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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.E. et al., Persons Coming Under the
Juvenile Court Law.

B244521

(Los Angeles County
Super. Ct. No. CK93080)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Appellant,

v.

EDGAR E.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Affirmed in part as modified, and reversed in part.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Stephen D. Watson, Senior Associate County Counsel, for Plaintiff and Appellant.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

INTRODUCTION

Edgar E. (Father) appeals from the jurisdictional order regarding his three biological children and his stepdaughter, who were all declared dependents of the juvenile court in October 2012. Father contends the court erred in finding under Welfare and Institutions Code section 300, subdivision (b) that he sexually abused his stepdaughter K.A.¹ He contends that the Los Angeles County Department of Children and Family Services (DCFS) failed to show under section 300, subdivision (d) that K.A. and her sisters had been sexually abused or were at substantial risk of such abuse, and therefore count b-9 alleging sexual abuse should have been dismissed.

DCFS also appeals, contending that the juvenile court erred by dismissing the count alleged under section 300, subdivision (d) that Father sexually abused K.A. Because we agree with DCFS and conclude that the factual findings made by the juvenile court necessitated that it sustain the count alleging Father's sexual abuse of K.A. under subdivision (d), we affirm the jurisdictional order to the extent it sustained count b-9, and reverse that order to the extent it dismissed count d-3.

FACTUAL AND PROCEDURAL BACKGROUND

Daughter J.E. (born in Dec. 1994), daughter E.E. (born in Aug. 1996), and son Jos. E. (born in Jan. 2006) are the subjects of dependency proceedings that were initiated after the children were detained in April 2012. Their half-sister, K.A. (born in Sep. 2004), was also detained. The children came to the attention of DCFS when it received a report that M.A. (Mother) had hit E.E. with a leather belt and Father punched her face, causing a nosebleed, a cut lip, and multiple marks and bruises.²

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

² Mother is not a party to this appeal.

J.E. and E.E. told the investigating social worker that Father had sexually abused them in the past. Mother and Father were separated from June 1997 until May of 2005, during which time K.A. was born. Thus, Father had been absent from J.E.'s and E.E.'s lives from the time they were three years old and one year old, respectively, and returned when they were 10 years old and eight years old. E.E. told the DCFS social worker that Father used to touch her breast and "private area" over her clothes with his hand. She said she told Mother but Mother did not believe her. She also said Father had physically abused her, and had been arrested in 2008 and 2011 for physically abusing J.E.

J.E. said Father sexually abused her when she was 11 years old. She fell asleep on the floor while watching television and awoke to find Father's hand on her "private part" under her underwear. She told Mother about the abuse but Mother did not believe her. The family previously lived in Georgia, and J.E. told the social worker that in 2008 a dependency petition was filed in that state alleging Father had physically and sexually abused the children. The children were in foster care for eight weeks and were then returned home. In 2011, J.E. had obtained a three-year restraining order against Father after he hit her with his closed fist. Mother allowed Father to return home, and J.E. said Mother told her to conceal that fact.

Father told DCFS he did not realize the restraining order was still in effect. He said he returned home to help Mother care for the children. Mother also said she did not realize the restraining order was still in effect. She let Father return home because Jos. E. was traumatized that his Father was not living at home. Mother denied there was any physical abuse in her home and said that Father was simply a very strict disciplinarian. The initial DCFS report did not address Mother's reaction to the sexual abuse allegations.

DCFS filed a section 300 petition on April 18, 2012, containing numerous allegations under subdivisions (a), (b), (d), and (j), alleging Father struck E.E. in the face with his fists, threw a bag of bird food at her head, and struck her repeatedly with a belt, causing welts, bleeding cuts, a bloody nose, and bruises. Father also struck J.E.'s body repeatedly, and in the past had bound her to a column in the basement as punishment. Father and Mother engaged in domestic violence in the children's presence. Father had

sexually abused E.E. and J.E. by fondling their vaginas. Mother knew Father was sexually abusing J.E. and E.E. and had failed to protect them, and had also failed to protect them from Father's physical abuse. Their adult sibling, Edgar E., was violent and had physically abused J.E. and E.E. The petition alleged that all of this behavior placed Jos. E. and K.A. at risk of suffering physical and emotional harm.

The juvenile court found a prima facie case that the children were as described in section 300. The children were all detained in foster care. The court ordered monitored visitation between Father and Jos. E. but ordered that Father have contact with the female children only in a therapeutic environment.

I. The Jurisdiction and Disposition Report

DCFS reported on May 18, 2012, that the incident leading to its involvement with the family occurred when E.E. failed to bring pet birds inside the house overnight, resulting in the death of one of the birds. The parents yelled at her and she argued back, throwing a video game remote control against the wall and breaking it. Mother began hitting her with a leather belt. E.E. said Father threw a bag of bird food at her head and punched her in the face, cutting her lip and causing her nose to bleed. Her adult brother threw a glass of water at her. She left the house. The parents were driving down the street when they saw her and tried to make her get into the car. Mother grabbed her and tried to force her into the car. Bystanders began filming the altercation and called the police, as did Father. Police responded, investigated the incident, and eventually placed Mother under arrest for child abuse. Father had left the house by the time police arrived.

E.E. and J.E. took responsibility for the problems with their parents. However, J.E. maintained that Father has anger issues and "hits us." She said, "I lied in Georgia because I was mad at him. I made it all up. I know this is our fault. We do not listen and want to do as we wish. I started drinking and using drugs since I was in junior high." J.E. said, "I know me and [E.E.] have a lot to do with the family problems but also my dad has anger issues. I would like to go to family counseling and [a] drug program." She said she had never seen her parents physically fighting and she had lied about that in

Georgia. “They usually fight because of us. My dad is strict and my mom allows us to go against him.” J.E. said Father never touched her inappropriately; she made it up in Georgia because she was mad at him.

E.E. agreed Father has anger issues and “is the one who punches us and hits us more often.” “In Georgia he would tie up [J.E.] in order to hit her because she would run. I think he only did it that one time.” She said Father had never touched her inappropriately. She said, “I know we are part of the problem and we should be listening to our parents. I think counseling will help because we have a lot of anger towards our dad.”

Mother told the social worker that they had lost J.E. and E.E. to drugs. Father was the disciplinarian and would sometimes spank them severely with a belt. She denied spanking them often. Mother said Father had never hit her; she lied to police in 1997 about him hitting her because she was mad at him for having another relationship. Father said they had problems with the two older girls, who did not want to do as they were told. Mother would give in to them and not allow Father to discipline them. He denied ever tying anyone up. Mother agreed that she thwarted Father’s efforts to discipline the children and was disrespectful to him in front of the girls. She often chided him for having left the family.

The paternal grandmother said the family’s problem was that the girls were disobedient and that the problems started when Father came back into their lives. She felt the girls did not accept him as their Father and felt he has no right to discipline them.

The social worker indicated that the parents meant well in disciplining the children but that they needed to develop alternative forms of discipline and learn to co-parent the children. The family also had issues relating to unresolved anger over Father leaving the family. It appeared to the social worker that J.E. and E.E. were minimizing the physical abuse and taking the blame for it in order to avoid getting Father in trouble. An incident in June 2011—in which it was reported to police that Father punched J.E. and hit Mother—had ended in the issuance of a restraining order against Father, but Mother allowed him back into the home in September 2011. J.E. and E.E.’s foster mother

overheard J.E. telling E.E. to forgive Father because he would not do it again and that things would change when they went home. They did not want Father to be arrested.

A new allegation arose when the social worker interviewed K.A. regarding the allegations that Father had touched J.E. and E.E. in a sexual manner. K.A. told the social worker “my dad touched me in my private parts with his finger. One time we were at my aunt’s house and two times we were at my mom’s apartment. My sister was sleeping in the couch in the sofa bed. He touched me over my clothes. When I was with my [aunt], I told my mom. My mom said she would talk to my dad.”

K.A.’s foster mother reported that she had monitored a telephone conversation between K.A. and Mother in which Mother was yelling at K.A., calling her a liar, and telling her to stop saying these lies. K.A. confirmed to her foster mother that Father had touched her private parts with his finger.

Mother said it was not true that Father had ever touched any of the girls inappropriately. She said K.A. never told her anything about that. Father agreed that it was all lies made up by the girls to make him leave the house.

Mother explained that she was involved in another relationship when she was separated from Father, and gave birth to K.A. during that time. K.A.’s biological father was Carlos M. When K.A. was seven months of age, Mother took her to live with the child’s maternal grandmother in Guatemala, where the child remained until she came to live with Mother in October 2010.

DCFS further reported that there had been a social services case in 2007 in Georgia regarding the family. In that case “the parents consented to a finding of deprivation based upon the father’s physical abuse and perpetration of domestic violence and the mother’s failure to protect the children [from] physical abuse and domestic violence. On [April 16, 2007,] custody of the children was granted to [DCFS]. On May 24, 2007, due to the parents[’] considerable progress on their case plans the children were returned to their custody subject to a Protective Order which requires that the parents continue [in] individual and family counseling as recommended, ensure that there

is no domestic violence in the home, use no physical discipline on the children, and cooperate with parent aide, C.A.S.A., guardian ad litem and [DCFS].”

II. The Amended Section 300 Petition

On May 22, 2012, DCFS filed an amended petition alleging in an amended count b-9 (also d-3 & j-8) that Father sexually abused K.A. by fondling her vagina with his hand. Mother failed to take action to protect K.A. although she knew of the sexual abuse by Father. Father’s sexual abuse of K.A. and Mother’s failure to protect her endangered the child’s health and well-being, created a detrimental home environment, and placed K.A. and her siblings at risk of physical harm and sexual abuse.

At that time, J.E. was reported to be falling asleep in school and using her cell phone. Graffiti was found near her bed. She left her foster home without permission and her whereabouts were unknown for a month. DCFS asked the court to issue a protective custody warrant for her. She was arrested for violating curfew and placed in a group home, which she left without permission. She was located at her paternal grandmother’s house, but refused to return to the group home. E.E. was arrested for shoplifting and was reported to be smoking marijuana with another foster child. She had pierced her upper lip and one of the piercings was infected.

Father said that K.A. had been trained to say he had sexually abused her and said it only after she heard her older sisters say it. He said the social worker was “taking this case too personal” and was telling the children lies. Mother agreed that the social worker had persuaded K.A. to say she had been sexually abused. Mother said K.A. was inappropriately affectionate with strangers. She never left K.A. alone with Father and she was certain that he had not sexually abused the child. The paternal grandmother said she did not believe K.A. had been sexually abused because she had not raised Father to act like that. However, her home had been approved for placement of the children and she said she would protect them from anyone.

III. The Mediation

On June 29, 2012, Mother and Father agreed to submit to amended language in the first amended petition on counts a-1, b-1, and j-1 that on several prior occasions Mother and Father physically disciplined J.E. and E.E. and did not protect the siblings from physically fighting with each other. On April 14, 2012, in the presence of K.A. and Jos. E., the parents physically disciplined E.E. by striking her, forcibly attempting to get her into a car, striking her with a belt (Mother), and restraining her (Father). E.E. sustained multiple marks and bruises. An adult sibling threw a glass of water at E.E. The parents' conduct and failure to protect the children was alleged to endanger J.E. and E.E. and place all of the children at risk of harm. Count b-6 was amended to state that the parents had engaged in verbal and physical altercations in the children's presence, including pushing each other. Such conduct was alleged to place the children at risk of harm.

The parties agreed to dismiss counts a-2 through a-4, b-2 through b-5, and j-2 through j-5. The parties did not reach agreement as to counts b-7 through b-9, d-1 through d-3, and j-6 through j-8, the sexual abuse allegations. Those counts were scheduled to be determined at an adjudication hearing on July 26, 2012.

IV. The Multidisciplinary Assessment

A multidisciplinary assessment team evaluated all four children. K.A. had problems adjusting to sleeping alone in her foster home; the situation improved when another foster child was placed in the home and shared the room with her. K.A. showed considerable distress when she disclosed Father's sexual abuse to the social worker. However, she was sad and missed her family and wanted to see all of them. Mother reported that K.A. had difficulty adjusting when she came to live with the family. Her half-siblings had trouble accepting her.

E.E. was interviewed on June 18, 2012, and reported that Father had groped her and attempted to touch her "private body parts" when she was about 10 years old. J.E., interviewed on July 2, 2012, said she did not recall the details of Father sexually abusing

her when she was about 11, but she remembered feeling uncomfortable. She did not like being hugged or touched by men, particularly Father.

Jos. E.'s foster mother said he had exposed his private parts to younger female foster children. He also tried to kiss girls at school and touch their bodies inappropriately. He hit girls in his foster home, saying Father told him it was "ok to hit girls if they didn't obey."

J.E., E.E., and Jos. E. had been placed with the paternal grandmother. K.A. remained in a nonrelative foster home.

As of September 26, 2012, Father had completed 48 weeks of parenting classes and four counseling sessions.

V. The Adjudication Hearing

The adjudication hearing was held on September 26, 2012. K.A. testified that during a telephone conversation with Mother (while K.A. was in her foster home), Mother accused K.A. of lying about Father having touched her "private part." K.A. said she was not lying and that Father had touched her private part three times. The first time, she was in bed and Father touched her in the crotch area with his hand over her clothes, specifying later that she was wearing pants at the time. Her legs were not open, and Father did not try to open them. He moved his hand but he did not move his hands between her legs. She told him to stop and he did. Mother was in the same bed but was facing away, so K.A. did not know if Mother was aware. Soon thereafter, she told Mother that Father touched her "private part," and Mother responded that she would talk to Father that night, but Mother did not do so.

On a different day when K.A. was at her aunt's house, while she was in bed and wearing pajamas, Father placed his hand on her "private part," indicating her crotch area. He did not move his hands around or put his hands between her legs. K.A. said she did not tell her aunt because her aunt was at work. She said her two sisters and brother were there, apparently meaning at the house but not in the room because she later indicated her brother Jos. was not in the room with her any of the times Father touched her

inappropriately. K.A. said when Father touched her she felt “bad” “[b]ecause that was wrong.”

The third time Father touched K.A.’s “private part,” indicating her crotch area, she was wearing a dress. He did not move his hands around or put his hands between her legs. This incident also occurred at her aunt’s house. She first testified no one else was present in the room, but later said her sisters were in the room but not in the bed. K.A. said she never spoke to her sister about Father touching her inappropriately. She told her first grade teacher, Ms. V., about Father touching her.

J.E. testified that she had told a social worker in Georgia that Father touched her inappropriately, but that it was not true and she said it only because she was mad at him for trying to discipline her. She also said she had lied to the Georgia social worker when she said Father had hit Mother. She denied ever telling Mother that Father had touched her inappropriately. She acknowledged telling a social worker in California that Mother had told her to lie about abuse that occurred in Georgia, but said she had lied to the social worker. She said she was not lying when she reported that Father physically disciplined her.

J.E. denied talking to Mother about the case. She also said she never told K.A. that Father had touched her inappropriately. She had not discussed the sexual abuse allegations with her paternal grandmother or her sisters. She had not visited with Father since April.

E.E. testified that she had lied when she said previously that Father touched her breast and private area. She only said it because she was following along with J.E. She had no recollection of ever saying that Father tied J.E. up to hit her. She denied being influenced to recant her sexual abuse allegations. She had not had any visits with Father since after the first court date. She said she made up the allegations of sexual abuse because she was mad at him after their altercation on April 14, 2012.

Mother testified that she did not call K.A. a liar over the telephone; she merely told her to tell the truth. She denied K.A. ever told her that Father had touched her inappropriately. She acknowledged that J.E. told a social worker in Georgia that Father

touched her inappropriately, but Mother denied telling J.E. to recant. According to Mother, K.A. told her the foster mother said that K.A. should say Father touched her inappropriately. Mother said when she was young her uncle had tried to touch her, and therefore she had taught her children to tell her if someone tried to touch them inappropriately.

VI. The Ruling

The court sustained the physical abuse counts (a-1, b-1 & j-1) and the domestic violence count (b-6), the counts to which the parties had agreed in mediation. The court also dismissed counts a-2 through a-4, b-2 through b-5, and j-2 through j-5, pursuant to the parties' agreement. The court determined that counts b-7 (sexual abuse of E.E.) and b-8 (sexual abuse of J.E.), the remainder of the j counts (j-6 through j-8, sexual abuse of E.E., J.E. & K.A, respectively), and all of the d counts (d-1 through d-3, sexual abuse of E.E., J.E. & K.A, respectively) should be dismissed. However, the court sustained count b-9, but amended it by removing Jos. E. from the count and amending the language to state that Father "inappropriately touched the child [K.A.]'s inner thigh with the Father's hand." The court struck the allegations of Mother's failure to protect from the count. The court stated: "The testimony from [K.A.] was and it was asked numerous times, she indicated that her father touched her on the inner thigh, not fondled the vagina. That he did not go over the vagina, did n[o]t grope, fondle and so the court is dismissing the sexual abuse counts." The court noted that DCFS had a low burden, "which is probably why they met their burden." The court found K.A. to be credible, but found the other witnesses credible as well. "[W]hen you put all of that together, something is not as it has been presented."

The court stated: "I'm not taking the sexual abuse out of the last line because without services it could lead to sexual abuse. I'm just not finding that sexual abuse took place at this time or [DCFS] met their burden to sustain a d." DCFS objected to dismissal of counts b-7 and b-8, and the d and j counts.

At disposition, the court declared all of the children to be dependents of the court under subdivision (b), finding there to be a substantial danger to the children’s health and safety if they were returned to the parents. The court granted the parents family reunification services.

This timely appeal by Father followed. In addition, DCFS filed a cross-appeal.

We note that after Father’s notice of appeal was filed the juvenile court ordered the matter transferred to San Bernardino County.

DISCUSSION

Relying on the fact the court dismissed all of the counts alleged under subdivision (d), particularly the one alleging that Father sexually abused K.A., Father contends on appeal that the juvenile court erred in finding under section 300, subdivision (b) that K.A. had been sexually abused.³ DCFS disagrees, and contends on cross-appeal that in fact the juvenile court erred by dismissing count d-3 and not sustaining count b-9 as pleaded. We agree with DCFS.

We first address the trial court’s dismissal of count d-3 based on its finding that DCFS did not meet its burden of proof to establish sexual abuse had occurred. Where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Caron v. Andrew* (1955) 133 Cal.App.2d 402, 409.) More specifically in this case, the question before us is whether

³ A child may be declared a dependent of the juvenile court under subdivision (b) where the court finds “[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 . . . to adequately supervise or protect the child[.]”

A child may be declared a dependent of the juvenile court under subdivision (d) where the court finds “[t]he 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 the parent . . . has failed to adequately protect the child from sexual abuse when the parent . . . knew or reasonably should have known that the child was in danger of sexual abuse.”

the evidence the juvenile court found to be credible compels a finding in favor of DCFS, such that the court erred in concluding that DCFS failed to meet its burden of proof. We find that the court's factual findings necessarily lead to the conclusion that the court should have sustained the subdivision (d) count as to K.A.

The court believed K.A. when she said Father touched her three times on the crotch area, she told him to stop, it made her feel bad, and she knew it was wrong. The court found that the evidence did not support the allegation that Father touched her "vagina" because he did not move his hand or grope between her legs. Accordingly, the court amended the language of count b-9 to replace the word "vagina" with "inner thigh," even though K.A. said "private part" and counsel twice indicated without objection from anyone that K.A. was pointing to her "crotch area." In any event, the important point is that the court believed that Father touched K.A.'s inner thigh or crotch area. The court stated that the touching was "inappropriate[]," implicitly acknowledging the touching was sexual in nature, but indicated that the nature of the touching was minimal. The court apparently did not find the conduct significant enough or *serious* enough to amount to sexual abuse under subdivision (d), though it left in the language in count b-9 terming it as sexual abuse because "without services it could lead to sexual abuse. I'm just not finding that sexual abuse took place at this time or [DCFS] met their burden to sustain a d."

However, by finding that Father "inappropriately touched" K.A.'s "inner thigh," the court was necessarily and as a matter of law finding that sexual abuse occurred. Penal Code section 11165.1 defines sexual abuse as either sexual assault or sexual exploitation, and subdivision (b)(4) of that statute provides that sexual assault includes "[t]he intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, *inner thighs*, and buttocks) or the clothing covering them, of a child . . . for purposes of sexual arousal or gratification" (Italics added. See *In re Mariah T.* (2008) 159 Cal.App.4th 428, 439.) Thus, we conclude that the court erred by dismissing

count d-3 alleging that Father sexually abused K.A. Concomitantly, we reject Father's contention that the court erred by sustaining count b-9.⁴

We further conclude that the language of counts b-9 and d-3 should be amended to conform to the evidence that K.A. indicated Father touched her crotch area rather than her inner thigh. Thus, the counts should read: On prior occasions, Father sexually abused the child K.A. by inappropriately touching the child's crotch area with the Father's hand. Such sexual abuse of the child by Father endangers the child's physical health, safety, and well-being, creates a detrimental home environment, and places the child K.A. and the child's siblings, J.E. and E.E., at risk of physical harm, damage, sexual abuse, and failure to protect.

DCFS further contends that the court erred by amending the subdivision (b) allegation to remove the language regarding Mother's failure to protect K.A. from Father's sexual abuse. That, however, is a factual determination by the court to credit Mother's testimony that she did not know about Father's sexual abuse of K.A. It is not our role to reweigh the evidence, and we will affirm the court's findings if they are supported by substantial evidence, as is the case here. (*In re P.A.* (2006) 144 Cal.App.4th 1339, 1344.)

Finally, the court dismissed all but one of the allegations made pursuant to section 300, subdivision (j).⁵ DCFS contends the court should have sustained count j-8, which alleged that Father's sexual abuse of K.A. places K.A. and her three siblings at risk of

⁴ "It may be inferred from the fact of a lewd touching that the victim suffered serious physical harm" within the meaning of section 300, subdivision (b)." (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 398.)

⁵ A child may be declared a dependent of the juvenile court under subdivision (j) where the court finds "[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."

physical harm, damage, sexual abuse, and failure to protect. Again, however, inherent in the court's dismissal of the subdivision (j) counts (counts j-2 through j-8) are factual determinations that we are not at liberty to reweigh. We presume the court considered the circumstances surrounding the abuse of K.A., the age and gender of each child, the nature of the abuse of K.A., Father's mental condition, and any other factors the court considered probative. For example, K.A. is Father's stepchild and is considered something of an outsider by the other children, and they resent her because Mother favors her in their eyes. J.E. and E.E. are teenagers and Jos. E. is male and treated differently by Father. Based on such factors, the court could have reasonably concluded they were not at risk of suffering sexual abuse by Father.

The children have all been declared dependents and are under the supervision of the juvenile court based upon sustained allegations pursuant to section 300, subdivisions (a), (b), and (j) (the latter based on physical abuse of E.E. by Father), and as a result of this appeal K.A. is now to be declared a dependent under subdivision (d). The juvenile court's decision to dismiss count j-8 does not materially affect the supervision the children will receive from the court. We will not disturb the court's decision in that regard.

DISPOSITION

The jurisdictional order entered by the juvenile court is affirmed, with directions to the juvenile court to modify the language of count b-9 as indicated in this opinion. To the extent the court dismissed count d-3, the jurisdictional order is reversed with

directions to the juvenile court to sustain count d-3 with the modification of its language as indicated in this opinion.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.