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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

In re BRIANA V., a Person Coming Under
the Juvenile Court Law.

B264463
(Los Angeles County
Super. Ct. No. DK08406)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,
Plaintiff and Respondent,

v.

MARIO V.,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Marguerite Downing, Judge. Reversed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and
Appellant.

Mary C. Wickham, Interim County Counsel, and Dawyn R. Harrison, Assistant
County Counsel, and Kimberly Roura, Deputy County Counsel, for Plaintiff and
Respondent.

The juvenile dependency court declared minors Briana V., Abby V., Reyna V., and Ricardo V. dependents under Welfare and Institutions Code section 300,¹ subdivision (b), based on allegations that Mario V., the father of the minors, and their mother, Maria G., abused illegal substances. The court also ordered the minors removed from parental custody. In this appeal, Mario V. challenges only the orders pertaining to him, arguing that this court should reverse because sufficient evidence did not support the juvenile court's finding that his drug use harmed the minors or placed them in a substantial risk of harm. For the reasons articulated below, we agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mario V. (Father), Maria G. (Mother) and their children, Briana (born in 2009), Abby (born in 2011) and Reyna (born in 2013) first came to the attention of the Department of Children and Family Services (DCFS) in August 2013, when Mother was arrested for domestic violence. While under the influence of alcohol, Mother threw a beer can at Father and slapped and scratched him. At the time, Mother admitted to a 17-year history of abusing alcohol, cocaine, and marijuana. The parents agreed to a voluntary maintenance plan requiring them to attend domestic violence, parenting, and substance abuse counseling, and to participate in drug testing.

The parents, who have never been married, separated for some period in 2013; Mother and the children resided with Mother's relatives while Father lived with his parents. In 2014, the family briefly reunited.

On November 21, 2014, DCFS received a referral that Mother had given birth to Ricardo, who was born showing the effects of exposure to drugs and that at the hospital, Mother tested positive for drugs. Mother admitted to the social worker that, against the advice of her doctor, she had smoked marijuana approximately twice a month while

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

pregnant, but she also claimed that she had stopped using cocaine after her arrest for domestic violence.

Mother disclosed that she and Father had separated four months before Ricardo's birth and that their future together was uncertain. She reported that Father had a history of using methamphetamine, but did not know if he currently used drugs. Mother stated that they did not use drugs in the family home or in front of the children, claiming that when she or Father used drugs they would arrange for a babysitter to stay overnight with the children. Nonetheless, the parents had not complied with the voluntary maintenance plan. They both had missed some drug tests, and Father had tested positive for marijuana in January 2014. Mother did not believe that Father's drug use affected his parenting; she characterized Father as "really good with the children," observing that he visited the children on a daily basis.

DCFS filed a section 300 petition under subdivisions (a) and (b), alleging that the parents engaged in domestic violence (counts a-1 and b-3) and that both parents had a history of substance abuse, including using methamphetamines, and marijuana (counts b-1 and b-2). The court ordered the children detained with maternal relatives, and ordered drug testing and monitored visits for the parents.

In his DCFS interview, Father told the dependency investigator that he had a full-time job as a painter at an aerospace company. He reported that he smoked marijuana to relieve pain that he suffered from a work-related injury to his jaw. He also said that he had used methamphetamine in the past and had relapsed five or six months before, but had since stopped using it. Father had a juvenile record, consisting of offenses in 2008 for possession of a weapon and possession of marijuana for sale.

Father tested negative for drugs on December 9, 2014 as well as in January and February 2015. He did, however, miss a few drug tests in early 2015. Father reported that his work schedule fluctuated between evening and graveyard shifts, making it difficult for him to participate in a substance abuse program, and therefore, although he planned to do so, he had not yet enrolled in treatment. Father continued to have regular,

positive visits with the children, who were healthy and well-adjusted, meeting their developmental milestones.

At the adjudication hearing on March 30, 2015, the children's counsel and Father's lawyer asked the court to dismiss the counts against Father. DCFS requested the court to sustain all counts in light of Father's juvenile record, and his methamphetamine relapse. DCFS also argued that Father had created a home environment that condoned drug use, pointing out that Father had been in a relationship with Mother during the time Ricardo was prenatally exposed to drugs.

The dependency court dismissed the domestic abuse counts but sustained the drug abuse allegations.² The court declared the minors dependents and removed them from the parents' custody. The court also ordered monitored visits, drug testing, parenting, domestic violence and drug abuse counseling for the parents.

Father filed a timely notice of appeal.

DISCUSSION

The jurisdictional findings and declaration that the children are dependents based on Mother's conduct are not challenged on appeal, and thus, as Father correctly recognizes, the juvenile court has jurisdiction over the minors without regard to the findings relating to him: "[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citations.]"

(*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; accord, *In re Alexis E.* (2009)

171 Cal.App.4th 438, 451.) Nonetheless, the jurisdictional allegations against Father

² The section 300 petition as sustained against Father stated:

"b-2: The children[']s father . . . has a history of substance abuse, including methamphetamine, and is a current user of marijuana, which renders the father incapable of providing regular care for the children. The children are of such young age requiring constant care and supervision and the father's illicit drug use interferes with providing regular care and supervision of the children. On 1/15/2014, the father had a positive toxicology screen for cannabinoids. Said substance abuse by the father endangers the children's physical health and safety and places the children at risk of physical harm and damage."

served as a basis for the disposition orders and may have other adverse consequences for him in this or future proceedings. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 [“we generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) ‘could have other consequences for [the appellant], beyond jurisdiction’”].) Accordingly, even though jurisdiction is appropriate, we will decide Father’s claim that sufficient evidence did not support the b-2 allegation against him.

Welfare and Institutions Code section 300, subdivision (b), requires proof of three elements: “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 [2 Cal.Rptr.2d 429].) ‘The third element “effectively requires a showing that at the time of the jurisdiction hearing the child is at *substantial* risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]’” (*In re J.O.* (2009) 178 Cal.App.4th 139, 152, italics added.) “Section 300, ‘subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness. [Citation.]’” (*In re David M.* (2005) 134 Cal.App.4th 822, 829; accord, *In re John M.* (2013) 217 Cal.App.4th 410, 418.)

DCFS had the burden to present evidence of a specific, non-speculative and substantial risk to the minors of serious physical harm based on Father’s conduct. (*In re David M., supra*, 134 Cal.App.4th at p. 830.) They failed to make that showing. The record lacks sufficient evidence that Father’s current use of marijuana or prior use of methamphetamine caused harm or placed the children at risk of harm.

As we observed in *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003, a parent’s use of marijuana or other drugs, standing alone, does not bring a minor within the

jurisdiction of the dependency court. (See also *In re James R.* (2009) 176 Cal.App.4th 129, 137 [no evidence that the mother’s beer-drinking rendered her incapable of taking care of her children or posed a risk to them]; *In re David M., supra*, 134 Cal.App.4th at p. 830 [jurisdiction under section 300, subdivision (b), reversed where the mother had a continuing substance abuse problem, but there was no evidence of a specific, defined risk of harm from mother’s substance abuse]; *In re Rocco M., supra.*, 1 Cal.App.4th at p. 817 [the mother’s cocaine use was not sufficient basis or jurisdiction under section 300, subdivision (b)]; *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 59, fn. 2, [the father’s alcoholism alone did not support jurisdiction under section 300, subdivision (b)]; *In re W. O.* (1979) 88 Cal.App.3d 906, 910 [the parents’ drug use and discovery of drugs in the family home is insufficient to support the exercise of dependency jurisdiction].)

The evidence is uncontroverted that Father used drugs; he admitted he smoked marijuana to self-medicate his jaw pain, and he confessed that he had also used methamphetamine a year before the adjudication hearing. This evidence without more, however, does not establish Father had a “substance abuse problem” warranting the exercise of jurisdiction and removal of his children. (See *In re Drake M., supra*, 211 Cal.App.4th at p. 766 [holding that “a finding of substance abuse for purposes of section 300, subdivision (b), must be based on evidence sufficient to (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional; or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM–IV–TR”³].) The record lacks

³ “The full definition of ‘substance abuse’ found in the DSM–IV–TR describes the condition as ‘[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12–month period: ¶ (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household); ¶ (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use); ¶ (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct); and

evidence that Father had been diagnosed with a substance abuse problem. In addition, Father performed a full-time job for three years, and had no adult criminal record. DCFS did not show Father failed to satisfy any significant obligations at work or home, or that he had legal or social problems⁴ resulting from his use of marijuana. DCFS also failed to demonstrate that Father's use of substances affected or exposed the children to any actual harm. (Cf. *In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 452 [finding risk of harm based on the father's use of marijuana in the home that exposed the children to the "negative effects of secondhand" smoke].) Likewise, the record is devoid of evidence that Father failed to fulfill a parental role. He had regular visits with his children and by all accounts he provided excellent care to them. The older children were developmentally on target and well adjusted; they did not suffer from emotional or physical abuse as a result of Father's conduct.

This is not a case like *In re R.R.*, in which the father's use of methamphetamine required hospitalization and compromised his ability to maintain contact with and care for his children. (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1284.) Nor is it like *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1220, where the father's persistent use of marijuana coupled with his unemployment and "repeated scrapes with the law," justified the court's exercise of jurisdiction.

Furthermore, DCFS's argument, that Father's drug use put the children at risk because it created a home environment that condoned drug use or that it somehow encouraged Mother to use drugs while she was pregnant, is speculative. (See *In re David M.*, *supra*, 134 Cal.App. 4th at p. 828 [inferences must be "'a product of logic and reason'" and "'must rest on the evidence'"; inferences that are the result of conjecture cannot support a jurisdictional finding].) Mother's statement that she and Father left the

¶ (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).’ (DSM-IV-TR, p. 199.)” (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 766.)

⁴ Mother's abuse of substances triggered the domestic violence between the parents.

children with a babysitter when they used drugs lacks context—it is unclear when and how often the parents used drugs together. Their relationship spanned more than five years, and the parents separated approximately midway through Mother’s pregnancy. Therefore, the fact that in the past the parents used drugs together does not give rise to the reasonable inference that Father used drugs with Mother *while* she was pregnant with Ricardo. Mother had a lengthy and severe substance abuse problem apart from Father. She used drugs long before they met, and she continued to use marijuana after they separated, even during pregnancy, and even against the advice of her doctor. Consequently, a claim that Father’s use of marijuana influenced Mother’s conduct is conjecture.

In short, DCFS failed to show a nexus between Father’s use of illegal substances and risk of harm to the children. (See *In re James R.*, *supra*, 176 Cal.App.4th at p. 137 [“[t]he mere possibility of alcohol abuse, coupled with the absence of causation, is insufficient to support a finding the minors are at risk of harm within the meaning of section 300, subdivision (b)”].) In reaching our conclusion that sufficient evidence did not support the jurisdictional allegations against Father, we do not excuse or minimize his use of illegal drugs. Nonetheless, based on the evidence in the record before us and reasonable inferences derived from it, nothing supports the finding that Father’s use of drugs exposed the minors to a substantial risk of serious harm.⁵

⁵ Because we reverse the jurisdictional order in this case, the dispositional orders become moot. (*In re R.M.* (2009) 175 Cal.App.4th 986, 991.) As a result, we need not address Father’s other arguments on appeal.

DISPOSITION

The jurisdictional and dispositional orders as to Mario V. are reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.