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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CAMERON L. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MICHAEL L.,

Defendant and Appellant.

D061636

(Super. Ct. No. SJ12626A-B)

APPEAL from orders of the Superior Court of San Diego County, Garry G.
Haehnle, Judge. Reversed.

Michael L. appeals from orders of the superior court making jurisdictional and dispositional findings on juvenile dependency petitions filed by the San Diego Health and Human Services Agency (the Agency) on behalf of his minor children, Cameron (age four) and Bailey (age two) (together, the children). Michael contends substantial evidence does not support the jurisdictional and dispositional findings. As explained

below, we conclude the juvenile court's findings that the children are within the court's jurisdiction are not supported by substantial evidence. Accordingly, we reverse the court's jurisdiction orders, mooted all subsequent orders.

FACTUAL AND PROCEDURAL BACKGROUND

In early August 2011, the Agency received a referral that two men were smoking marijuana in a home where children were "believed to be present" and that there appeared to be a marijuana hash manufacturing lab at the residence. A few days later, two Agency social workers, accompanied by law enforcement, went to the home where the children lived with Michael, their mother Lauren T., their half brother Dominic (age eight), and a roommate, Nick. The home smelled strongly of marijuana, items used to manufacture marijuana hash were on the kitchen counter, marijuana paraphernalia was in the master bathroom, the freezer contained marijuana and chemicals, and marijuana plants were growing in Nick's bedroom closet. All of these items were easily accessible to the children.

Cameron and Dominic reported seeing their parents smoke and admitted going into Nick's room. Michael claimed that he used marijuana to help with his chronic headaches, and Lauren stated that Michael and Nick had been growing marijuana for about eight weeks. The police prepared a report noting that Michael, Lauren and Nick had nongovernment issued marijuana recommendation or prescription cards. Social worker Ian Baxter explained to Michael that the children would be taken into protective custody. Michael later e-mailed and left voicemail messages for Baxter, threatening to sue and claiming Baxter was a kidnapper. Baxter met with Dominic's father, who agreed

not to allow Dominic to have contact with Lauren until a social worker approved the contact.

The Agency took the children into protective custody and filed identical petitions alleging that the children were at substantial risk of serious physical harm or illness based on inadequate supervision. (Welf. & Inst. Code, § 300, subd. (b); all further statutory references are to this code unless otherwise indicated.) The petitions noted that Bailey tested presumptive positive for amphetamine and methamphetamine upon his admission to Polinsky Children's Center. However, a confirmatory drug screen on him came back negative. At the detention hearing, the court found a prima facie showing had been made that the children were persons described by section 300, subdivision (b). It detained the children in out-of-home care, ordered supervised visits for the parents, and deferred determination as to the applicability of the Indian Child Welfare Act. Based on Michael's threatening statements, several professionals on the case filed applications for restraining orders. The juvenile court subsequently granted Baxter a one-year protective order.

Near the end of August, the children were detained in the home of the maternal aunt, Jacqueline T. The parents participated in supervised visits that went well, but the children wanted to go home and cried for an hour after being separated from their parents. Near the end of September, Lauren moved into Jacqueline's home. A visit to Jacqueline's home showed no signs of substance abuse.

Lauren submitted verification of citizenship to the Chickasaw Nation. She has no criminal history, graduated from high school, and has taken classes at a local college studying web design. She takes Adderall and Lexapro daily for anxiety and attention

deficit disorder. Lauren denied any marijuana use during the preceding three years and tested negative for drugs or alcohol. She attended individual therapy sessions, and the parents participated in conjoint therapy sessions, with planned weekly meetings. The parents actively participated in parenting classes, attended a wellness conference, and were addressing the concerns regarding marijuana in the home.

Michael graduated from high school and reportedly entered the Navy at age 17. He possessed high test scores and has worked in the software field since being released from the military. Michael's criminal history included convictions in Georgia in 1991 and 1994 for a variety of misdemeanor driving offenses and one felony conviction for concealing facts of "fraudulent documents in matter of government." He suffered additional convictions in Georgia in 2000 and 2002 for depositing a bad check and possession of Schedule I drugs. In 2006, he suffered an arrest in California for possessing drug paraphernalia and taking a vehicle without the owner's consent. In August 2010, he suffered a California arrest for driving without a license. In October 2010, he suffered another California arrest for driving without a license, failing to have proof of insurance, not wearing a seatbelt, and possessing less than an ounce of marijuana. He has an outstanding arrest warrant in South Carolina for drug possession and one in Georgia for depositing an insufficient funds check.

Michael claimed that he was diagnosed with a medical condition resulting in headaches and pressure in 1994, and that he is willing to see a psychologist to address this issue. Michael obtained a medical marijuana card from a physician in October 2010. He "vaporizes" marijuana every morning to "release[]" the pressure in his head. Another

physician that had seen Michael four or five times noted that Michael disclosed significant caffeine intake and headaches, which were "classic caffeine withdrawal headaches." This physician denied either recommending marijuana for Michael or writing a prescription for it.

In early August 2011, Michael attempted to drug test using a fake penis. A social worker noted that Michael's behavior toward the Agency has "improved greatly." In early November 2011, the parents submitted to a drug test. Lauren tested negative for drugs or alcohol, but Michael tested positive for marijuana and marijuana metabolite. By mid-November, the children were removed from Jacqueline's care and detained back at Polinsky Children's Center because a number of protective issues had arisen. Cameron indicated that Lauren had allowed Michael to come to the home when Lauren was not there. Jacqueline went away for the weekend and, upon her return, she discovered that Lauren had taken the children and moved them. Jacqueline called the police when she found Lauren and the children missing. She admitted, however, that she had told Lauren the prior week that Lauren needed to move out with or without the children. Lauren claimed she did not contact the Agency about the move because it was a Sunday evening.

Michael admitted he was with Lauren the night she left Jacqueline's home. He claimed he was at a motel room with them, but did not spend the night. The paternal grandmother reported that she visited San Diego about two months ago and had concerns that Michael might be using methamphetamine. When she confronted Michael about her suspicions, he "blew up" at her. She claimed that Michael had a look in his eyes as if he wanted to kill her. She became fearful for her personal safety and left California.

Jacqueline left a voicemail message for the social worker indicating Michael was dangerous and that she feared for her safety if she testified in court.

On February 6, 2012, the Agency filed amended petitions. In addition to the original allegation of inadequate supervision, each petition contained a second count alleging that Michael reportedly suffered from posttraumatic stress disorder (PTSD) due to his military service, that he had made threats against an Agency social worker to the point that the court issued a restraining order against him, that he presented as emotionally unstable, was unwilling or unable to stop his marijuana usage, and the children were in need of the protection of the juvenile court because Lauren failed or was unable to protect or supervise the children.

That same day, the juvenile court held the contested jurisdiction and disposition hearings. An addendum report filed on the date of the hearing noted that the parents were living together in a trailer and that Michael had not responded to a request for a home inspection. A few days earlier, Lauren had left the social worker a message stating that she was with Michael and needed shelter referrals. The social worker left Lauren a message the next day, but Lauren had not returned the call as of the time of the report.

A substance abuse counselor who saw Michael for an assessment reported that while Michael made no threats, he made "innuendos" such as stating that his father had a shotgun and that Michael would do whatever it took to get his children back. The counselor stated that Michael was "emotional" and that his "affect concerned me." Michael also made conflicting statements regarding his marijuana usage and had not yet enrolled in individual therapy with a Treatment & Evaluation Resources Management

provider. The social worker opined that Michael's mental health issues and the parents' substance abuse issues posed a serious risk of physical or emotional harm to the children.

At the hearing, the court received into evidence the Agency's reports and heard testimony from Indian expert Regina Frye. Frye opined that continued custody of the children by the parents would likely result in serious physical or emotional damage to the children because of Michael's continued marijuana use. She expressed concern regarding the statements Michael made to the substance abuse counselor and concluded the children could not stay with Lauren because the parents were now living together. Consequently, she asked the court to order an out-of-home placement.

The trial court concluded there was a current risk to the children because it had "no clue" what was happening with the parents, what their living situation was, what type of programs they have been involved in, and whether they are treated or untreated. The court remarked that there has been no treatment for what led the children into the court system. Because Lauren was living with Michael, the children could not be returned to her. The court found both counts true by clear and convincing evidence, declared the children to be dependents, placed them in a licensed foster home, and found by clear and convincing evidence that removal of the children was appropriate under section 361, subdivision (c)(1).

It also found by clear and convincing evidence that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the children, that active efforts to provide services and programs designed not to break up the Indian family have proved unsuccessful. The court continued services to the family

consistent with the case plan, set the six-month review hearing for August and the 12-month review hearing for October, and ordered a psychological evaluation for Michael. Michael timely appealed.

DISCUSSION

I. *Standard of Review*

A parent may seek review of both the jurisdictional and dispositional findings on an appeal from the disposition order. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) When the sufficiency of the evidence to support a finding or order is challenged on appeal, the reviewing court must determine if there is any substantial evidence, that is, evidence which is reasonable, credible, and of solid value to support the conclusion of the trier of fact. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, all conflicts are to be resolved in favor of the prevailing party and issues of fact and credibility are questions for the trier of fact. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 16.)

"However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394 (*Savannah M.*).

II. *Jurisdictional Findings*

The juvenile court found that the children were persons described under section 300, subdivision (b) and took jurisdiction over them. Section 300, subdivision (b) provides that jurisdiction may be assumed if: "[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 or guardian to adequately supervise or protect the child . . . or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . mental illness . . . or substance abuse."

Under this section the Agency must show: "(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.) The third element requires a showing that at the time of the jurisdictional hearing, the child is at substantial risk of serious physical harm in the future. (*Savannah M., supra*, 131 Cal.App.4th at p. 1396.) Standing alone, past conduct is insufficient to establish a substantial risk of harm and "there must be some reason beyond mere speculation to believe [the past conduct] will reoccur. [Citations.]" (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565, 564.)

Michael concedes there is evidence to support a finding that marijuana and related paraphernalia was found in the home and that he used marijuana. He also does not challenge his statement that he suffered from PTSD or the fact that a restraining order had been issued against him for the protection of a social worker. He contends that these facts were insufficient to support the court's jurisdictional findings because the evidence

did not show a substantial risk of harm to the children in light of those facts. The Agency does not argue that the children suffered any physical harm or illness due to Michael's marijuana use and alleged mental illness, or Lauren's alleged inadequate supervision. Moreover, the record contains no evidence to support such a finding as a confirmatory drug screen on Bailey came back negative. Accordingly, we focus on whether the record contains substantial evidence showing Michael's marijuana use or alleged mental illness placed the children at substantial risk of serious physical harm in the future.

A. Michael's Marijuana Use

Our Legislature has decreed that "[t]he provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.) As a threshold matter, although Michael's mother expressed concern that he was possibly using methamphetamine, Michael never tested positive for methamphetamine, alcohol or any drug other than marijuana. Similarly, Lauren never tested positive for methamphetamine, any other drug or alcohol. Accordingly, we need not address the unsupported allegations of methamphetamine use and focus our attention on Michael's marijuana usage.

Courts have concluded that evidence of marijuana usage on the part of a parent, without more, cannot support a finding of serious harm or serious risk of harm to a child. (*In re David M.* (2005) 134 Cal.App.4th 822, 829-830 [mother's marijuana substance abuse and mental health issues of both parents not sufficient for jurisdiction as the Agency offered no evidence that these problems caused, or created a substantial risk of causing, serious harm to the children]; *Jennifer A. v. Superior Court* (2004) 117

Cal.App.4th 1322, 1346 [marijuana usage by mother did not support a finding of detriment to children where no medical professional diagnosed her with a substance abuse problem and no testimony linked her marijuana and alcohol use to her parenting judgment or skills]; cf. *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453 [jurisdiction supported based on evidence that father's use of marijuana had a negative effect on his demeanor towards the children and others].) Similarly here, we conclude Michael's marijuana usage did not support a finding of serious harm or serious risk of harm to his children.

Michael admitted using marijuana every morning to treat his headaches. There is no evidence, however, regarding how much marijuana he used, whether he used marijuana throughout the day, or whether his marijuana use impaired his ability to function in everyday life. Critically, there is no evidence linking Michael's marijuana use to an impairment of his parenting skills or judgment. While we agree with the Agency that marijuana *could* impair Michael's judgment and lead to a situation where he *might* be neglectful of the children, there is absolutely no evidence that this occurred. The record suggests Michael never acted inappropriately during his visits with the children as the caregiver expressed "no concerns" during the visits.

When the children were initially detained, the home smelled of marijuana. Lauren admitted that Michael had been "cooking" it the night before and that marijuana paraphernalia was left on the kitchen counter. When the children were detained, however, Cameron's presumptive drug screen came back negative for "all substances." Although Bailey tested presumptively positive for amphetamine and methamphetamine, a

confirmatory drug screen came back negative. Presumably, the presumptive and confirmatory drug screens for Bailey checked for marijuana or marijuana metabolites and found none, suggesting that despite the odor of marijuana in the home, the children were not exposed to marijuana or marijuana smoke.

Although Cameron stated that he saw his parents smoke inside, there is no information about where he was located when this occurred. Lauren and Michael both stated that marijuana was not used around the children, and Dominic claimed that he saw Michael smoke "once" and that Michael smokes outside. This evidence, when viewed in connection with the negative drug screens, does not support an inference that the children were exposed to secondhand marijuana smoke or that Michael constantly used marijuana throughout the day.

While the presence of marijuana inside a home could potentially pose a risk of harm to a child, the same can be said of many other substances such as prescription drugs, over-the-counter medications, alcohol, or cleaning products that are often accessible to curious children. The mere existence and use of potentially harmful substances in a home where children reside, without more, is an insufficient basis to assert jurisdiction. While we cannot fault the Agency for acting in an abundance of caution by removing the children from the home based on the existence of marijuana and marijuana paraphernalia within reach of the children, we are at a loss as to why the Agency did not return the children after the parents expressed their willingness to have their home checked for safety and submitted photographs showing a clean kitchen, a lockbox for medication, and a padlock on where the marijuana was grown.

B. Michael's Alleged Mental Illness

Subdivision (b) of section 300 does not contain a described formal procedure to determine if a parent suffers from a "mental illness" and evidence from expert witnesses is not needed before a court can take jurisdiction over a child. (*In re Khalid H.* (1992) 6 Cal.App.4th 733, 736-737.) Nonetheless, case law has defined "mentally ill persons" as those who are of such a mental condition that they are in need of supervision, treatment, care or restraint, or who are of such mental condition that they are dangerous to themselves or to the person or property of others. (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 490, superseded by statute as stated in *In re Cody W.* (1994) 31 Cal.App.4th 221, 224-225.) In California, one must be either a licensed psychiatrist or a psychologist to diagnose a mental disorder. (Bus. & Prof. Code, §§ 2052, subd. (a), 2053.5, subd. (a)(5), 2903.)

Here, the juvenile court found the evidence supported a finding that Michael's mental illness rendered him incapable of providing regular care to the children. However, review of the record reveals no evidence that any physician diagnosed Michael with PTSD or any other type of mental illness. There was also no evidence that Michael was ever hospitalized or treated for any mental illness. The information in the medical records showed that Michael consulted physicians with regard to physical health problems, but none of these records suggest Michael suffered from a mental illness.

Even if we assume Michael's claim that he suffered from PTSD is sufficient to show that he has a mental illness, the existence of a mental illness does not give rise to the presumption of harm or risk of harm to the child required for jurisdiction under

section 300, subdivision (b). (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 540.) Rather, the Agency must show precisely how the children were harmed and would be harmed by his mental illness. (*In re James R.* (2009) 176 Cal.App.4th 129, 136.) The Agency failed to make such a showing.

There is no evidence that Michael ever acted inappropriately in front of the children or that his purported PTSD impacted his ability to safely parent them. While Michael initially displayed rage toward the Agency and anger toward a family member for accusing him of using methamphetamine, there is no evidence that Michael transferred this anger to Lauren or the children. Although Michael has a criminal record, his history does not include any violent crimes. What we find particularly striking about this record is the dearth of information regarding Michael. We know from Michael's self-reports that he graduated from high school, served in the Navy, had high test scores, and worked in the software field since being released from the military. Apparently, no investigation was done to confirm these representations. Nor do we know whether Michael was employed.

On this record, there is insufficient evidence to support the finding that Michael's alleged mental illness placed the children at a substantial risk of serious physical harm and the juvenile court's finding of a risk of harm is merely speculative. (*In re David M., supra*, 134 Cal.App.4th at p. 830.)

Finally, this record does not support an inference that Lauren failed or was unable to protect or supervise the children. As we have detailed, Michael's marijuana use and

alleged mental illness did not pose a threat to the children. Moreover, Lauren always tested negative for any drug or alcohol use.

C. Conclusion

The children were developmentally on target, and there is no evidence that they were anything other than happy and healthy living with their parents. Cameron stated he was never alone, that he has never been touched inappropriately, and felt safe at home. While Bailey was too young to be interviewed, the social worker found no visible marks or bruises on him. Dominic also had no visible marks or bruises, had never been touched inappropriately, and felt safe with Lauren and Michael. While Dominic had seen Lauren and Michael argue, he never observed any physical altercations. Baxter conducted a home inspection, noting that the living room was clean and child appropriate and there were proper amounts of food in the home.

This was not a case where the Agency became involved because there was a referral of abuse or neglect due to inadequate supervision, Michael's marijuana use or alleged mental illness. Rather, there was an anonymous report that marijuana was used where children might have been present. While we do not condone Michael's marijuana use or intemperate behavior toward the Agency, the record does not support a finding that his marijuana use or alleged mental illness had *any* negative impact on the children.

In this situation, there were less drastic measures available to protect the children. (See, e.g., § 16506, subd. (b) [family maintenance services available without dependency adjudication where child is in "potential danger of abuse, neglect, or exploitation," and family is willing to accept services and participate in corrective efforts].) Notably, very

early in the case the parents displayed a strong desire to reunify with their children and indicated they were willing to have the house checked to ensure it was safe for the children.

In summary, for the foregoing reasons, we conclude that substantial evidence does not support the trial court's finding that jurisdiction was warranted under section 300, subdivision (b). Accordingly, we conclude that the jurisdictional orders must be reversed. All subsequent orders are vacated as the juvenile court had no jurisdiction to issue them. (*In re James R.*, *supra*, 176 Cal.App.4th at p. 137.)

DISPOSITION

The jurisdiction orders declaring the children dependents of the juvenile court are reversed. All subsequent orders are vacated as moot.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.