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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re TYLER R., A Person Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

FABIO R.,

Defendant and Appellant.

B237630

(Los Angeles County
Super. Ct. No. CK88936)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Marilyn H. Mackel, Juvenile Court Referee. Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant, Fabio R.

Office of the County Counsel, John F. Krattli, Acting County Counsel,
James M. Owens, Assistant County Counsel, and Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Fabio¹ R. (father) appeals from the trial court's judgment declaring his son, Tyler R., a dependent of the court based on its finding that father used inappropriate physical discipline against the child. He also appeals from the order removing Tyler from father's custody. He contends that neither the judgment nor the order was supported by substantial evidence. As we find the record supports the trial court's findings, we will affirm both.

FACTUAL AND PROCEDURAL BACKGROUND²

Tyler's mother, Danielle K. (mother),³ met father at a drug dealer's home in La Verne. The two were both users of methamphetamine. Mother explained to the Department of Children and Family Services (DCFS) social worker that she began using drugs at the age of 19 but stopped using around the age of 30 when she found out she was pregnant with Tyler. When Tyler was about six months old, she began using again. About a year later, mother enrolled in a treatment program at Tarzana Rehabilitation Center when her family threatened to take Tyler from her due to her drug use. She states she has been clean since. She has voluntarily tested for drugs, the results of which have been negative. Mother has a criminal record associated with her prior substance abuse. She was arrested for DUI about two years ago, but the charge was

¹ Father's name is spelled "Fabio" and "Favio" throughout the record. As we are confident that father can spell his own name, we use "Fabio" for the remainder of this opinion, which is how father spelled his name in his opening brief.

² The factual and procedural background is drawn from the record, which includes a one-volume Clerk's Transcript and a one-volume Reporter's Transcript.

³ Mother is not a party to this appeal.

dismissed due to lack of evidence. Although the couple were no longer together, they shared equal custody of Tyler.

Tyler came to the attention of DCFS on July 6, 2011 by a referral from the La Verne Police Department alleging that Tyler suffered physical abuse by father.⁴ Officer Martinez interviewed Tyler, documenting Tyler's statements in a police report. DCFS subsequently interviewed Tyler and his statements were consistent with those he made to Officer Martinez. Tyler had been visiting with father who took him to see the movie, "Cars 2," in IMAX 3-D on the evening of July 4, 2011. Tyler appeared unappreciative of the movie because he failed to thank father and wanted father to purchase a toy for him. Father became angry and ordered Tyler to go to the bedroom and lie on his stomach. Father then spanked Tyler on his buttocks, over his clothes with an open hand thirty or so times. Father continued to ask Tyler, "Do you want some more?" Father then ordered Tyler out of the bedroom but followed him into the kitchen

⁴ DCFS was previously involved with this family on two occasions. The first occasion was in April of 2010. Mother observed a "sudden change" in Tyler's behavior including some anger management issues. She stated Tyler took a "woman's magazine" into his room and was later found masturbating to the photos. Mother believed Tyler had been sexually abused by an unknown perpetrator and contacted DCFS. Tyler denied any sexual abuse and the allegation was determined to be unfounded.

The next occasion was in March of 2011. Mother contacted DCFS alleging that father physically and emotionally abused and neglected Tyler. Tyler denied any abuse or neglect, however, and the allegations were determined to be unfounded. An allegation of general abuse by mother was raised and determined to be substantiated because Tyler disclosed his maternal grandmother disciplined him by putting soap in his mouth, which mother knew about but did nothing to prevent, and because both mother and maternal grandmother would give him excessive time-outs as discipline as well. The investigation was closed after mother signed an affidavit stating she would not allow the maternal grandmother to use soap as discipline again.

and spanked him a few more times. Afterwards, father went outside to the swimming pool and called Tyler over. He made Tyler promise to never be unappreciative again. Tyler stated that his father usually spanks him when he gets into trouble.

The next day Tyler visited with mother.⁵ While assisting Tyler in changing out of his swimming trunks, the maternal aunt noticed that Tyler's butt was extremely bruised and purplish in color. When she asked Tyler "what is that?" Tyler responded, "what?" She told Tyler that it is not acceptable for anyone to hit him and he responded, "but that's my poppa." She brought the bruising to mother's attention and the two took Tyler to the La Verne Police Department. Police photos taken at the time showed extensive bruising to Tyler's buttocks. Tyler's maternal grandmother also had taken photos of the bruising and showed them to the DCFS social worker who reported "a large amount of purplish markings on the child's left buttocks and a smaller amount on the right buttocks," supporting the statements in the police report. Tyler did not receive any medical attention. An emergency protective order, which expired on July 12, 2011, was put in place against father. Father was arrested and charged with

⁵ In its August 16, 2011 jurisdiction/disposition report, DCFS reported statements made by mother in an interview on August 4th. Mother stated that on July 5, 2011, the day after the incident occurred, Tyler appeared to be "walking weird" so she told him to go to the restroom. Tyler suffered from encopresis and mother assumed that this was the cause. Afterwards, Tyler went out to swim after which the maternal aunt noted the bruising. DCFS attempted to mischaracterize this statement to insinuate that Tyler had difficulty walking and defecating due to the spanking. The evidence does not support this inference, however.

a Penal Code section 273d, subdivision (a),⁶ violation. It is not clear from the record whether father was convicted of such charge, however.

Additionally, mother applied for and received a temporary restraining order on July 6, 2011 that expired on July 22, 2011. On July 7, 2011, a criminal protective order was issued against father. The order was subsequently modified on August 2, 2011 and is set to expire on August 2, 2014. It allows father to have “peaceful contact” with Tyler for court-ordered visitation.

DCFS interviewed both the maternal grandmother and the maternal aunt. Maternal grandmother described father as “very controlling.” She also stated that when Tyler returns to mother’s house after visiting with father “he smells badly as if he did not bathe.” Maternal aunt also stated that Tyler smells as if he does not bathe when he returns from visits with father, supporting maternal grandmother’s statement. Maternal grandmother also commented that “Tyler’s disruptive behavior escalates after visits with the father because there is no structure at father’s home.”

DCFS arranged for Tyler to be examined at Los Angeles County – University of Southern California (LAC/USC) Medical Center on July 8, 2011. Tyler explained the spanking incident to the health care provider. Based on Tyler’s history and the physical exam, the provider concluded that the “[e]valuation [was] suspicious for physical

⁶ Penal Code section 273d, subdivision (a), states: “Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony and shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, four, or six years, or in a county jail for not more than one year, by a fine of up to six thousand dollars (\$6,000), or by both that imprisonment and fine.”

abuse” but that “[f]urther information [was] needed.” The provider also concluded that the exam findings were consistent with Tyler’s story. The mental health assessor at the Center contacted the DCFS social worker and explained that Tyler needed therapy. She stated that Tyler was angry at his father and previously had suicidal ideations, which he no longer has. She also stated that Tyler was scared of his father.

DCFS interviewed father at the Glendora office on July 12, 2011. Father admitted to having spanked Tyler but denied that he was the cause of the bruising at issue. He also believed he spanked Tyler on July 3rd, not July 4th. He described the spanking as being limited to four or five strikes with a couple more in the kitchen. He denied stating, “Do you want some more?” or that the spanking was done out of anger. Father stated that he rarely spanks Tyler. He claimed that Tyler was doing “cannon balls” from a trampoline into the pool without his permission and that Tyler had slipped by the pool landing on his backside which may have caused the bruising. But he otherwise did not know how Tyler became bruised. DCFS asked father to comply with a voluntary reunification case plan with monitored visitation, but father stated, “I will not sign anything, even if it is voluntary. I will pick up my son tomorrow [T]here is no way I left those marks on him. My son is being brain washed. I don’t believe he is scared of me.” He also refused to sign an affidavit that he received counseling resources from DCFS. Father denied any criminal history but he was previously charged with petty theft in 1995.

DCFS conducted a subsequent interview of Tyler on July 13, 2011. Tyler confirmed he was jumping on the trampoline but that his dad gave him permission to do

so. Tyler denied falling by the pool as asserted by father and stated, “ ‘my dad’s lying. He spanked me.’ ” Tyler described the spankings as “ ‘hard swats’ ” and stated this was the first time that his father spanked him hard enough to leave marks. When asked if he’d like a visit with his father, Tyler shook his head and replied, “ ‘I’m scared.’ ” The social worker explained that the visit would be monitored and safe, but Tyler replied, “ ‘I don’t know.’ ”

Later that evening, the DCFS social worker called father to schedule a visit with Tyler. Father requested that the social worker interview Tyler again and ask if he was afraid of father. The social worker informed father that another interview would be inappropriate and redirected the call to the visit. After discussing a potential date and time for the visit with mother, the social worker called father again to confirm. Father again asked if Tyler was afraid of him. The social worker attempted to redirect father to the visit but he “became irate and yelled to CSW ‘you aren’t answering my question! I want to know that my son is not afraid of me. I did not ask if he was afraid of a visit with me, but afraid of me!’ ” Father did not allow the social worker to respond and continued to yell. He “stated that when he saw his son, he was going to ask him why he did not tell CSW that he slipped by the pool.” The social worker reminded father that discussing the case was inappropriate and the visit would be terminated if he did so. Father then replied, “to CSW ‘you seem like a smart lady. My son is being brain washed and I want it documented that he is not afraid of me.’ ” The social worker terminated the call because father continued to yell and remained uncooperative.

On July 18, 2011, DCFS filed a petition alleging (as ultimately amended):⁷

“a-1 [¶] On 07/04/2011 the child, Tyler[’s] . . . father, [Fabio,] inappropriately physically disciplined the child striking the child’s buttocks with the father’s hands resulting in bruises to the child’s buttocks. Such inappropriate physical discipline was excessive and caused the child unreasonable pain and suffering. Such inappropriate physical discipline of the child by the father endangers the child’s physical health and safety and places the child at risk of physical harm, damage, danger and physical abuse.” The trial court found father to be the presumed father of Tyler. It ordered Tyler released to mother and ordered monitored visitation, parenting courses and anger management counseling for father. Later, the trial court ordered father to take on-demand drug tests.

In a last minute information filed on September 23, 2011, DCFS noted father’s continued lack of cooperation. Specifically, a social worker attempted to set up an on-demand drug screen with father. Father became upset and stated, “ ‘You are not supposed to be talking to me, it is Court ordered.’ ” Father also informed the social worker that he would not be able to test because he was leaving town. In response to another social worker’s contacting father to set up an appointment, father stated, “ ‘I got a call from my attorney I am not suppose[d] to go to your office at all and I am not supposed to be talking to anyone from your office. If I continue to be contacted by anyone from your office I will begin to start recording the telephone conversation.’ ”

⁷ The petition originally contained a number of other allegations, including one against mother relating to her history of illicit drug use. Mother signed a voluntary case plan and the allegations against her were dismissed.

Also, the maternal grandmother informed DCFS that she had to end a call between father and Tyler because father began to discuss “inappropriate things” and told maternal grandmother, “ ‘Will you just shut up!’ ”

The adjudication hearing was held on September 28, 2011. In a last minute information filed with the trial court on that date, DCFS reported that father and Tyler had completed two conjoint therapy sessions together. Tyler’s therapist, Vanessa M., reported that she needed to redirect father several times during the sessions because he continued to bring up the issues that brought Tyler to the attention of the court. She stated that father was “very anxious and frustrated” and focused on the court process rather than on his relationship with his son. The therapist agreed that father remains in denial about the damage he caused Tyler. Father signed a waiver of his right to a trial and submitted to the petition as prepared by DCFS. The trial court declared Tyler to be a dependent of the court pursuant to section 300, subdivision (a), and ordered him placed with mother. It sustained the petition as amended. It also ordered family maintenance services and parenting courses for mother; family reunification services, counseling and drug testing for father; and continued counseling for Tyler. This appeal followed.

ISSUES ON APPEAL

Father raises the following issues in this appeal: (1) whether there is substantial evidence to support the trial court’s finding that it has jurisdiction over Tyler because father used inappropriate discipline against him; and (2) whether substantial evidence supports the trial court’s order removing Tyler from father’s custody.

DISCUSSION

1. Substantial Evidence Supports the Trial Court's Jurisdictional Finding that Father Used Inappropriate Discipline Against Tyler

Father contends that the trial court's jurisdictional finding was not supported by substantial evidence. In support of this contention, father argues that his spanking of Tyler's buttocks over his clothing with an open hand was not severe enough to constitute "serious physical harm" despite the resulting bruising. He also argues there was no evidence to demonstrate that Tyler was at risk of suffering serious physical harm in the future. We disagree.

"We review the [trial] court's jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the [trial] court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible. [Citation.] '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.]' [Citation.]" (*In re David M.* (2005) 134 Cal.App.4th 822, 828.)

Section 300, subdivision (a), provides that the following will cause a child to fall under the jurisdiction of the court and be adjudged a dependent of such court: “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 or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child’s siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm. For purposes of this subdivision, ‘serious physical harm’ does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury.”

The evidence in the record supports the trial court’s finding that Tyler suffered, and that there is a substantial risk that he will suffer, serious physical harm inflicted nonaccidentally by father. First, father admitted to spanking Tyler, a spanking that was severe enough to leave significant bruising. Father was arrested and charged with abuse by the La Verne Police Department as a result. Shortly thereafter, a criminal protective order against father was put in place, remaining effective until August 2, 2014. A health care provider at LAC/USC Medical Center reported that the bruising was “suspicious for physical abuse” and consistent with Tyler’s story. Clearly Tyler’s injuries were significant and determined to be far beyond, “reasonable and age-appropriate spanking to the buttocks.” From this evidence, the trial court could conclude that Tyler had sustained serious physical injuries at father’s hands.

Second, even if the bruising did not rise to the level of “serious physical harm,” the record supports the inference that Tyler is at risk of serious physical harm in the future based on father’s actions after the incident. When confronted about the bruising, father consistently denied that he was the cause despite admitting that he spanked Tyler. He was uncooperative with DCFS and believed his son was being brain washed. Despite knowing that Tyler told more than one person that he was afraid of father, father continued to focus on the legal process rather than on repairing his relationship with Tyler during their counseling sessions together. Father has yet to take responsibility for the injuries he inflicted on his son. Until he does so, it is unlikely that he will learn from this incident and, thus, the trial court could easily conclude that Tyler remains at risk.

2. *Substantial Evidence Supports the Trial Court’s Order Removing Tyler from Father’s Custody*

Father next contends that the trial court’s order removing Tyler from his custody was not supported by substantial evidence. Specifically, he argues that the evidence did not support the finding that Tyler could not be safely returned to father’s custody at the time of the dispositional order. We disagree.

Section 361 provides in relevant part: “(c) A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if

the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . . The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent or guardian from the home. The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." Although a trial court makes a finding pursuant to section 361, subdivision (c), under the higher standard of clear and convincing evidence, the substantial evidence test is the standard of review on appeal. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078.)

Father does not challenge the trial court's finding that there were no reasonable means by which Tyler could be protected without removal. Thus, the question at issue is whether the record supports the finding that Tyler could not be safely returned to father's custody.

As noted above, father consistently denied that Tyler's injuries were the result of his spanking him. He has not shown that he was remorseful or that he has taken any responsibility for his actions. Instead, he was irate and yelled at social workers demanding they document that Tyler was not afraid of him. He repeatedly attempted to discuss with Tyler why he denied falling by the pool as father had asserted. He ordered the maternal grandmother to "shut up," as he discussed "inappropriate things" with Tyler on the phone. And during therapy sessions, father could only focus on the court

process rather than repairing his relationship with his son. The trial court could easily conclude that Tyler's return to father's custody would put him at risk of further injury because father had not demonstrated that he was willing to change his behavior and move past the issues that had resulted in the court's jurisdiction over his son.

DISPOSITION

The judgment and dispositional order are affirmed.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.