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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re MAVERICK M., a Person Coming Under
the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MEGAN M.,

Defendant and Appellant.

F063659

(Super. Ct. No. 10CEJ300198)

OPINION

APPEAL from orders of the Superior Court of Fresno County. Hilary A. Chittick,
Judge.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant,
Appellant and Respondent Megan M.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel,
for Plaintiff and Respondent

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Megan M. (mother) appeals from the juvenile court's dispositional orders taking
dependency jurisdiction over Maverick, removing him from mother's custody, placing
Maverick with his father, Scott M. (father), and providing mother with reunification

services and father with family maintenance services. On appeal, mother contends (1) the juvenile court erred in finding jurisdiction under Welfare and Institutions Code section 300, subdivisions (a) and (f),¹ because the findings are not supported by substantial evidence, and (2) the order temporarily removing physical custody of Maverick from her was not supported by evidence that removal was necessary to avoid a substantial danger to his physical health or emotional well-being. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORIES

At about 9:15 a.m. on February 21, 2009, Deniele V. dropped her two children, 17-month-old Ella and two and a half year old John, off at mother's house so mother could babysit them. Sometime after 11 a.m., Deniele received an hysterical call from mother. She drove over to mother's house. When she arrived, Ella was lying limp and unresponsive in mother's arms. The children's father, Todd V., also drove to the house. Emergency medical personnel responded to the scene after a 911 call was placed; Ella was transported to Community Regional Medical Center (CRMC).

At CRMC, doctors discovered that Ella had sustained multiple injuries on her head and abdomen, and edema (swelling of the brain). Ella was transferred to Children's Hospital Central California (CHCC) the following day as her brain continued to swell. Dr. John Kinnison, the CHCC child advocate, reported that Ella's injuries included a skull fracture on the right side of the back of her head, subarachnoid and subdural brain hemorrhages, extensive bilateral edema, extensive bilateral retinal hemorrhaging involving all three layers of the retina, an extensive area of bruising across her left temple, bruises on her left cheek, abdomen and right hip, and a suspected mesenteric root hemorrhage with a palpable tear of the small bowel mesentery. Over the next two days, Ella's condition worsened. On February 24, Ella's parents requested CHCC staff

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

withdraw all medical care after a CHCC doctor determined Ella's prognosis for recovery was extremely poor. Ella died that day shortly after medical care was withdrawn.

The Police Investigation

Reedley Police Department Officer Isaac Almanzar responded to mother's home on February 21. Mother told Officer Almanzar that Ella was lying on the bed and "the next thing she saw was the baby falling backwards off the bed." He checked the area where Ella fell, but did not find anything hard on which Ella could have hit her head. A CRMC trauma nurse, Allen Collison, told the officer Ella's injuries were not consistent with mother's explanation.

Later that day, mother provided a statement to Detective Mark Diedrich. She told him the children were behaving normally when they were dropped off at her home. Ella became fussy when she put the children down for their naps, so she took Ella into her bedroom, where the two sat on opposite sides of the bed. When mother lifted herself off the bed to reach for something, Ella, who was standing, fell backward off the bed and onto her head, a distance of approximately three feet. When Detective Diedrich asked mother if Ella had any bruises before her fall, mother said she had an old bruise on the right side of her face, and she sustained bruising on the left side of her face from hitting the carpeted floor when she fell. Dr. Quetzalsol Lopez at CRMC advised Detective Diedrich that Ella's injuries were not consistent with a fall.

Detective Diedrich interviewed Ella's parents on the day of the incident. They told him that Ella was not injured before she was dropped off at mother's house and the children were in good spirits. Detective Diedrich interviewed Ella's parents again the next day, this time in the presence of a Department social worker. The parents denied that Ella had injuries or bruising when Deniele dropped the children off at mother's house. Detective Diedrich asked them about the bruise on Ella's right cheek. The parents explained she got the bruise, as well as something that looked like a blood blister on the back of her ear, when she walked into a table at their house the week before, but

they thought the injuries had healed and disappeared. They denied that Ella had medical problems, but did say she bruised easily due to her light complexion. They also said it was difficult to get her to take a nap. The social worker recalled that Deniele said Ella sustained the scab behind her ear when she ran into a coffee table the week before and Deniele did not know of any other injuries.

Detective Diedrich interviewed mother again on February 23, 2009. She said that when Deniele dropped the children off at her home on February 21, Ella was active and running around. When Ella did not fall asleep for her nap, mother brought her into mother's bedroom and placed her on the bed, where Ella played with her doll. Mother was also sitting on the bed, and when she moved to grab something, the bed shook and Ella flipped backwards, hitting her head on the carpeted floor. There were no tables near the bed. Mother thought Ella would start crying, but when she picked Ella up, she was not crying and her eyes were closed. Mother denied spanking the children. Detective Diedrich asked mother if Ella had any injuries when she was dropped off that morning. Mother said that she had a bruise on her right cheek, which was caused when she ran into Deniele's coffee table, and she fell in the bathtub a week before. Mother said Ella sustained scratches on the left side of her face after the fall from the bed. Mother did not know what part of Ella's head made contact with the floor. Mother was unable to tell Detective Diedrich about any other bruising on Ella's body, explaining that she did not look at Ella to check for additional bruising.

In the opinion of a number of medical professionals involved in Ella's treatment, her injuries were not consistent with a fall from a bed. Dr. Kinnison told Detective Diedrich that Ella's injuries were more consistent with abuse than a fall from thirty inches, as there was no explanation how a fall backward could cause extensive bruising over Ella's left temporal region, a posterior skull fracture and a suspected abdominal hemorrhage. Based on the medical findings and stated history of a three-foot fall backward onto a carpeted floor, the injuries were highly suspicious for non-accidental

trauma. According to Dr. Kinnison, medical literature did not support extensive injuries of this nature being caused by short falls and the leading diagnosis was inflicted head trauma.

Dr. Michael Chambliss conducted an autopsy on February 25, 2009, which Detective Diedrich attended. Dr. Chambliss found that Ella had suffered extensive injuries, advised the detective the preliminary finding of death was blunt force trauma to the head and abdomen, and said he considered the case to be a homicide. Dr. Chambliss further explained the injuries were acute and it was unlikely she sustained them before February 21, 2009. In addition to Ella's other injuries, Dr. Chambliss discovered that Ella had two isolated symmetrically placed posterior 4th rib fractures, but he did not see any soft tissue or muscular hemorrhage. Blunt force injuries to the head included a linear fracture more than 4 1/2 inches long of the right occipital and parietal bones of the skull, a thin subdural hematoma and mild subarachnoid hemorrhage, and a five inch by five inch bruise on the left side of the head. Blunt force injuries to the abdomen included a large hematoma at the root of the mesentery, a bruise in the right inguinal area and a bruise in the middle of the abdomen. On November 12, 2009, Fresno County Coroner Dr. David Hadden certified Ella's cause of death as blunt force trauma to her head and abdomen and the manner of death as homicide.

In April 2010, mother was arrested on a warrant for criminal charges of murder and assault on a child causing death. She was released on bail and was awaiting trial throughout the course of the dependency proceedings.

The Dependency Petition

In August 2010, mother gave birth to Maverick. At that time, mother and father, who were married, were living together at the maternal grandmother's home. On September 2, 2010, police removed Maverick from mother's care and custody due to the pending felony charges. Maverick was placed in the care of his father, who separated from mother and moved in with Maverick's paternal grandparents, while mother

continued to live with the maternal grandmother. The Fresno County Department of Social Services (Department) agreed to allow mother to have four one-hour visits per day so she could breastfeed him, with her visits to be supervised at all times by various third parties.

On September 3, 2010, the Department filed a dependency petition alleging that Maverick came within the provisions of section 300, subdivisions (a) (serious physical harm) and (f) (caused another child's death through abuse or neglect). The petition alleged under subdivision (a) that Maverick was at substantial risk of suffering serious physical harm inflicted nonaccidentally by mother in that, while mother was babysitting Ella on February 21, 2009, Ella sustained blunt force injuries to her head and abdomen that resulted in her death, and Maverick was at similar risk of abuse in mother's care. The petition further alleged under subdivision (f) that Maverick was at substantial risk of suffering severe physical harm in mother's care based on blunt force injuries to Ella's head and abdomen sustained while in mother's care and Ella's resulting death.

On September 14, 2010, the juvenile court ordered Maverick detained from mother and gave her reasonable supervised visits at the paternal grandparents' home of no less than four times per day for one hour at a time.

The Jurisdictional Hearing

A contested jurisdictional hearing was held over eight days in March and April 2011. Testimony was received from ten percipient witnesses and four expert witnesses. As pertinent here, Ella's mother, Deniele, testified that mother began babysitting Ella and John full time around October 2008. Before February 21, 2009, Ella was injured when she hit the tip of her ear on the corner of the living room coffee table while playing with toys, but Deniele was not sure when it happened or who saw it happen, but thought it was either her husband or herself. Ella bruised her ear lobe, but the ear was not cut and did not bother her; she did not require medical treatment. Deniele did not remember if she

told people at the hospital that Ella had no prior injuries, but she did remember law enforcement asking her about the coffee table incident.

On Friday, February 20, 2009, the day before the fall at mother's house, Deniele took her children to a friend's house for a play date with the friend's five children, who ranged in age from five to 13. That evening, they ate dinner at the home of another family, who also had children with whom Ella and John played. Deniele did not recall Ella being cranky after the dinner. Nothing transpired during that day that concerned Deniele and she was unaware of any injuries Ella suffered at either home that would cause her concern. When she put Ella to bed that night, it was a normal bedtime and Ella did not complain of any stress.

Deniele confirmed she had a booster seat that attached to the top of a dining room chair; the booster seat had two straps, one that held it to the back of the dining room chair and a second that went under the chair's seat. A child was strapped into the seat with a t-shaped strap that went between the child's legs and a second strap that went across the child's stomach, and a tray attached to the booster seat. Deniele was not sure if the strap fell above the navel. It was Deniele's custom to strap Ella into the seat and attach the tray. Deniele used the booster seat only in the carpeted dining room. The booster seat was strapped to different height chairs; sometimes the chairs were taller and sometimes lower. When mother's counsel asked if there was an incident where Ella fell out of the booster seat, Deniele responded, "Not that I remember." Deniele did not remember telling mother that John pushed Ella over in the "high chair" and Ella hit her head, and did not recall it happening. She testified that it did not happen, but if it had, she would have told mother about it. Deniele was not aware of any incident in the year before February 21, 2009 where the booster seat fell over or was pushed over with Ella in it.

Deniele testified about previous injuries Ella had sustained. Her left arm was injured a couple of months before February 21, 2009, but Deniele was not sure how it occurred. Ella also was injured under her chin, but mother did not recall when that

happened. Deniele remembered being asked at the hospital about an older bruise on the right side of Ella's face, which she thought occurred when Ella ran into the coffee table. Deniele did not recall Ella having bruises on her abdominal area when she dropped her off at mother's house. While Deniele did not recall Ella being injured in the bathtub at her house, she did recall that around mid-December of 2008, Ella no longer wanted to take baths at home, although mother told Deniele she had no trouble bathing Ella at her house. Deniele did not recall any other falls Ella had in the month before February 21, 2009. Deniele was not aware of any major accidents or anything else that happened to Ella before February 21, 2009 that could result in her having suffered a broken rib.

Ella's father, Todd, testified he did not recall hearing that Ella fell backwards out of a high chair and hit her head at his home. Todd vaguely recalled Ella being injured when she bumped into a coffee table; he believed Deniele told him about the incident and that he did not witness it. He did not believe he saw any injuries on Ella from that incident. Todd was not aware of any incident in which Ella could have sustained a broken rib. On the evening of February 20, 2009, he was at the same friends' house as Deniele and the children. Ella was normal and he did not remember her being cranky. He was not with Ella all day on February 20; he believed he worked that day, but did not know when he got off work, although he typically worked from 5 a.m. to 2 p.m. He did not recall seeing any bruising on Ella's abdominal area immediately before she was dropped off at mother's house on February 21.

Detective Diedrich was assigned to the case on February 21, 2009. In conducting his investigation, he first went to CRMC, where Dr. Lopez told him Ella's injuries included a fractured skull and some internal swelling and were inconsistent with a fall from a bed. Detective Diedrich first interviewed mother by telephone on February 21. During that interview, mother told him Ella was standing on the bed right before she fell off. Detective Diedrich did not recall asking mother whether Ella had been involved in any prior falls and confirmed no such question was in his report.

The first time Detective Diedrich saw mother was when he interviewed her at the Reedley Police Department on February 23, 2009. The interview was recorded. Detective Diedrich asked mother about whether Ella had bruising from prior injuries, but he did not ask her about prior falls. Later that day, while at mother's house to take pictures and talk about what happened, mother told Detective Diedrich that Ella was sitting "Indian-style" on the bed before she fell.

Detective Diedrich interviewed Ella's parents together at CRMC on February 21. Both Todd and Deniele told him Ella was not injured when she arrived at mother's home that day. He conducted a records check on mother and father, and determined they had no criminal history or record of violence. He interviewed Ella's parents again on February 22. Detective Diedrich asked them if Ella had any injuries or bruising before being dropped off; they said she did not. Detective Diedrich then brought up the bruise on Ella's right cheek. Ella's parents explained it was a blood blister type bruise behind her ear and a bruise to the right cheek that she got from walking into a coffee table. Detective Diedrich did not recall them telling him who witnessed the incident and he did not think he asked them. They said the incident happened in the past week.

On March 3, 2009, Detective Diedrich interviewed Ella's parents a third time. He again asked them about past injuries, but not about prior falls. Deniele said mother told her Ella hit her chin on the playpen, which bruised her chin. Deniele told him in the week preceding February 21, 2009, mother watched Ella and John the previous Tuesday and Wednesday, while Deniele was home with the children on Monday, Thursday and Friday. On the night of Friday, February 20, the family went to a friend's house for dinner. Detective Diedrich asked Todd about past injuries; he described Ella as a tough kid who would not back down, and she recently was chasing her brother when she bumped her head on the coffee table and got a bump on her ear. Todd gave other examples of Ella rough housing with John and getting bruises.

After mother's arrest, Detective Diedrich obtained a large number of recorded jail calls involving mother, some of which he listened to. Detective Diedrich recalled listening to a conversation between mother and her grandmother, Barbara R., in which Barbara asked mother whether she had conveyed the fact that John had pushed Ella over in a highchair, and she fell and hit the back of her head. Detective Diedrich did not recall mother saying on the recording that she told her attorney, Layne Hayden, about the fall. Neither Deniele nor Todd told him they were aware Ella had fallen in a highchair before February 21, 2009. However, he did not ask Deniele about that. At no time during his investigation of the case did mother tell him she knew that Ella had fallen from a highchair before February 21, 2009.

Gregory Reiber, M.D., a forensic pathologist, was initially contacted by the Fresno County District Attorney's office in November 2009. At that time, he opined a single fall off a bed did not explain the totality of Ella's injuries and it appeared the manner of death was homicide, as a fall straight off a bed could cause the injury to the back of the head but would not explain the bruise on the left side of the face.

After receiving additional information from mother's counsel, however, Dr. Reiber re-analyzed the case to determine the likely cause of Ella's injuries. The information he considered was (1) a recorded interview of mother, in which she told a consistent story that Ella fell off the bed, she did not see how Ella landed, the result was a bruise on the left side of her face, Ella did not cry and she was completely unresponsive immediately after the fall; (2) a jail telephone call recording which relayed there was a fall when a child was knocked over while in a booster seat that was strapped to a standard dining chair, which occurred in the home of Ella's parents; and (3) a declaration from attorney Layne Hayden in which he stated mother, his client at the time, told him that Deniele told her John had pushed Ella over while she was sitting in the booster seat and fell, hitting her head.

Based on this information, Dr. Reiber opined that if Ella was pushed over while secured in the booster seat, even if it was attached to a shorter chair, the fall would be sufficient to cause a fracture to the back of her skull, and the strap across the waist, as well as the tray, could have caused the injuries to Ella's ribs and abdomen. A fall from a bed could have caused the bruise on Ella's left temple, although the pattern of the bruise would be difficult to explain just by landing on carpeting, and a better explanation would be if Ella hit a woven hamper while falling. Dr. Reiber also believed the bruise could be caused by a full force fall to the left side of the face, which could happen if the child was falling because she was unconscious due to a head injury suffered the day before.

Dr. Reiber would not expect an immediately devastating injury from a fall while in a booster seat. If the fall were unbroken and the head took the primary impact, there could be a fracture and resulting concussion, and the child could go through a period where she seemed okay and then suddenly crash as the brain started to swell. To a non-physician, the child could seem fine, although she might be in pain, crying and persistently fussy as the discomfort increased. Dr. Reiber would expect there to be immediate obvious crying and discomfort, but other symptoms would depend on how rapidly problems develop. The child might have a decreased appetite from the abdominal injury and would have a degree of fussiness, perhaps alternating with times of unusual sleepiness, and perhaps be less active than normal. Ella's fussiness while at mother's home when she was put down for a nap is consistent with a fall the day before.

Based on the likelihood of a previous fall and evolving brain injury, Dr. Reiber believed it was very likely Ella was lapsing into unconsciousness while sitting on mother's bed, especially in light of Ella's complete unresponsiveness after the fall. The second impact to the brain from the fall from the bed would hasten the development of brain swelling, which was very severe by the time Ella arrived at the hospital. According to Dr. Reiber, the booster seat information took what he considered unexplainable injuries and provided a logical explanation, i.e. a fall from a booster seat, subsequent

deterioration of the child to the point of ultimately losing consciousness, and a subsequent fall off a bed, all of which made sense given the spectrum of findings in this case. With this combination of injuries, Dr. Reiber would consider Ella's death accidental.

Dr. Reiber admitted his changed opinion was based on the assumption that the booster seat fall actually occurred the day before Ella was injured at mother's home, and her injuries would be more difficult to explain if the booster seat fall occurred a week before the second fall. A fall from a bed would not have caused all of Ella's injuries and her injuries could fit with being inflicted by someone. Dr. Reiber agreed that if the fall from the booster seat did not occur, there was nothing in the medical records inconsistent with the injuries having been sustained the morning Ella was in mother's custody. Moreover, without an alternative explanation for the injuries, the alternative he was left with was his original opinion of homicide. Dr. Reiber testified about a possible scenario that could have caused Ella's injuries the morning of February 21, which includes a combination of actions: blows to the abdomen, such as punching or kicking, that would cause the mesentery to bleed; striking her while she was lying flat on her back on the ground with enough force to crack the two ribs in the back; and another episode where she was struck with something on the left side of the face, bruising it, and then being knocked over and fracturing her head.

Dr. Chambliss testified he originally opted to call Ella's death a homicide because only one of the three separate locations of injury, namely the skull fracture, was explained, while the other two locations, the bruise on the left side of the face and the abdominal injury, were unexplained. Dr. Chambliss signed the death certification pending further investigation; he was waiting for additional information from police so he could sort out the other two injuries, but he never received it.

Dr. Chambliss, however, now had "some doubt" as to whether Ella's death was a homicide, as her death "could be an accident" depending on the scenario that occurred to

produce the injuries. His opinion changed based on information mother's attorney provided of an additional possible event the day before February 21, 2009, in which the child was secured in a booster seat, pushed out of the chair by a sibling, and landed on her head, although he was not sure if the child landed on the side or back of her head. A fall while in a booster seat could explain the following injuries, depending on how the child fell: (1) the injury to the mesentery could be caused by the strap on the booster seat that went across the abdomen, which would press in the mesentery and create injury that could look like child abuse; (2) the rib fractures could be caused by the booster seat going up against the rib cage if the child fell backward; and (3) the fracture to the back portion of the head.

In order to sustain the skull fracture, Ella would have to have fallen backwards on the right side of her head, with her head either hitting the floor or the back portion of the chair as the chair hit the floor. Dr. Chambliss had a difficult time seeing how the booster seat fall could have caused the symmetrical rib fractures, which were not visible until autopsy. While Dr. Chambliss agreed the abdominal injuries could be caused by a belt against the abdomen, that depended on how Ella was belted into the seat. He admitted that quite often a child who falls backwards sustains more superficial injuries than Ella's, whose injuries were deeply placed and tended to be seen with child abuse. The abdominal injuries could have been caused by a blow to the abdomen with something such as a fist.

Dr. Chambliss opined that if there was a fall in a booster seat the day before a child fell off the bed, it would be more common for the child to be vomiting or become unresponsive within a matter of minutes or a few hours after the first fall; while a delayed decompensation, where the brain swells and the child becomes unresponsive the next day, could happen, it would be a rare occurrence. The abdominal injuries would not necessarily have caused problems for the child during the time between the falls. According to Dr. Chambliss, all of the injuries were not explained completely by the fall

off the bed at mother's residence. Assuming there was no fall in a booster seat, the mechanism of injuries on February 21 could be an initial or primary attack to the left side of the face leading to a fall in which the secondary impact fractured the right back of the head, although that does not explain the abdominal injury. All three areas of injury could be explained by a blow to the abdomen that caused the child to fall backwards and hit the right back of the head, with the head rotating so the left side hit something to cause the bruise.

Dr. Janice Ophoven, a forensic pathologist with special training in pediatric forensic pathology, was asked to evaluate the pattern of Ella's injuries taking into consideration the possibility of two events, the first at her home and the second at mother's home. The mechanism of injury as described by mother regarding the fall at her home was consistent with the injury to Ella's left temporal region, and in Dr. Ophoven's opinion, Ella's other injuries were consistent with a fall from a booster chair onto the surface as described. Pursuant to the clinical history, Ella was suffering from severe neurologic decompensation when she arrived at mother's house and very quickly showed signs of uncontrollable increased intracranial pressure which resulted in strokes to the brain and inevitably led to her death. Dr. Ophoven opined that the most appropriate conclusion for the certification of death that was scientifically consistent with the findings was an accidental death.

When Dr. Ophoven first reviewed the case, she was aware there was evidence of blunt force impact to the left side and back of the head, as well as to the retroperitoneal tissues and deep mesentery, and bilateral rib fractures over the fourth ribs. She informed mother's counsel the injuries were consistent with two impacts and a single fall from the bed onto one side did not explain the mesenteric bleeding or a second impact on the other side of the head, which meant there was either another impact or concerns for foul play. It was puzzling to Dr. Ophoven that Ella's intracranial pressure "got really high really fast," as such an increase usually would not occur with a recent assault. If the fall from

the booster seat occurred within 72 hours of her hospitalization, Ella might have been more irritable and uninterested in having anyone handle the back of her head. While she could have been awake and “up and around,” she would not have acted like she was “at a birthday party.”

If there was no history of a fall in a booster seat, then the retroperitoneal hemorrhage and posterior occipital fracture are unexplained, and Ella’s injuries were caused by blunt force trauma that could have occurred within a 72-hour window. Dr. Ophoven confirmed that a single fall from the bed did not explain all of Ella’s injuries, which meant that regardless of whether the fall from the bed occurred, Ella was subjected to some other trauma. While Dr. Ophoven could not tell whether the other trauma occurred in the five hours before Ella entered the hospital, nothing in the medical records was inconsistent with the injuries occurring during that period.

It appeared to Dr. Ophoven that Ella had malignant hypertension that progressed much faster than would be expected in the usual blunt force impact scenario, although it was possible. In Dr. Ophoven’s opinion, the course of the pressure was inconsistent with an injury occurring between 8 a.m. and the time Ella went to the hospital. A note in the CHCC records suggested to Dr. Ophoven that the skull fracture may have occurred before the day Ella came into the hospital. In addition, the amount of blood in the back of Ella’s abdomen could be explained by the inability of Ella’s blood to clot throughout her hospitalization and did not necessarily mean she was severely punched.

Dr. Kinnison testified that after reviewing the transcripts of witness testimony from the jurisdictional hearing, including the testimony of Drs. Reiber, Chambliss and Ophoven, as well as that of Detective Diedrich, Officer Almanzar and Ella’s parents, his original assessment of the case had not changed, i.e. that he did not have sufficient history to explain the injuries that were visualized when he initially consulted on the case, therefore he suspected that non-accidental trauma could be a likely etiology for the injuries. His original opinion was based on the history provided to him that Ella had

fallen off a bed to the floor, which led him to suspect that non-accidental trauma could have occurred based on the degree of Ella's injuries.

Dr. Kinnison considered the alleged fall from a booster seat the day before. While he agreed that a fall backwards from the height of the booster seat could cause an occipital skull fracture and small subdural bleed, he had a difficult time saying that the t-strap on the booster seat definitively explained the mesenteric tear, as he did not know where the strap lied and in a fall backward, the strap would pull down on the thighs and not necessarily the abdomen. Moreover, severe debilitating intracranial injuries are not usually seen from falls of that height. He also had difficulty ascertaining if the fall could have caused the rib fractures, since he was not certain if the chair was a flat object or where the chair hit her on the back.

If the booster seat fall did not occur, Dr. Kinnison was still of the opinion Ella's injuries were suspicious of non-accidental trauma. He agreed the injuries to Ella were inconsistent with a single fall from a bed. When originally assessing Ella's injuries, the only information Dr. Kinnison had regarding the mechanism for injury was that Ella fell backwards off the bed. Knowing that a child could not land both on the back of her head and the side of her head at the same time, he determined there had to have been a second mechanism for injury.

Dr. Kinnison agreed it could not be determined from the injuries whether they occurred within four or five hours, or 72 hours, of Ella's hospitalization. While he agreed with Dr. Ophoven that it would be unusual for the intracranial pressure to be so high if a fall occurred shortly before emergency personnel were contacted, he disagreed the pressure was inconsistent with trauma occurring within four hours. Dr. Kinnison opined that a child who has been injured, in most circumstances, would be fussy, show some irritability, may have nausea or loss of appetite from abdominal trauma, would show pain or tenderness or favor a certain area if there was a fracture, may not like to be picked up if there were rib fractures, may have difficulty sleeping if there were a posterior skull

fracture, and may have sleepiness or seizures from blood in the subdural spaces. During his consult, he did not receive information from anyone that these things existed; he was told Ella was healthy when she was dropped off. Dr. Kinnison agreed it would be possible for Ella to have sustained all of her injuries between the hours of 9 a.m. and 12 a.m.

After hearing oral argument, the juvenile court found the petition's allegations true. The court explained a child was dead from significant injuries, which the experts all agreed were inconsistent with a single fall from a bed; therefore, the issue before the court was whether the evidence showed the injuries could have been sustained that morning while under mother's care or earlier. The court stated the injuries were consistent with either scenario, with the exception of the injury to the side of the face, although Ella's behavior was marginally more consistent with the injuries occurring that morning as opposed to before. Moreover, the court noted there not only was no evidence before it that any other circumstance occurred to cause a fall before that morning, there was affirmative evidence of no other injury, as Ella's parents consistently denied a prior injury. The court concluded it was left with no explanation for the injuries other than that they occurred that morning, and due to the low burden of proof of preponderance of the evidence, it was compelled to find jurisdiction under both subdivisions (a) and (f).

The juvenile court granted mother's request for increased visitation pending the dispositional hearing, and authorized additional visits supervised by a third party from 6:30 to 9:30 p.m. daily, which increased mother's visitation to eight hours per day.

The Dispositional Hearing

The dispositional hearing was originally set for May 24, 2011. In a report prepared for that hearing, the Department recommended that Maverick remain placed with father, who would receive family maintenance services, and mother be provided

reunification services. The Department asserted that while mother met the criteria for denying services under section 361.5, subdivision (b)(4),² in that Ella was found to have suffered severe physical harm while in mother's care which resulted in her death, the Family Reunification Services Initial Review Panel (FRSIRP) determined it would be in Maverick's best interest to provide mother with reunification services. The Department pointed out that Maverick was placed with father, who was non-offending, mother and father remained in a relationship with each other and stated they desired to live as a family with Maverick, and while mother and father were residing separately, their living arrangement was put in place to comply with their case plan and juvenile court orders. The Department noted mother had been visiting Maverick up to eight hours per day, Maverick was comfortable in her care and she interacted appropriately with him. Based on the amount of time mother had been able to visit Maverick and his positive interactions with her, it appeared he had developed a significant bond with her. While mother had not been offered services as of the writing of the report, she had completed a parenting program on her own. During a May 4, 2011 staffing meeting, mother stated she was willing to begin services as soon as possible in order to reunify with Maverick.

Nevertheless, the social worker believed prognosis for successful reunification was guarded, as mother had not accepted responsibility for Ella's injuries and death, had not acknowledged to the Department any behaviors, mental issues, or lack of skills that would cause risk to Maverick, and while she was willing to participate in services, she had not acknowledged any problems, such as anger, frustration, or lack of coping or

² Section 361.5, subdivision (b)(4) provides that "[r]eunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, any of the following: . . . [¶] (4) That the parent . . . of the child has caused the death of another child through abuse or neglect." If this provision is found true, the juvenile court may still order reunification services if it finds, by clear and convincing evidence, that reunification is in the child's best interest. (§ 361.5, subd. (c).)

parenting skills, for which she needed services. Moreover, mother had not shown insight into negative behaviors or reactions with regard to how she expresses anger or copes with stress. The social worker opined that mother's willingness to participate in services appeared to stem from a desire to reunify with her son rather than any self-identified need for behavioral change.

On May 17, 2011, the juvenile court granted mother's ex parte request for family reunification services pending the dispositional hearing. The court ordered the following services provided to mother: (1) a psychological evaluation; (2) a domestic violence assessment and recommended treatment; (3) a mental health assessment and recommended treatment; and (4) a parenting class. The juvenile court continued the dispositional hearing to June 9, 2011. The hearing was continued several more times and finally began on September 28, 2011.

By August 2011, the Department changed its recommendation on mother's reunification services, asserting she should be denied services under section 361.5, subdivision (b)(4) and it would not be in Maverick's best interest for her to receive services. Mother had completed a psychological evaluation with Dr. Laura Geiger, who determined that while mother's intelligence was normal and she did not have a major mental disorder, her "insight was only fair" and she presented as "denying many common frailties." According to Dr. Geiger, mother tested as "having many subtle ways by which she would avoid facing her own internal conflicts," and her motivation to change and potential for insight and improvement appeared only fair. Dr. Geiger identified mother's current difficulties as young adult identity issues and some transitory, highly suspicious states that apparently were related to her legal situation. Dr. Geiger recommended mother receive weekly individual psychotherapy to address her identity crises and provide the emotional support needed to explore how she handles frustration and resentment. Dr. Geiger saw minimal risk of physical abuse of Maverick, but stated there was emotional risk given the court cases mother was facing. Mother completed her

domestic violence inventory, in which she scored in the medium risk range for violence; such scorers are often impatient, easily annoyed, have a rather low frustration tolerance level, and can be provoked, although they are not violence oriented. The assessor noted that mother minimized the incident regarding Ella's injuries and recommended mother participate in a 52-week child abuse batterer's treatment program.

The Department social worker noted that mother had failed to accept any responsibility for Ella's injuries and death, had not acknowledged any behaviors that would cause risk to Maverick, and had not expressed a need to participate in services. While Maverick had developed a significant bond with mother due to her liberal visits, the social worker opined Maverick needed a responsible and stable care provider who would be able to meet his needs. It was unlikely mother could safely care for Maverick within the six month time frame in which reunification services could be provided, as the prognosis for successful reunification was poor due to the severity of Ella's injuries, mother's continued denial of her involvement in them, her failure to identify any need for services and her lack of expressed insight.

The Department also recommended that dependency jurisdiction continue and father be provided family maintenance services. The Department asserted there was sufficient detriment to warrant continued court supervision as mother and father wanted to live together as a family with Maverick, and father was unable to provide the Department with a plan to protect Maverick should court supervision be withdrawn since he steadfastly believed in mother's innocence.

In a September 2011 addendum report, the social worker recounted a verbal report received from mother's therapist, Jeanette Lopez LCSW. Lopez told the social worker that mother had good coping skills and did not have a personality disorder. Lopez did not observe anger issues with mother and she did not have a character defect. Lopez diagnosed mother as having post traumatic stress disorder (PTSD). While Lopez believed mother was naïve in the way she handled the crisis situation with Ella, she did

not believe mother caused Ella's injuries and thought the juvenile court wrongly determined mother caused Ella's death. Lopez believed mother was genuine rather than manipulative. The social worker noted that since Lopez did not believe the jurisdictional findings were correct, she had not considered the findings in developing and implementing mother's treatment plan, and the treatment was not assisting mother in acknowledging responsibility for Ella's injuries and death, or increasing her ability to safely care for Maverick.

In another addendum report, the social worker reported that while mother had completed a child abuse intervention (CAI) intake appointment, the agency refused to enroll her in the program because she denied any responsibility for Ella's injuries and death. While mother was referred to another agency for child batterer's treatment, she refused to attend the intake appointment until after the dispositional hearing.

At the dispositional hearing, the Department submitted on its reports. April R., Maverick's maternal grandmother, testified on mother's behalf. Mother, who was 21 years old, had worked with children since she was 13 years old by babysitting, working as a classroom tutor, being a cheerleading coach, and working in her church's nursery and after-school program. April had never seen mother strike, threaten, or yell at a child. To April's knowledge, no one else had ever accused mother of hurting a child in any way. April had observed mother with Maverick; mother was patient and loving with him, and they were very closely bonded.

Dr. Ophoven also testified. She acknowledged her prior testimony that Ella's blood was not clotting when she arrived at the hospital. In Dr. Ophoven's opinion, if Ella had been clotting properly, the injury to the mesentery was not a life threatening one and would have healed on its own without treatment. She further opined the amount of blood seen in the mesentery at postmortem did not reflect the degree of force involved. The clotting problem also would make it difficult to interpret Ella's bruises, which appeared more pronounced than they actually were. Because Ella could not clot, Dr. Ophoven

would not consider the spectrum of abdominal abnormalities seen postmortem a serious pattern of trauma. In Dr. Ophoven's opinion, Ella's injuries, specifically the increased cranial pressure resulting from the brain swelling, caused her clotting problem, which is a fairly typical complication from deterioration of brain function following blunt force impact.

Mother's therapist, Lopez, testified that mother is a high functioning normal individual whose personality type does not include having violent outbursts, abusing children, or having impulse anger control issues. Based on her treatment of mother, Lopez did not believe mother was a physical or emotional risk to Maverick, and she thought mother could care for Maverick unsupervised without risk to him. Mother no longer suffered from PTSD and therapy sessions had helped her cope with the stress of the situation. Lopez believed mother when she told Lopez she did not commit the acts with which she was charged. Lopez admitted that if it was her opinion that mother committed the crime, there would be a risk to Maverick. Lopez thought mother needed services to help her process the trauma of being falsely accused. Apart from the counts the juvenile court found true, there was nothing in mother's background or upbringing that Lopez believed would make mother a greater risk of abusing a child.

Dr. Khaled Tawansy, an ophthalmologist on staff at CHCC, testified that he reviewed the medical records and police reports in this case. He explained the extensive hemorrhaging in Ella's retinas could have been caused by the rise in intracranial pressure, which interferes with the drainage of blood from the eyes, rather than by inflicted trauma. In Dr. Tawansy's opinion, the intracranial pressure was consistent with two impacts and he would not have expected to see intracranial pressure as high as it was if there was only one course of trauma. While the speed by which Ella deteriorated was more rapid than would typically be found if the injuries occurred within a few hours before emergency personnel were called, it was not impossible. The retinal hemorrhages could have been caused by a blunt injury to the head which led to a rise in intracranial pressure and in turn

caused a secondary retinal hemorrhage. He could not say for sure whether the blunt trauma was inflicted or accidental, or a series of two accidents.

The social worker assigned to the case testified about her conversation with Lopez regarding mother's progress during therapy. The social worker was very concerned when Lopez told her she believed mother did not commit the acts, as therapy then would not be addressing the reasons the family was involved with the Department. The social worker admitted, however, the recommendation for mental health treatment sent to the therapist from the mental health assessment agency stated that mother had been accused of homicide, she reported feeling supported by her immediate family but ostracized from her community and church, her criminal trial was pending, and she would benefit from the support of a mental health clinician "during this difficult time." The social worker did not ask the therapist to include in therapy the underlying issues of the offense, as those issues are usually addressed in domestic violence treatment.

The social worker believed there would be a substantial risk to Maverick's health and safety if he were returned to mother's care and custody, even with family maintenance services or informal supervision. This was because mother had not accepted or acknowledged responsibility for Ella's injuries, which made it difficult for her to progress in services. While mother needed to make changes based on the counts that were found true, the social worker did not see how mother would be able to make those changes as she denied harming Ella or having issues, such as with anger or coping.

The juvenile court continued the hearing to October 17, 2011. After hearing oral argument, the juvenile court found section 361.5, subdivision (b)(4) did not apply because it could not find mother caused the death of a child by clear and convincing evidence. The court made Maverick a dependent, placed him with father, and ordered family maintenance services for father. The court found by clear and convincing evidence it was required to remove Maverick from mother's custody in light of the severity of Ella's injuries and her death, as well as mother's failure to address any issues

in the intervening time period. Consequently, the court removed Maverick from mother's custody and ordered reunification services for her. The court ordered a total of 40 hours of supervised visitation per week, to be divided in whatever way the Department and parents could agree, but prohibited overnight visits. The court further ordered that visits could occur anywhere, not just at father's home. The court set a combined 6- and 12-month review hearing for November 21, 2011.

DISCUSSION

Jurisdictional Findings

Mother contends there was insufficient evidence to support the juvenile court's jurisdictional findings. We disagree.

Section 300 and its subdivisions describe those minor children over whom the juvenile court may exercise its dependency jurisdiction. The juvenile court's jurisdictional finding that a child falls within one of these statutory descriptions must be supported by a preponderance of the evidence. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; § 355, sub. (a).)

On review, we determine whether the juvenile court's jurisdictional finding is supported by substantial evidence. (*In re P.A.* (2006) 144 Cal.App.4th 1339, 1344.) In so doing, we "must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) Under this standard, the juvenile court, not this court, assesses the credibility of witnesses, resolves conflicts in the evidence, and determines where the weight of the evidence lies. (*Id.* at pp. 52-53.) "We affirm the rulings of the juvenile court if there is reasonable, credible evidence of solid value to support them." (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1319.) "We cannot reweigh the evidence or substitute our judgment for that of the trial court." (*In re Cole C.* (2009) 174 Cal.App.4th 900, 918.)

Here, the court took jurisdiction over Maverick under section 300, subdivisions (a) and (f). A child is described by section 300, subdivision (a), if the “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child’s parent. . . .” Section 300, subdivision (f) authorizes jurisdiction over a child if the court finds that “the child’s parent . . . caused the death of another child through abuse or neglect.” Both grounds for jurisdiction were based on the allegation, which the court found true, that Ella sustained blunt force injuries to her head and abdomen while in mother’s care that resulted in her death.

Substantial evidence supports the finding that mother inflicted serious physical harm non-accidentally upon Ella, thereby causing her death. Ella and John were left in mother’s care at around 9:15 a.m. on February 21, 2009. According to both mother and Deniele, Ella was behaving normally at that time; she was active and running around. Ella’s parents both said that Ella did not have any injuries when she was left with mother. Within three hours of being dropped off, Ella sustained serious injuries which included a fractured skull, a large bruise on the left side of her face, and an abdominal hemorrhage, and died as a result. While mother claimed Ella was injured when she fell from the bed, medical professionals all agreed Ella’s injuries were inconsistent with a single fall from a bed. The medical experts also agreed that without another explanation for Ella’s injuries, her injuries were caused by blunt force trauma and could have been inflicted during the time Ella was in mother’s custody. From this evidence, the juvenile court reasonably could conclude that mother had inflicted serious physical harm non-accidentally upon Ella and caused her death through abuse.

Rather than demonstrate how this evidence does not support the jurisdictional findings, on appeal mother bases her challenge to the sufficiency of the evidence on the assertion that “the great weight of the evidence” indicated Ella’s death was accidental. As the Department points out, this argument fails because the evidence mother relies on, namely the opinions of three of the expert pathologists who testified at the hearing, was

based on an alleged event, namely the booster seat incident, that was not shown by the evidence to have occurred.

Drs. Reiber, Chambliss and Ophoven all testified that Ella's death could have been accidental if, the day before she was dropped off at mother's house, she was pushed over while strapped into a booster seat attached to a chair and hit her head on the chair or the floor. These doctors also testified that if the booster seat incident did not occur, the alternative explanation for Ella's injuries and death was intentionally inflicted blunt force trauma, and it was possible for those injuries to have been inflicted during the time Ella was in mother's custody. The juvenile court rejected the experts' opinions of an accidental death because there was no evidence to establish the assumption on which those opinions were based, namely that the booster seat incident actually occurred. The juvenile court did not err in doing so.

The only evidence presented of the booster seat incident was (1) Detective Dietrich's confirmation, when asked by mother's trial counsel, that he had listened to a jail conversation in which mother's grandmother asked mother whether she had conveyed the fact that Ella had been pushed over by John in a highchair and hit her head, (2) the recitation of the incident by the expert pathologists as given to them by mother's trial counsel or as learned by listening to the jailhouse recording, and (3) Dr. Reiber's testimony about the contents of Layne Hayden's declaration, in which he stated mother told him about the booster seat incident.

This evidence, however, does not independently prove that the booster seat incident occurred. The jailhouse conversation and the contents of Hayden's declaration are hearsay that the juvenile court specifically ruled was not being considered for its truth, but instead to show the information on which the expert, Dr. Reiber, was relying. A witness's on-the-record recitation of sources relied on for expert opinion does not transform inadmissible matter into independent proof of any fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619.) While experts may rely on hearsay in forming their

opinions and may state on direct examination the matters on which they relied, experts may not testify to the details of those matters if they are otherwise inadmissible. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525.)

Here, there was no evidence apart from the testimony of the experts and Detective Diedrich's confirmation of the jailhouse conversation that the booster seat incident occurred. Moreover, there was affirmative evidence that the incident did not occur, as Ella's parents denied Ella was injured when she was dropped off at mother's house, Deniele testified the incident did not occur, and Todd did not recall hearing of the incident. Since there was no evidence from which the juvenile court could conclude that the booster seat incident occurred, the juvenile court did not err in rejecting the experts' opinions that Ella's death was accidental. This is because an expert opinion based on factual assumptions that are without evidentiary support, or factors that are speculative or conjectural, has no evidentiary value. (*Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 404 (*Dee*); see also *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) "[A]n expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist" does not provide assistance to the trier of fact, who is charged with determining not hypothetical possibilities, but what occurred in the case before it. (*Dee, supra*, 174 Cal.App.4th at p. 404.)

Having properly rejected the experts' opinions that Ella's death was accidental, the juvenile court was left with their opinions that her death was caused by intentionally inflicted blunt force trauma, and that such trauma could have been inflicted within the time Ella was in mother's custody. From this the juvenile court reasonably could conclude, as it did, that mother had inflicted serious physical harm non-accidentally upon Ella and caused her death through abuse.

In sum, substantial evidence supports the juvenile court's jurisdictional findings that Maverick was described in section 300, subdivisions (a) and (f).

Removal Order

Mother next contends the juvenile court erred in removing Maverick from her custody because there was insufficient evidence of a substantial danger to Maverick's physical health, safety, or well-being if he was returned to her. We find no ground for reversal.

When a parent challenges a dispositional finding, the question is whether substantial evidence supports the finding. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581 [although trial court makes findings by the elevated standard of clear and convincing evidence, substantial evidence test remains the standard of review on appeal].) In resolving this question, we view the evidence in the light most favorable to the trial court's determination, drawing all reasonable inferences in favor of the determination and affirm the order even if there is other evidence supporting a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

As relevant here, before the juvenile court may order a child physically removed from his or her parent, it must find by clear and convincing evidence that the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1).) A removal order is proper if it is based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The parent's level of denial is an appropriate factor to consider when determining the risk to the child if placed with that parent. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [denial is a factor often relevant to determining whether persons are likely to modify their behavior

in the future without court supervision].) The parent need not be dangerous and the child need not actually have been harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536, citing *In re B.G.* (1974) 11 Cal.3d 679, 699.)

We conclude that application of the appropriate standard of review requires that we affirm the juvenile court's dispositional order because it is supported by substantial evidence. The juvenile court found, by a preponderance of the evidence, that mother caused Ella's death. Although the juvenile court specifically stated it could not make the same finding under the clear and convincing evidence standard, substantial evidence exists from which the juvenile court could find that Maverick would be at substantial risk of harm if he was returned to mother's custody. As the juvenile court explained in making its removal order, it is mother's failure to address the issues that led to Ella's injuries and death, coupled with the severity of those injuries, that placed Maverick at substantial risk of harm if he were returned to her care. Mother consistently denied responsibility for Ella's injuries despite the juvenile court's jurisdictional findings, thereby making it nearly impossible for her to address the issues that led to those findings and placing Maverick at risk of harm. Mother's therapist acknowledged that if mother was responsible for Ella's death, there would be a risk to Maverick.

In short, the finding that mother personally inflicted Ella's injuries and caused her death, coupled with her complete denial of responsibility for her actions and failure to address the reasons for jurisdiction, constitutes substantial evidence that Maverick would be at substantial risk of harm if he were returned to mother's custody, and supports the juvenile court's order removing him from mother.

DISPOSITION

The juvenile court's orders are affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Detjen, J.