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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ALEJANDRA Z., et al.,

Persons Coming Under the Juvenile
Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANA A.,

Defendant and Appellant.

B276759
(Los Angeles County
Super. Ct. No. DK15625)

APPEAL from orders of the Superior Court for Los Angeles
County, Terry Truong, Commissioner. Reversed.

Valerie N. Lankford, under appointment by the Court of Appeal,
for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant
County Counsel, and Sarah Vesecky, Senior Deputy County Counsel,
for Plaintiff and Respondent.

Ana A. (mother) appeals from jurisdiction and disposition orders of the juvenile court finding that her children, Alejandra Z., Alisson Z., and Nicholas A., were persons described by Welfare and Institutions Code¹ section 300, subdivision (b) (section 300(b)), and removing the children from her custody. She contends that the juvenile court's amendment of the allegation in the dependency petition stating that mother's conduct places the children at risk of serious physical harm and danger, so that the allegation as sustained stated that the conduct merely "places the children at risk of harm," necessarily means the juvenile court's finding of jurisdiction under section 300(b) was error. We agree. Accordingly, we reverse the juvenile court's order finding jurisdiction, as well as its disposition order.

BACKGROUND

A. Conduct and Investigation Leading to Detention

On February 11, 2016, the Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (L.A. IMPACT) conducted a buy/bust operation in which mother participated in a deal to sell 300 pounds of marijuana. The children's father, Nicholas A.² (father), also

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

² Nicholas A. is the biological father of the youngest child, Nicholas A., Jr.; although he is not the biological father of the two oldest children, he was found to be their presumed father. He is not a party to this appeal.

was a participant in the deal.³ Both mother and father were arrested, and were said to be associated with a drug trafficking organization. L.A. IMPACT recovered 300 pounds of marijuana during the deal, and an additional approximately 200 pounds (28 bales) at the home of one of the other participants in the deal. L.A. IMPACT also executed a search warrant at the family's home and recovered two bundles and two small packages of marijuana in mother's bedroom master closet and one bundle on the top shelf of the hallway closet. The marijuana was "heavily wrapped in clear Saran Wrap," and weighed approximately eight pounds in total.

Because there were children at the family home, the Los Angeles Department of Children and Family Services (the Department) was contacted to conduct an independent child abuse and neglect investigation. A social worker from the Department's Multi-Agency Response Team (MART) spoke with the case agent from L.A. IMPACT, who told her that, in addition to the deal for which she was arrested, mother had earlier discussed a deal for 10 kilos of cocaine, but that deal

³ According to the L.A. IMPACT report, mother set up the deal with a police informant. To facilitate the sale, mother (along with father) met the informant in a parking lot and exchanged vehicles. Mother and father drove the informant's car from the parking lot to an alley behind their home, where mother exited the car. Father then drove the informant's car to a house several houses away that backed up to the same alley, where another man (Juan T.) was waiting. Father and Juan T. loaded the marijuana into the informant's car. Father then drove the car to the parking lot, followed by Juan T. driving his car. In the meantime, mother got into a different car with another man, and followed behind Juan T. All four people were arrested when they arrived at the parking lot, and the police recovered 12 bales of marijuana from the informant's car.

did not go through. The social worker interviewed mother, who admitted that she had been caught selling marijuana. She said she knew she made a mistake and would have to pay for it, but said she was a good mother, and that her children did not know anything about the marijuana found in her home.

The MART social worker also interviewed the children. The two older children, twelve-year-old twins Alisson and Alejandra, did not know what was taking place. They said that mother worked cleaning rooms, and took good care of them. They had no knowledge of either mother or father selling drugs out of their home, and denied any excessive foot traffic at the house. They also denied ever having seen drugs in their home. When asked about the hallway closet, both girls said they often grab things from the closet, such as sweaters or coats, but never noticed drugs or peculiar packages on the top shelf. The younger child, four-year-old Nicholas, was too young to make a meaningful statement as to the drug allegations. All three children were well groomed, dressed appropriately, and had no visible marks or bruises.

The MART social worker took the children into custody and recommended that they not be released to mother or father. She gave the following reasons for doing so: (1) mother and father were arrested; (2) they “failed to protect their children from a drug environment” because there were drugs “in and around the family home”; (3) they “associate in criminal activity that is consistent with organized crime and/or a drug trafficking organization,” which “brings an unnecessary risk to the family home from drug rivals”; (4) the “known home drug

environment . . . might invite others to engage in criminal activity to include drug use, drug sales and possession of weapons”; and (5) “[p]er law enforcement, it is common practice in the drug world to seek restitution for the loss of product/money. The restitution owed to the parents friend’s criminal associates can lead to violent retribution against the family if the illegal proceeds are not paid back and/or if there is a perception that the parents become cooperative with law enforcement and/or the prosecution as part of the criminal investigation.”

The Department filed a petition under section 300(b), alleging a single count: “On 02/11/2016, the children Alejandra [Z.], Allison [Z.] and Nicholas [A. Jr.]’s mother, Ana [A.] and the mother’s male companion, Nicholas [A.], father[] of the child, Nicholas [A. Jr.] placed the children in a detrimental and endangering situation in that eight pounds of marijuana were found in the children’s home within access of the children. The children’s mother and the [A.] father engage in drug sales. On 02/11/2016, the mother and the [A.] father were arrested for Sell/Furnish etc. Marijuana/Hash for Sale. The [A.] father has a criminal history of a conviction for Possession of a Controlled Substance: Paraphernalia. Such a detrimental and endangering situation established for the children by the mother and [A.] father endangers the children’s physical health and safety and places the children at risk of serious physical harm and danger.”

Following a detention hearing, the juvenile court ordered the three children detained.

B. *Jurisdiction/Disposition Report and Hearing*

In the jurisdiction/disposition report, the social worker assigned to the case (the CSW) reported on interviews of the family members conducted by the dependency investigator (the DI). The DI reported that each of the twin girls said she knew she was in foster care because her mother sold drugs. Both girls denied seeing any strange packaging in the form of a brick in their home, and both denied seeing or knowing about any drug use by either mother or father. The girls also told the DI that they were not allowed to go into mother's bedroom. The DI was unable to interview the boy, Nicholas, because he was easily distracted and cried that he wanted to go with his mother.

In her interview with the DI, mother said that she “made an error but [she was] not fully involved” with the marijuana deal, although she confirmed that she was arrested for having marijuana for the purpose of sale. She said that she and father were “working on clearing it up. There are no charges against us, it's still an investigation.” The DI reported that she received a call from mother several weeks after the interview, and that mother told her that she was working with a law enforcement officer and trying to “clear up her case.” She told the DI that she could contact the officer to confirm that she was working with him.

The jurisdiction/disposition report noted that the CSW received a call from an officer with L.A. IMPACT, who told her that mother was providing information to him in another drug trafficking case to avoid any criminal charges against her. The CSW also reported that mother and father were enrolled in programs and actively participating in

services. In addressing the children's safety in the home, the report relied almost entirely on the MART social worker's observations in the detention report. The only additional information that was taken into account was that (1) although mother and father had enrolled in services, "they have failed to verbalize an understanding of how the children were placed at risk"; and (2) mother and father were working with law enforcement, and according to the MART social worker's detention report, their cooperation with law enforcement could lead to "violent retribution against the family," which would put the children at great risk.

At the start of the jurisdiction hearing, counsel for mother requested a continuance because she wanted to call as a witness the officer with whom mother was working, but he was not available that day. She said that he was an expert in drug trafficking, and she expected him to testify that there was no risk of harm to the children due to drug trafficking if they were returned to the home. The juvenile court stated that it would not allow the officer to testify because he was not qualified to opine on whether the children would be safe in mother's care. Therefore, the court denied the request for a continuance and proceeded with the jurisdiction hearing.

The Department introduced its reports into evidence, but presented no witnesses.

Father introduced various letters and reports attesting to his enrollment in services and participation in drug testing and his participation in Nicholas's schooling. Father's counsel also offered his client's stipulated testimony. He stated that if father were to testify, he

would testify that he currently had a good job working for Uber and Lyft, that he did not need to engage in drug sales, and that even if he had engaged in drug sales in the past, he would not risk having his children continue to be detained from him by engaging in such actions in the future.

Mother also introduced letters attesting to her participation in various services. In addition, mother's counsel offered mother's stipulated testimony: if mother were called to testify, she would testify that she will not make any transactions relating to drugs in the future, and that she has been working with an officer with L.A. IMPACT, who has indicated to her that her children will not be at risk if returned to her.

Following the arguments of counsel, the juvenile court found the single count alleged in the petition to be true *as amended*. The court then stated its amendments: (1) in the first sentence, it replaced "eight pounds" with "bundles"; (2) it deleted the third sentence; and (3) it deleted the words "serious," "physical," and "and danger" from the last sentence. As a result of those amendments, the last sentence of the allegation stated: "Such a detrimental and endangering situation established for the children by the mother and [A.] father endangers the children's physical health and safety and places the children at risk of harm."

Based on its finding, the juvenile court found the children to be persons described by section 300(b) and declared them dependents of the court. Moving on to the disposition, the court found that there was a substantial danger to the children's physical health, safety,

protection, or physical or emotional well-being if they were returned to their home, and ordered the children removed from mother and father's custody, with reunification services to both mother and father.

Mother timely filed a notice of appeal from the jurisdiction and disposition orders.

DISCUSSION

Mother argues on appeal that by amending the petition to delete “serious” and “physical” from the sole allegation against her, the juvenile court implicitly found that the harm to which the children were exposed was neither serious nor physical. She contends that, because jurisdiction under section 300(b) requires a finding that the children are at substantial risk of suffering serious physical harm or illness, the juvenile court erroneously found jurisdiction over the children under section 300(b). We agree.

Section 300(b) provides, in relevant part, that a child is within the jurisdiction of the juvenile court if “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child.” In other words, for there to be jurisdiction over a child under section 300(b), there must be proof of (1) neglectful conduct by the parent, (2) causation, and (3) serious physical harm to the child or a substantial risk of serious physical harm. (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 724-725.) “The third element ‘effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious

physical harm in the future.” (*In re James R.* (2009) 176 Cal.App.4th 129, 135; accord, *In re Jesus M.* (2015) 235 Cal.App.4th 104, 111.)

It is not enough to find that the parent’s conduct exposes the child to some risk of some kind of harm. “As appellate courts have repeatedly stressed, “[s]ubdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.” [Citations.]” (*In re Jesus M.*, *supra*, 235 Cal.App.4th at pp. 111-112.) The juvenile court in this case, however, specifically deleted the words “serious physical” from the allegation against mother in finding the allegation to be true. There is no reasonable explanation for this deletion other than that the court found that mother’s conduct exposed the children to some risk of harm, but the harm was neither serious nor physical. This finding is insufficient to support jurisdiction under section 300(b).

The Department argues that (1) mother forfeited her right to argue that the amended allegation does not support jurisdiction because she failed to challenge the sufficiency of the petition below; (2) despite the amendments, the allegation supports jurisdiction because the form petition includes language stating “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness”; and (3) substantial evidence supports the jurisdictional finding. We are not persuaded.

First, the Department misapprehends mother’s argument. While the Department is correct that, “[i]n general, a parent may not challenge the sufficiency of the allegations in a dependency petition on

appeal if he or she did not raise the issue in the dependency court” (*In re John M.* (2012) 212 Cal.App.4th 1117, 1123), in this case mother is not challenging the sufficiency of the allegations. Rather, mother contends that the juvenile court’s amendment of those allegations is evidence that the court found that the harm to which the children was exposed was neither serious nor physical. That argument is not forfeited by failure to raise it below.

Second, the Department’s reliance on the language printed at the top of the form petition is misplaced. That language merely sets out the standard for finding jurisdiction under section 300(b), and does not contain any factual allegations. Instead, the factual allegations are found in count b-1, which was added below the form language. In making its jurisdiction finding, the juvenile court expressly found *count b-1* to be true *as amended*.

Finally, the evidence the Department points to as supporting jurisdiction is not the kind of specific and nonspeculative evidence that would cause us to ignore the juvenile court’s deletion of an allegation critical to a finding of jurisdiction. For example, the Department cites to evidence that a “significant amount of marijuana was found in a closet frequently accessed by the children.” But the one bundle that was found in the closet to which the children had access was on the top shelf and heavily wrapped in Saran Wrap,⁴ and the older children had no knowledge that it was there.

⁴ This makes this case easily distinguishable from *In re Rocco M.* (1991) 1 Cal.App.4th 814, the case relied upon by the Department, where the child

The remaining evidence the Department cites is either incorrect, not specific to the family at issue, entirely speculative, and/or fails to show a substantial risk of physical harm:

1. The Department states that there was evidence that the parents stored a significant amount of drugs underneath the carport of the family home, but the cited evidence shows that is incorrect; the drugs were stored at a different home.

2. The Department also states that “the parents’ evasiveness and failure to accept responsibility when the DI interviewed them called into question whether they would again engage in the behavior.” But the Department ignores the evidence that mother is working with law enforcement on a different drug trafficking case in order to avoid criminal charges. There is no reason to believe that she would risk having those criminal charges reinstated by engaging in additional drug sales, particularly while she is working with law enforcement.

3. The Department states that the children were put at risk of physical harm because “drugs and guns go together.” But the Department admits there was no evidence that the parents owned or kept any guns at the family home.

4. The Department points to legislation that shows the Legislature’s recognition that exposing a child to drug trafficking is inherently dangerous. But that legislation is not evidence that *these* children were at substantial risk of *serious physical* harm.

found cocaine with a mirror and straw left by his mother in the bathroom. (*Id.* at p. 817.)

5. The Department contends that “[a]ssociates could be upset that a large amount of the marijuana had been confiscated and that the parents appeared to be working with law enforcement.” This, however, is pure speculation; it does not show that the children currently are at risk of serious physical harm.

6. Finally, the Department argues that the children were at risk “because by leaving drugs in an area the children could access, the parents implied that drugs and drug-trafficking was appropriate.” Again, this ignores the evidence that the children were not aware of the presence of drugs in the home, and fails to show that they were at risk of serious physical harm.

Our rejection of the Department’s evidentiary showing should not be read to imply that drug trafficking does not present any danger to children living with drug traffickers. We simply observe that the Department was required “to present evidence of a specific, nonspeculative and substantial risk to [the child] of serious physical harm” (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003), caused by mother’s conduct in this case. The court below made no finding that it did so, and the evidence the Department relies upon does not compel such a finding. Therefore, the juvenile court’s order finding jurisdiction must be reversed. Moreover, because the juvenile court did not properly have jurisdiction over the children, the disposition order also must be reversed.

DISPOSITION

The jurisdiction and disposition orders are reversed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.