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

In re J.G., a Person Coming
Under the Juvenile Court Law.

B290059

(Los Angeles County
Super. Ct. Nos.
17LJJP00051/17LJJP000
51A)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

R.G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of
Los Angeles County, Steven E. Ipson, Juvenile Court Referee.
Reversed.

Anne E. Fragasso, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Brian Mahler, Deputy County
Counsel, for Plaintiff and Respondent.

INTRODUCTION

Ronald G. (father) appeals from jurisdictional and dispositional orders made pursuant to Welfare and Institutions Code¹ section 300 removing his 12 year-old son, J.G., from his custody, terminating jurisdiction, and awarding sole legal and physical custody of J.G. to Susan S. (mother).² These orders were largely based on an incident of domestic violence against father by his girlfriend and father's ongoing failure to submit to regular drug testing as ordered by the court. Father claims there is insufficient evidence to support a finding of a substantial risk of harm to J.G. based on these allegations of domestic violence and drug use. We agree that, at the time of the jurisdictional hearing, the evidence was insufficient to establish a continuing risk of harm to J.G. We therefore reverse.

FACTS AND PROCEDURAL BACKGROUND

A. *Incident and Initial Investigation*

J.G. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in July 2017 following a violent altercation between father and father's girlfriend, Sara B. J.G., then 12 years old, was living with father and Sara and witnessed part of the incident.

According to the police report, on July 23, 2017, Sara and father got into a verbal argument, which escalated when Sara punched father in the jaw and face several times and kicked him in the head. When father attempted to leave, Sara got on top of him and put him in a choke hold. Father told police he did not hit Sara but attempted to stop the attack by pushing her off of

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

² Mother is not a party to this appeal.

him. J.G. heard the fight from his room; after about 15 minutes, it became louder, so he went to father's room. When he entered the room, he saw Sara choking father and yelled at her to let father go. Father broke free and called the police. When the police arrived, they noted that father had dried blood from cuts on his face and lip, and complained of jaw pain. Father told the police that he and Sara had been drinking that night, but denied any narcotics abuse or any history of domestic violence between them. J.G. told the police he had never seen Sara and father become physical before. Sara admitted to the police that she hit father. The police determined Sara was the "dominant aggressor" and arrested her. Father declined an emergency protective order and told the police he would seek a permanent restraining order.

On July 26, two DCFS social workers (CSWs) visited father's home. J.G. answered the door and said he was home with Sara; father was not there. Sara refused to allow the CSWs to speak to J.G. and refused to provide a phone number for father. Sara agreed to speak with the CSWs, stating that she and father had a misunderstanding and were just "wrestling" at the time of the incident. She said she and father had consumed one shot of alcohol each before the incident. Sara denied using any illicit substances, but the CSWs observed her to be "jittery and talking really fast in an incoherent manner." Sara told the CSWs that she had lived with father off and on for the past year and that she was familiar with DCFS investigations because she had "signed over" her own children to the care of family members.

A CSW met with father and J.G. at home on July 31, 2017. J.G. was about to leave for football practice and appeared clean and healthy. He told the CSW that his mother was in Louisiana

for work and he had lived with his father for two to three years. He visited mother often when she was in town, but she was frequently gone for weeks or months at a time. J.G. confirmed that he saw Sara choking father, and stated that he felt scared and thought father was going to pass out. J.G. stated this was the first time he had seen any physical altercation between father and Sara and that Sara had never been aggressive toward him. He did not fear Sara or father and felt safe at home. He denied seeing father or Sara use alcohol or drugs at home.

Father described the incident with Sara as “horseplay gone wrong.” He had not obtained a protective order because he felt there was no risk of reoccurrence. He admitted deep feelings for Sara but said she would be moving out of the home in the next two days. Father was aware of Sara’s history with her own children but stated he had no concerns because Sara was good to him and J.G. He also reported that two to three months prior, he and Sara had an argument and he asked her to leave. She refused, so he called the police. After the CSW expressed concerns about Sara, father stated that he planned to end their relationship.

Father told the CSW that he drank alcohol but denied using any drugs, stating that he had been sober for 18 years. He agreed to submit to an on-demand drug test a few days later. He also reported that he had a criminal record for narcotic trafficking, but that it was a long time ago. DCFS provided a criminal report showing substance-related convictions for father from 1993, 1997, and 1998.

DCFS made several attempts to schedule a home visit with mother in August 2017. Mother cancelled a scheduled visit and then did not return several phone calls. A CSW spoke with

mother in September 2017. She stated that she had no concerns about J.G. residing in father's home prior to the domestic violence incident. She and father had an informal custody arrangement and J.G. had gone back and forth between her and father. She was currently working in Pasadena and was willing to be J.G.'s primary caregiver. Mother denied using any substances and agreed to take a drug test.

On August 2, 2017, father took a drug test and tested positive for amphetamines. According to DCFS, a lab technician at the testing facility stated that father's reported medications of Viagra and Norco would not cause a positive amphetamine result.

Father spoke to a CSW on August 29, 2017 by phone. He claimed his positive drug test was due to Benadryl. He agreed to test again but stated he could only test on Friday, as he was having issues at work. Father also stated that Sara had been arrested the week before; he was unsure what the charges were.

A CSW also interviewed J.G.'s paternal grandmother (grandmother), who reported that father was a good and caring father whose "judgment was off" regarding Sara. Grandmother was not aware of any other domestic violence incidents and had no concerns about substance abuse by father.

Father did not show up for his scheduled drug test on September 1, 2017.

On September 12, 2017, DCFS requested a court order authorizing removal of J.G. from father and mother's custody in anticipation of DCFS filing a section 300 petition. The court denied the removal request on September 13, 2017, finding no basis to remove from mother as she was non-custodial and insufficient evidence to establish cause.

DCFS filed a non-detention report on September 21, 2017, detailing the interactions with the family to date. The same day, DCFS filed an addendum report recommending that the court allow J.G. to remain released to father home on the condition that father cooperate with the court's orders and DCFS recommendations. In a last minute information, DCFS reported that mother's drug test results had been negative, but diluted.

B. *Section 300 Petition*

On September 22, 2017, DCFS filed a petition naming J.G. as a dependent under section 300, subdivisions (a) and (b)(1).³ In count a-1, the petition alleged that father and Sara "engaged in a violent altercation in the presence of the child." Specifically, Sara "repeatedly struck" father in the face with her fists, kicked father in the head, and grabbed father by the neck in a choke hold." In response, father pushed Sara. Father sustained "bleeding to the mouth, redness to the face, and a laceration to the inside of [his] lip." The petition further alleged that father and Sara had engaged in a prior physical altercation in April 2017, and father "failed to protect the child" by allowing Sara to remain in the

³Section 300 states, in relevant part, "A child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶](a) 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. . . . (b)(1) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . 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 . . . substance abuse."

home with unlimited access to J.G. The petition also alleged that father had “prior criminal convictions of Battery and Assault.” DCFS alleged that this violent conduct and father’s failure to protect J.G. endangered the child’s safety and placed him at risk of serious physical harm. Count b-1 contained the same allegations.

Count b-2 alleged that father had a history of alcohol abuse and was a current abuser of methamphetamine, “which renders the father incapable of providing the child with regular care and supervision.” The petition further alleged that father was under the influence of “illicit drugs” in August 2017 while J.G. was in his care. Father had a positive toxicology screen for amphetamine on August 2, 2017. Father also had prior convictions for possession of controlled substances and driving under the influence.

At the detention hearing on September 22, 2017, the court found a prima facie case for exercising jurisdiction over J.G. pursuant to section 300. The court ordered no contact between J.G. and Sara. The court further ordered father to submit to weekly drug testing near his employment and to attend a domestic violence class. The court ordered J.G. to remain released to his parents.

C. *Adjudication*

1. *Jurisdiction/Disposition Report*

DCFS filed the jurisdiction/disposition report on December 8, 2017. DCFS reported that father failed to show up for drug testing on seven occasions between September 1 and November 27, 2017. He did submit to testing on October 31, 2017, with a

negative result. DCFS also reported that it had been unable to conduct further interviews with father or mother.⁴

On the date set for the adjudication hearing, December 14, 2017, the court continued the hearing to January 4, 2018 and ordered DCFS to make unannounced home visits to the family. The court further ordered that release of J.G. to father was conditioned upon: “(1) father continuing to test and test clean, with no unexcused missed tests;” and (2) J.G. continuing to have no contact with Sara. The court stated it would consider a “verifiable excuse” that father had missed a test because he “was out of the area due to work.”

In an addendum filed on December 28, 2017, a CSW detailed a telephone interview with father on December 8, 2017. After the CSW read the allegations of the petition, father stated, “A lot of it is untrue.” He denied a physical altercation on April 2, 2017, claiming that it was a “verbal dispute” after which he asked Sara to leave. He admitted the prior charges for battery, stating that it was “a while ago” and that he took anger management classes and had not “had an issue in a while.” As for the most recent July incident, father stated that it was a “misunderstanding. It was horse playing that went bad.” He claimed the injuries to his face were caused by an accident while playing tennis earlier in the day. He stated that he had feelings for Sara, “but I love my son more. So if I have to not allow her to be around to keep my son then that’s what I will do. But I don’t

⁴ Contrary to this statement, in a subsequent report on March 14, 2018, DCFS provided information regarding multiple home visits and interviews with the family conducted between October and December 2017. We discuss that information further below.

believe my son is in danger because she is around.” He told the CSW that he did “not foresee getting back into a relationship with [Sara] right now.”

With respect to the substance abuse allegations, father stated he had “not used since 1998.” Regarding the positive toxicology screen in August, father stated: “It reads pretty good to incriminate me, but it’s not true.” He blamed the result on various medications he was taking for allergies. He also stated that he had missed tests because of his job.

A CSW interviewed mother by phone on December 12, 2017. Mother said she did not want her son “anywhere around” Sara. J.G. had never mentioned to her any issues in father’s home. She stated that J.G. was currently staying with her because of father’s work, but she did not have any concerns about his being with father as long as Sara was not around.

DCFS indicated it was concerned that “it does not appear that father understands the severity of the incident and how it places [J.G.] at risk.” DCFS also noted father’s “extensive history” of possession and use of illicit drugs, the fact that father and Sara were drinking prior to the incident, and that father had a positive drug test and subsequently had not submitted to testing since the end of October, 2017. DCFS stated that mother had been cooperative with the department and was appropriately caring for J.G. DCFS indicated it did not feel informal supervision was appropriate at the time, because father had not complied with the drug testing orders. DCFS stated it would “like father to be afforded the opportunity to follow through with an identified case plan so that the child safety concerns can be addressed.” DCFS recommended that the court order father to

submit to continued on demand drug testing, and to complete a drug treatment program in the event of any missed tests.

DCFS filed a last minute information on January 3, 2018. It reported two negative toxicology tests for father on September 26 and October 27, 2017 and three no-shows between December 6 and 19, 2017.

At the hearing on January 4, 2018, the court continued adjudication to March 28, 2018 at the request of mother's counsel. Counsel for mother also raised a concern with the court that father had not been drug testing. The court asked the parties about "the status on [J.G.'s] situation." J.G.'s counsel reported that J.G. had not had any contact with Sara and was presently living with mother. DCFS counsel stated that if father continued to fail to drug test, the department would likely file a request to detain J.G. from father. Father's counsel noted that father was out of town on at least one of the no show dates in December and that the court had indicated father could miss a test with a verifiable excuse. The court clarified that father needed "a verified excuse, and . . . some documentation [provided to DCFS], and a retest." Father told the court he was willing to test "right now." Father's counsel added that father was only in the area "about a week or two" per month due to work and it was "a logistical issue to arrange testing." The court maintained the order regarding weekly testing and also directed father to submit to a drug test that day.

2. *Request for Detention and Additional Investigation*

DCFS filed a document captioned as a supplemental petition under section 387 on March 14, 2018.⁵ The petition

⁵DCFS subsequently stated that petition was misfiled as a supplemental petition modifying a previous order under section

alleged that father had failed to comply with the court-ordered weekly drug testing and had missed ten tests between December 14, 2017 and February 27, 2018. DCFS alleged that this failure to comply endangered J.G.'s health and safety and put him at risk of serious physical harm. DCFS recommended removing J.G. from father and maintaining his placement with mother.

DCFS also filed a detention report on March 14, 2018. DCFS reported that J.G. had been living primarily with mother since September 2017 and was visiting father two to three times per month. The detention report also included additional information regarding DCFS contacts with the family between October and December 2017. A CSW visited father and J.G. on October 26, 2017. During this visit, father agreed to sign the case plan. He insisted Sara had not visited his home; J.G. said the same.

Despite DCFS's December 8, 2017 representation that it had been unable to meet with father, the March 14, 2018 detention report contained information about CSW communications with father between October and December, 2017. The detention report stated that on October 31, 2017, a CSW met with father, mother, and J.G. at father's home. J.G. denied seeing Sara and denied physical or sexual abuse. A week later, J.G. told a CSW that he had been living with mother for the past week. He liked staying there but missed father.

During a visit on November 20, 2017, father acknowledged missing drug tests since he had been back to work. He told the CSW that he was "very stressed" as his employer was giving him less work. He also had arranged for Sara's ex-husband to come

387, but should be deemed an application for detention under section 385, as there was not yet any dispositional order in place.

pick up the rest of her things. On November 27, 2017, father missed another drug test; the same day, he left a message for the CSW that he found another job and had to leave for a nearby county that afternoon. Father spoke with the CSW by phone the next day and said he had been working nights and his schedule and locations for work were unpredictable. Father stated he was concerned about missing tests but also expressed frustration with having to test. They discussed the possibility of father providing documentation to confirm that he was out of town. The CSW also told father he had to call in daily to check if he had to test that day.

On November 30, 2017, J.G. told a CSW that he was still staying with mother and missed father. Father called to talk to him almost daily.

A CSW met with mother, father, and J.G. on December 1, 2017 at father's home. J.G. reported that things were going well and he denied seeing Sara. The CSW observed no signs of abuse or neglect. Father said that J.G. had not had any contact with Sara but that father had been in contact with her, continued to have feelings for her, and was reluctant to cut off his relationship with her daughters. When asked why he was not drug testing, father stated he did not think it was fair that he had to test. He continued to attend the court-ordered domestic violence and parenting classes and provided the CSW with letters confirming his participation in those classes.

On December 22, 2017, mother told a CSW that she was concerned because she heard father was seeing Sara and had seen Facebook posts suggesting they were together. However, mother stated she did not believe Sara had been at father's house when J.G. was there and thought J.G. would tell her otherwise.

J.G. said he had not seen father recently but had spoken to him over the phone.

The detention report also included information regarding father's conduct at the hearing on January 4, 2018. According to a CSW present in court, father was "very agitated" during the hearing, repeatedly speaking out and interrupting the judge and necessitating a warning from the bailiff. After the hearing, the CSW met with father, who "again appeared very agitated, jittery, and unable to control himself." Father accused the CSW of trying to "take his fuckin kid." Father met with another CSW at the DCFS office later that day, where he calmed down. The CSW reported that father explained that he might have a job "anywhere from Redding to San Ysidro and could get a phone call giving him 20 minutes notice that he has to leave for a job." The CSW told father that DCFS would work with his schedule but father had to notify DCFS in advance. Father stated he understood and said, "I guess I better take this drug testing thing seriously."

Father submitted to a drug test on January 4, 2018 as agreed; the results were negative. Father had three subsequent negative drug tests on January 5, 8, and 17, 2018.

A CSW interviewed J.G. again on January 23, 2018. J.G. stated that he recently spent a few days at father's home. He denied seeing Sara. He liked spending time with both mother and father.

Father missed four drug tests between January 23 and February 13, 2018. When he spoke with a CSW on February 21, he said he missed the tests due to "irresponsibility, um, I'm stressed out to the fucking max. Scared cuz I'm using my medical marijuana card." When the CSW stated she was writing

a warrant to detain J.G. due to the missed tests, father responded, “I’m not on fucking drugs.” The CSWs reported during their visits to father’s home that the home was clean and well-furnished, with no safety hazards.

DCFS concluded in the March 14, 2018 detention report that J.G. was “a victim of general neglect” by father, based on his “pattern of non-compliance with court orders.” The report cited father’s positive drug test in August 2017, history of substance abuse, and numerous missed tests. DCFS recommended monitored visitation for father.

At the March 15, 2018 hearing on DCFS’s detention request, counsel for DCFS argued that father had violated both conditions of the court’s order allowing J.G. to remain released to him, as he had missed numerous tests and there was “indication that [Sara] has had continued contact with the family, comes and goes.” DCFS’s counsel cited to Facebook posts by Sara suggesting a continued relationship with father and a comment by father’s neighbor that Sara “comes and goes.” Father’s counsel stated that father had drug tested a few times and had been “trying to work with the social worker” to schedule testing, but it was difficult for him to test because of his work schedule. He also argued that there was no evidence of contact with Sara by father or J.G. and father and Sara were no longer in a relationship. Counsel for J.G. requested unmonitored visitation and confirmed that J.G. had not had any contact with Sara.

The court found a prima facie case for detaining J.G. from father under section 300. The court ordered weekly monitored visitation for father, to be liberalized if father completed three negative drug tests with no missed tests. The court indicated that the department would work with father on the testing

schedule, but also noted father's comment that he missed a test because he was stressed out.

3. *Jurisdiction and Disposition Hearing*

In an addendum report on March 28, 2018, DCFS reported that father had missed two additional drug tests on March 15 and 20, 2018.

The adjudication hearing on DCFS's section 300 petition was held on March 28 and 29, 2018. Father was not present. His counsel informed the court that father had emailed him that morning, stating that he could not attend the hearing because of work and requesting a continuance. Nevertheless, father's counsel indicated he was ready to proceed. The hearing proceeded without father and the court did not rule on father's continuance request.

Father's counsel argued that the court should dismiss the petition. He stated there was no substantial evidence that father continued to have a relationship with Sara or allowed her any contact with J.G. He also argued there was no evidence of substance abuse or that father cared for J.G. while under the influence of drugs. Alternatively, father's counsel asked that the court strike the language from count b-2 regarding alcohol, noting that father had no history of alcohol abuse, apart from his admission that he had been drinking on the day of the domestic violence incident and had a single conviction for driving under the influence in 1992. Mother's counsel agreed that there was insufficient evidence to sustain count a-1, since father was not the aggressor in the domestic violence incident with Sara. As to the substance abuse allegations for count b-2, mother's counsel argued that father was a "functioning addict who, when he can test clean, he does test." J.G.'s counsel also agreed that there

was insufficient evidence to sustain count a-1, but urged the court to sustain counts b-1 and b-2. She argued that father's "lack of willingness to test" and his excuses were "evidence that he does have a substance abuse problem." The court struck count a-1 (alleging a risk of harm inflicted nonaccidentally by a parent) and sustained counts b-1 (alleging a risk of harm from father's failure to protect based on the domestic violence) and b-2 (alleging a risk of harm from father's failure to provide care due to substance abuse). Accordingly, the court exercised its jurisdiction over J.G. and declared the child a dependent of the court pursuant to section 300, subdivision (b).

Turning to disposition, DCFS recommended removing J.G. from father, placing him with mother, and ordering services for the family. Mother's counsel requested closing the case with a custody order and transfer to family court, given that mother was not offending and father had "so far, declined participation in the case plan and, frankly, is visiting about once per month." Mother's counsel argued that father was "not in a position to reunify" because he was either "working or he's dodging services." J.G.'s counsel joined in the request to close the case, stating that J.G. was "well cared for" in mother's home and that father was "not involved in his case plan. He appears to not be willing to participate whatsoever." She requested unmonitored visits for father. Counsel for DCFS repeated the recommendation to keep the case open with maintenance services because "the child had recently been with the father and the case . . . could use some more stability." Father's counsel stated he had "no direction regarding whether to terminate jurisdiction from my client." He argued that father was caring for J.G. prior to the incident with

no safety issues and that Sara was “no longer in the picture.” He also requested that any visitation be unmonitored.

The court found by clear and convincing evidence pursuant to section 361, subdivision (c) that there was a substantial danger to J.G. if he were returned to father, there were no reasonable means to protect the child’s health without removal from father’s custody, and that reasonable efforts were made to prevent the need for removal. The court further found that the conditions justifying the initial assumption of jurisdiction no longer existed; the court therefore terminated jurisdiction with a juvenile custody order in place. In the custody order, the court granted sole legal and physical custody to mother, with supervised visitation to father.

Father timely appealed.

DISCUSSION

Father’s appeal challenges both the jurisdictional and dispositional orders by the dependency court. As to jurisdiction, father contends substantial evidence did not support the dependency court’s conclusion that J.G. was at substantial risk of harm based on the allegations of domestic violence or substance abuse. We agree and reverse the court’s finding of jurisdiction. Accordingly, we need not reach father’s challenge to disposition.

A. *Governing Principles*

In reviewing the dependency court’s jurisdictional findings, “we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and

credibility are the province of the trial court.” (*In re R.T.* (2017) 3 Cal.5th 622, 633 (*R.T.*)). “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 David M.* (2005) 134 Cal.App.4th 822, 828 (*David M.*), abrogated on other grounds by *R.T.*, *supra*, 3 Cal.5th at p. 628.)

As relevant here, a dependency court may determine a child is subject to the court’s jurisdiction under section 300, subdivision (b)(1) if it finds by a preponderance of the evidence that “[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 a parent’s failure or inability to adequately supervise or protect the child or a parent’s inability to care for the child due to the parent’s substance abuse. Where the child has not suffered actual harm, the evidence must establish “that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm.” (*In re A.G.* (2013) 220 Cal.App.4th 675, 683.)

The court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child. (*In re N.M.* (2011) 197 Cal.App.4th 159, 165.) The court may consider past events in deciding whether a child currently needs the court’s protection. (*Ibid.*) A parent’s “[p]ast conduct may be probative of current conditions” if there is reason

to believe that the conduct will continue.’ (*In re S.O.* (2002) 103 Cal.App.4th 453, 461; accord, *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216 [(*Christopher R.*)]”) (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383–1384.) However, “[e]vidence of past conduct, without more, is insufficient to support a jurisdictional finding under section 300. There must be some reason beyond mere speculation to believe the alleged conduct will recur. [Citation.]” (*In re James R.* (2009) 176 Cal.App.4th 129, 135–136, abrogated on other grounds by *R.T.*, *supra*, 3 Cal.5th at p. 628.)

B. No Jurisdiction Based on Domestic Violence Allegations

Father argues that there is insufficient evidence to support the court’s finding as to count b-1, that as of the jurisdictional hearing on March 29, 2018, J.G. was at a risk of current physical harm due to the July 2017 domestic violence incident. He points to the lack of evidence of any contact between J.G. and Sara or any continuing violence between Sara and father after July 2017. We agree.

Domestic violence in the household where a child is living may support the exercise of jurisdiction only if there is evidence that the violence harmed the child or placed them at risk of harm, and “the violence is ongoing or likely to continue.” (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717; see also *In re M.W.* (2015) 238 Cal.App.4th 1444, 1454.) Thus, courts have upheld jurisdictional findings under section 300, subdivision (b) where there was evidence that the children were exposed to domestic violence and evidence supported an “ongoing concern” about the children’s future exposure to domestic violence. (*In re E.B.* (2010) 184 Cal.App.4th 568, 576; see also *In re T.V.* (2013) 217

Cal.App.4th 126, 134–135; *In re R.C.* (2012) 210 Cal.App.4th 930, 942.) *In re Heather A.* (1996) 52 Cal.App.4th 183, 194, disapproved on other grounds in *R.T.*, *supra*, 3 Cal.5th at p. 628.) Domestic violence may be detrimental to children who are “put in a position of physical danger from [spousal] violence” or who are present to observe it. (*In re Heather A.*, *supra*, at p. 194; see also *In re Daisy H.*, *supra*, 192 Cal.App.4th at p. 717; *In re Heather A.*, *supra*, 52 Cal.App.4th at p. 194, abrogated on other grounds by *R.T.*, *supra*, 3 Cal.5th at p. 628.)

Here, the record contains evidence that father and Sara engaged in a single (albeit serious) incident of violence in July 2017, in which father was the victim. J.G. was present and saw Sara choking father, but was unharmed. Although DCFS expressed concern that father was not taking the incident seriously, the evidence suggested that father enrolled in domestic violence and parenting classes and Sara moved out of the home shortly afterward. More importantly, there was no evidence of any further contact between J.G. and Sara. Both mother and J.G. repeatedly confirmed this fact. There was also no evidence that J.G. was ever physically abused or that he was exposed to any further incidents of domestic violence between father and Sara. J.G. reported to DCFS that the July 2017 incident was the first he had witnessed, and mother stated that she had no concerns with father’s care of their child apart from his relationship with Sara. Indeed, the court initially concluded that the incident was insufficient to require J.G.’s removal from father’s care.⁶ At the time of the jurisdictional hearing on March

⁶ While a failure to remove is not necessarily an impediment to jurisdiction, it is notable here that the circumstances related to the domestic violence allegations had

29, 2018, father had continued to comply with the court's order to keep J.G. away from Sara. Respondent's argument focuses on the incident itself and father's attitude at the time downplaying the incident, but fails to identify any evidence to establish an ongoing risk of harm to J.G. Under these circumstances, the court lacked sufficient evidence to conclude that J.G. remained at risk of physical harm from domestic violence between father and Sara at the time of the jurisdictional hearing on March 29, 2018.⁷

C. *No Jurisdiction Based on Substance Abuse Allegations*

Father also contends the court lacked substantial evidence to find that J.G. was at substantial risk of harm based on the allegations of substance abuse in count b-2. He argues that there was little evidence he was currently abusing drugs or alcohol and, even assuming he was doing so, no evidence his substance use posed a risk of harm to J.G. while in his care. DCFS points to father's positive test in August 2017, followed by months of missed tests. Although father claimed he was unable to test due to his work schedule, he also failed to provide any documentation supporting this claim, despite repeated requests from DCFS and orders from the court. Under those circumstances, the court could reasonably infer that father's failure to comply with the court-ordered drug tests could be considered as positive tests. (*In*

not changed as of March 2018. At that time, it appears the court and DCFS were largely focused on father's failure to submit to drug testing.

⁷ We note that at the same hearing, the court first found sufficient risk of harm to establish jurisdiction under section 300, and then, at mother's request and over DCFS's objection, found that the conditions justifying the initial assumption of jurisdiction no longer existed, thereby terminating jurisdiction.

re Noah G. (2016) 247 Cal.App.4th 1292, 1304, citing *In re Lana S.* (2012) 207 Cal.App.4th 94, 104 & fn. 5.)

We conclude that, despite father's numerous missed drug tests, there was insufficient evidence to support jurisdiction under section 300, subdivision (b)(1). The evidence presented failed to connect father's presumed drug usage to a substantial risk of harm to J.G.

It is well-settled that absent evidence that drug use has caused a child serious physical harm or illness or put the child at substantial risk of incurring such harm, mere use of illicit drugs by a parent constitutes an insufficient basis to support jurisdiction under subdivision (b) of section 300. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 769 (*Drake M.*); *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 ["It is undisputed that a parent's use of marijuana[, hard drugs, or alcohol] 'without more,' does not bring a minor within the jurisdiction of the dependency court."].)

In *Drake M.*, the court of appeal reversed a jurisdictional finding based on a father's use of medical marijuana. (*Drake M.*, *supra*, 211 Cal.App.4th at pp. 757–758.) The court first distinguished between substance "use" and substance "abuse," noting that "jurisdiction based on 'the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse,' must necessarily include a finding that the parent at issue is a substance *abuser*. (§ 300, subd. (b).)" (*Id.* at p. 764.) Such a finding of substance abuse, the court concluded, must be based on either (1) a diagnosis by a medical professional of a "current substance abuse problem"; or (2) evidence sufficient to establish a "current substance abuse problem" as defined in "The American Psychiatric Association's

Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000) (DSM–IV–TR).” (*Id.* at p. 766.) Under the latter definition, substance abuse is based on “clinically significant impairment,” as manifested by “failure to fulfill major role obligations at work, school, or home,” “recurrent substance use in situations in which it is physically hazardous (e.g. driving an automobile . . . when impaired)”; “recurrent substance-related legal problems”; or “continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.” (*Ibid.*) As our sister court concisely put it, “a finding that a parent has a substance abuse problem justifying the intervention of the dependency court” is supported by “a medical diagnosis of substance abuse” or “evidence of life-impacting effects of drug use.” (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726.)

Other courts in this district have rejected the conclusion that “only someone who has been diagnosed by a medical professional or who falls within one of the specific DSM–IV–TR categories can be found to be a current substance abuser.” (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218; see also *In re Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726 [“a finding that a parent has a substance abuse problem justifying the intervention of the dependency court” is supported by “a medical diagnosis of substance abuse” or “evidence of life-impacting effects of drug use”].) Regardless of whether *Drake M.* is viewed strictly or merely “as a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b)” (*Christopher R.*, *supra*, 225 Cal.App.4th at p. 1218), the court must nevertheless base its assertion of jurisdiction on a finding of substance abuse, rather than mere use.

Here, there is no evidence that father was subject to a clinical evaluation or professional diagnosis of substance abuse. Moreover, there is no evidence that father suffered from substance-abuse related impairment sufficient to meet any of the other *Drake M.* factors. The evidence showed that father largely maintained steady employment and stable housing and demonstrated no “persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.” (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) Further, while father did have a significant criminal history related to drugs, his convictions were decades old and there is no evidence that he had recent substance-abuse related criminal or legal issues. Indeed, there is no evidence that father ever used drugs in J.G.’s presence or at a time or in a manner that would be likely to render him unable to care for the child or would put the child at substantial risk of harm. Father also provided a handful of clean drug tests in late 2017 and early 2018.

Even assuming father’s presumed drug use rose to the level of abuse, DCFS failed to provide any evidence connecting father’s drug use with a substantial risk of physical harm to J.G. In *In re David M.*, *supra*, 134 Cal.App.4th at p. 829, for example, the court reversed a jurisdictional finding, concluding that the parents’ substance abuse and mental health issues were not tied to any actual harm to the minor. The mother had obtained some prenatal care, the baby was born without drugs in his system, and the “evidence was uncontradicted that David was healthy, well cared for, and loved, and that mother and father were raising him in a clean, tidy home.” (*Id.* at p. 830.) Similarly, in *In re Rebecca C.*, *supra*, 228 Cal.App.4th at p. 727, the court concluded there was no evidence that the mother’s drug abuse

created a substantial risk of harm to her teenaged daughter where their home was clean and “free of hazards,” the mother was significantly involved in Rebecca’s education, the mother had “committed herself” to a drug program, and the only evidence of risk was Rebecca’s prior homework problems.

Similarly, here, DCFS conducted multiple interviews of mother, father, and J.G., and made unscheduled visits to father’s home. The evidence established that J.G. was clean, healthy, and well cared for by father, and that father’s home was clean and had no apparent safety hazards. There was no evidence of any drug use or drug paraphernalia in father’s home or that J.G. ever had access to such items. Moreover, there is no evidence that father engaged in any substance use or abuse while caring for J.G. Indeed, mother, J.G., and grandmother all stated that father cared for J.G. well and expressed no concerns regarding substance abuse. As such, the record lacks evidence of a specific risk of harm to J.G. as of March 2018 resulting from father’s substance abuse. (See *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346-1347 [finding mother’s “missed, diluted, and positive drug tests between the 12–month review report/hearing and the 18–month review report/hearing” did not support a finding of a substantial risk to the children’s well-being, where mother was employed, cooperative, and there was no evidence “linking mother’s marijuana and alcohol use to her parenting judgment or skills”].) This case is therefore distinguishable from *In re Gabriel K.* (2012) 203 Cal.App.4th 188, cited by respondent. There, the court upheld a finding of substantial evidence that mother failed to make reasonable efforts to treat her drug issues, where she “remained enmeshed in a drug life that posed a danger to her children” and “[a]t the

time of the juvenile court's order, she was unable to provide an ongoing, positive influence in the lives of her sons because she was evading arrest on drug and weapons charges." (*Id.* at pp. 196–197.)

Under these circumstances, we conclude that the dependency court's finding of jurisdiction under section 300, subdivision (b) was not supported by substantial evidence.

DISPOSITION

The dependency court's jurisdictional order is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.