a sponsor and became a sponsor (which could take longer than the pendency of this case). The bottom line is that the juvenile court did not order father to stop smoking marijuana. Thus, what father really complains about is that the juvenile court imposed conditions on the dismissal of count b-2. We conclude that father is entitled to have count b-2 either dismissed or sustained on the evidence. The juvenile court abused its discretion by imposing conditions on the dismissal in lieu of deciding count b-2 on the merits because father as well as Carl and Cody were denied a ruling that will help frame the case and the case plan.

II. Mother’s Appeal.

Mother argues that there was insufficient evidence of a current risk of harm to Carl and Cody. But for the reasons discussed in connection with father’s appeal, we disagree. It bears commenting that mother is just as responsible as father for creating the risk that resulted in dependency jurisdiction. She admits to hitting father and having a problem with anger management. Mother and father have a history of domestic violence yet she has not taken appropriate steps to ameliorate the situation or otherwise ensure that her children have a violence free home.

DISPOSITION

The juvenile court’s jurisdictional and dispositional findings and orders are affirmed. On remand, the juvenile court is directed to either dismiss count b-2 or consider the evidence and reach the merits.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD