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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re NATHANIEL A., et al., Persons
Coming Under the Juvenile Court Law.

B262559

(Los Angeles County
Super. Ct. No. DK08774)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Julie Fox Blackshaw, Judge. Affirmed.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, Peter Ferrera, Principal Deputy County Counsel for Plaintiff and Respondent.

Father Mario M. (Mario) appeals the dependency court's jurisdictional and dispositional orders. He contends that the dependency court erred in conforming the allegations of the petition to proof; insufficient evidence supports jurisdiction over the children Laila and Nathaniel under Welfare & Institutions Code section 300, subdivisions (a) and (b) based on domestic violence, physical abuse, and his marijuana use; and the dispositional order must be reversed. We disagree and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A petition filed December 18, 2014, contained allegations under section 300, subdivisions (a), (b) and (j) that Mario abused his child Nathaniel, age seven, by grabbing the child's arms and putting him in bed and raising his hand as if to strike him; Mario and C.O. (Mother) engaged in verbal altercations in the presence of Nathaniel and his half-sister, Laila, age four; Mario threatened to kill Mother and himself; and both Mario and Mother had a history of illicit drug use that included positive tests for marijuana in November 2014.¹ (Counts a-2, a-3, b-2, b-3, b-4, and b-5.)

a. Detention

On November 13, 2014, police responded to Mother's home based upon a report of suspected child abuse. Mother told police that Nathaniel had ADHD, and she refused to medicate him for the condition due to his young age. Mother stated she disciplined the children by taking away their toys or giving them a time out. Mother admitted that she spanked Nathaniel with an open hand over his clothed buttocks, but claimed she rarely spanked Laila. Mario told police that he disciplined the children by taking away their toys, and denied spanking them.

¹ The petitions also contained allegations, later stricken, that Nathaniel's father Daniel A. physically abused Daniel by spanking him on the buttocks. (Counts a-1, b-1, and j-1.) Daniel A. is not a party to this appeal.

The detention report stated that the children had been detained on December 15, 2014, based on a referral. Both Mario and Mother consented to detention. Mother and Mario resided together with Nathaniel and Leila in a one-bedroom apartment. Mother had a custody order with respect to Nathaniel that provided she and Daniel had joint legal custody and Mother had sole physical custody. Nathaniel hit other students at school, did not follow directions, and did not sit still in the classroom.

Mother admitted recent marijuana use, and stated that Mario had a medical marijuana card. She denied that Mario hit Leila, but reported that he had spanked Leila on her buttocks twice with an open hand. Mario had raised his hand to threaten Leila while she was misbehaving, but did not hit or push her.

Nathaniel told the social worker he is in the second grade. Mother would discipline him by spanking him 10 times on his buttocks. Mario also hit Nathaniel, and had grabbed him by the arms and put him on his bed. In the past, Nathaniel has gotten bruises from being hit. Laila told the social worker that Mario puts her on the bed and spanks her with his open hand when she misbehaves. Mother has held her down when Mario hits her.

Mother told the social worker she was shocked by Laila's allegations of spankings. Mother agreed to place Laila with a paternal aunt, Christina H. and Nathaniel with his maternal grandmother, Sandra A. Sandra reported that she had never seen Mario or Mother hit the children, and believed all discipline for the children was appropriate. Christina knew that Mother and Mario used marijuana. Christina was aware of domestic violence between Mother and Mario, and they would have "heavy arguments" after which they would call Christina to pick Laila up.

R. Castro, the principal at Nathaniel's school reported that Nathaniel acted out aggressively and his behavior had been escalating. Nathaniel tried to tip over a table at school and other children were at risk from his behavior. Nathaniel took items from other students and hit them and did not show any remorse for hurting them. Castro believed

that Mother was in denial about Nathaniel's behavior problems because Mother blamed the school and bullying for Nathaniel's problems.

On November 19, 2014, both parents tested positive for marijuana. On December 4, 2014, the parents' tests again showed marijuana, but at lower concentrations.

On December 15, 2014, the social worker learned that Mother and Mario had an argument due to his infidelity and Mario left the home on December 5, 2014. Mario had been keeping their dirty clothing in the trunk of his car and refused to bring the clothing to Mother so she could wash it.

DCFS had offered the family a voluntary maintenance program (VFM). However, based on the parents' argument of December 5, 2014, DCFS decided that filing a petition in dependency court was a better course of action because it could obtain dispositional orders for the parents to address their long-standing issues of domestic disputes and substance abuse.

The parents had a prior referral from April 2011 resulting from a domestic dispute in which the police were called to the family's home. Mother told police that she and Mario argued and at times the arguments took place in front of the children. Mario had threatened to kill Mother and himself if she left him. Mother claimed she took Mario's statement as a joke, and told police that she would block Mario's path so he could not leave the apartment, but he would push her aside. Mario denied hitting Mother, and denied smoking marijuana at home. The allegations were deemed unfounded. Around this time, Mother had sought out a domestic violence shelter after she and Mario had separated, and told staff at the shelter Mario pushed her and banged her head against the wall.

At the detention hearing held December 18, 2014, the court ordered Leila detained, and the court ordered that DCFS provide Mario with a referral for drug and alcohol testing. The court gave Mario monitored visitation for at least three hours per week.

b. Jurisdiction and Disposition

DCFS's jurisdictional report stated that the children remained placed with Mother. Nathaniel told the social worker that Mario never liked him and hit him all the time. Mario threw soup cans and bean bags at him, and Mario hit Nathaniel with his hands on his back, shoulders, and buttocks. One time Mario threw a nail at him that cut Nathaniel's arm. Nathaniel witnessed Mario throwing objects at Laila. Nathaniel witnessed Mario push Mother and argue with her, and had to climb on Mario to stop Mario from hurting Mother. Nathaniel reported that Mother and Mario smoked cigars. He did not know what marijuana was. Mario threatened to take Laila away.

Mother used marijuana to alleviate anxiety, and did not have an active marijuana card. Mother believed Mario used marijuana for his back pain. Mario admitted to having used marijuana for several years.

DCFS observed that Nathaniel experienced behavioral issues and aggression as a result of witnessing the parents' domestic violence and verbal arguments. DCFS recommended Mother receive individual and family counseling, parenting classes, domestic violence classes for victims, and Mario receive individual and family counseling, parenting classes, anger management, and domestic violence classes for perpetrators.

At the February 24, 2015 hearing, Mario argued that the parents' verbal altercations, without more, did not support a finding of jurisdiction. With respect to allegation b-5, Mario asserted that he did not use in marijuana the home and DCFS had not established a nexus between his marijuana use and neglect of the children. Lastly, he asserted that raising a hand at a child was insufficient to confer jurisdiction in counts a-2 and b-2.

The court struck the allegations in counts a-2 and b-2 that Mario raised his hand at Laila. The court conformed those allegations to proof by adding "on prior occasions, [Mario] threw items at [Nathaniel], including cans and a nail." The court stated that in doing so, it was adding more specific allegations to the conduct already alleged, and it

was not alleging any conduct outside the scope of the current allegations. The court found the allegations based on Mother and Mario's conduct to be true.

With respect to disposition, Mario objected to being ordered to a drug or alcohol program on the basis there was no evidence he suffered from addiction to marijuana, which he used as a painkiller. Mario also asked the court to strike the domestic violence classes because the court was ordering anger management. Mario requested home of parent placement, or in the alternative, unmonitored visits.

The court ordered anger management and domestic violence based on Mario's throwing objects at Nathaniel. The court ordered monitored visitation for Mario, ordered Laila removed from him, and made a home of parent order with Mother for Nathaniel and Laila.

DISCUSSION

I. Justiciability of Mario's Claims

Mario asserts that although jurisdiction is proper under the sustained allegations of counts b-3 and b-4 based on Mother's marijuana use and domestic violence, he is prejudiced by the dependency court's assumption of jurisdiction over him because he will be labeled as a substance abuser and child abuser.

A jurisdictional finding against one parent is good against both because the actions of either parent bring the minor child within the jurisdiction of the court. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 307.) Here, jurisdiction over the children is proper based on the unchallenged findings regarding Mother. "However, when, as here, the outcome of the appeal could be 'the difference between father's being an "offending" parent versus a "non-offending" parent,' a finding that could result in far-reaching consequences with respect to these and future dependency proceedings, we find it appropriate to exercise our discretion to consider the appeal on the merits. [Citations.]" (*In re Quentin H.* (2014) 230 Cal.App.4th 608, 613; see also *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 (*Drake M.*) [reviewing the father's appeal, despite the fact that dependency jurisdiction

over the child would remain in place because the findings based on the mother's conduct were unchallenged, citing potential implications for future dependency proceedings and the father's parental rights].) We therefore exercise our discretion to consider Mario's appeal.

II. The Dependency Court Did Not Err in Amending the Petition on Counts a-2 to Conform to Proof

Mario argues that the dependency court's addition of the allegation that he threw cans and a nail at Nathaniel deprived him of due process because the addition materially altered the nature of the allegation and misled Mario in his preparation of a defense. Mario asserts that he had no reason to challenge the count because the unaltered allegation did not contain evidence of a risk of serious harm intentionally inflicted. We disagree.

The purpose of the petition is to give notice of the allegations against the parent. (*In re Christopher C.* (2010) 182 Cal.App.4th 73, 83.) Amendments to conform to proof are favored, and are permissible unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1640.) Only where the variance between the petition and the proof offered at the jurisdictional hearing is so great that the parent is denied constitutionally adequate notice of the allegations against him or her should a dependency court properly refuse to allow an amendment to conform to proof. (*Ibid.*)

Here, the court amended the petition at a-2 and b-2 to include that allegation that Mario threw items, including a can and a nail, at Nathaniel. The court's stated rationale was that the additional allegations were more specific concerning Mario's behavior toward Nathaniel, and did not add anything new to the petition. We find the dependency court acted properly. The family came to the attention of DCFS in November 2014, and the petition was filed a month later after Mario left the family home. Thus, Mario was on notice at least a month before the petition was filed that DCFS was investigating

allegations of physical violence against the children. Furthermore, Mario had notice on February 9, 2015, with the filing of the jurisdiction report that contained the additional specific incidents of physical abuse, which was more than two weeks before the February 24, 2015 hearing. As a result, his arguments based on purportedly insufficient notice are without merit. Finally, these amendments to conform to proof did not impermissibly expand the scope of the previously alleged incidents of physical harm to Nathaniel such that Father was unprepared to defend against them.

III. Sufficiency of Evidence Supporting a-3 Allegation

Mario argues that there was no evidence that Laila ever suffered serious harm as the result of physical abuse inflicted nonaccidentally, and the majority of cases addressing the issue do not find domestic violence, without more, will support a finding of jurisdiction. He contends that there was no evidence he was likely to harm Laila while engaged in domestic violence with Mother, and the only case conferring jurisdiction under subdivision (a) based on domestic violence is *In re Giovanni F.* (2010) 184 Cal.App.4th 594.

We review the court's jurisdictional findings for substantial evidence. (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) We consider the entire record to determine whether the evidence is reasonable, credible, and of solid value (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140.) We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or weigh the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

Section 300, subdivision (a) authorizes the dependency court to adjudge a minor a dependent child of the court when "[t]he 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." (§ 300, subd. (a).) The subdivision requires only a "substantial risk" that the child will be abused or neglected. The legislatively declared purpose of these provisions "is to provide maximum safety and protection for children

who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.” (§ 300.2; *In re I.J.* (2013) 56 Cal.4th 766, 773.) “The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child.” (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.) Subdivision (a) specifies, “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.” (*Ibid.*)

“Although many cases based on exposure to domestic violence are filed under section 300, subdivision (b), section 300, subdivision (a) may apply.” (*In re Giovanni F.*, *supra*, 184 Cal.App.4th at p. 599.) In *Giovanni F.*, the court affirmed a jurisdictional finding under section 300, subdivision (a) based on a series of incidents of domestic violence on the part of the father. One such incident occurred when the father punched the mother in the face and choked her to the point of unconsciousness while the father was driving a car with the child in the backseat. *Giovanni F.* concluded jurisdiction under “section 300, subdivision (a) is appropriate when, through exposure to a parent’s domestic violence, a child suffers, or is at substantial risk of suffering, serious physical harm inflicted nonaccidentally by the parent.” (*Id.* at pp. 598-599.) “When [domestic violence] occurs in a moving vehicle, the potential for injury inherent in the violence is dramatically increased by the likelihood of a collision that could prove fatal.” (*Id.* at p. 600.) *Giovanni F.* concluded the father’s “violence in the car would have been sufficient, by itself, to support jurisdiction under section 300, subdivision (a).” (*Id.* at p. 601)

In contrast, recently in *In re Jonathan B.* (2015) 235 Cal.App.4th 115, the mother picked up the children and the children’s father from a party and agreed to give the father a ride to his home. While in the car, the father called the mother a “bitch” and pinched her on the neck. When the mother objected, the father stated “I don’t care, they need to

know what kind of mother they have,” grabbed her sunglasses, and broke them. When they arrived at father’s home, he got out of the car and threw the mother’s belongings on the street. After the mother threatened to call the police, the father hit her in the face. (*Id.* at 117.) At the jurisdictional hearing, the father argued that the only other incident of domestic violence between the parties had been five years before. (*Ibid.*) *Jonathan B.* distinguished *Giovanni F.* on the basis that in *Giovanni F.*, the father had been consistently violent for years, while the parties in the case before it had not had any domestic violence incidents in five years. (*Id.* at p. 120-121.)

Here, although Mario does not contest jurisdiction over the children under allegations b-3 and b-4 and thus reversal would not be required even if we were to find error, we find jurisdiction sufficiently established under the petition at allegation a-3. That allegation asserted that the children were at risk of harm due to the parents’ domestic violence, namely, “verbal altercations in the children’s presence,” Mario’s threat to kill himself and Mother, and Mother’s conduct in permitting Mario to have access to the children. The allegation asserted that “[s]uch violent conduct on the part of [Mario] against the mother, and the mother’s failure to protect the children” endangered their physical health and safety and placed them at risk of physical harm.

Here, as in *Giovanni F.*—but unlike *Johnathan B.*—there was an ongoing problem of domestic violence between the parents that put the children at risk for harm: Mario had a bad temper and lost his temper; Mario had pushed Mother and threatened to kill her and himself; Nathaniel reported that he had seen Mario push Mother; Mother’s statements made to the domestic violence shelter about Mario pushing her head against the wall indicated abuse was prevalent in the home; and Mario threatened to take Laila away.

IV. Sufficiency of Evidence Supporting b-2 and b-5 Allegations

Mario contends that insufficient evidence supports a finding that Laila had been seriously physically harmed, or faced a risk of serious physical harm, as a result of his alleged abuse of Nathaniel, or as a result of his marijuana use. On the first point, he

contends that there was no evidence Laila was at risk of harm due to his intentional conduct, namely, throwing a nail at Nathaniel. On the second point, Mario contends that subdivision (b) only applies where the parent is unable to care for the child because the parent is a substance abuser. Here, he asserts, he had a medical marijuana card and there was no evidence he was an abuser (the trial court did not order substance abuse counseling); and, there was no evidence his marijuana use impaired his ability to care for the children.

“[S]ection 300, subdivision (b), authorizes the dependency court to assert jurisdiction over a child in a number of circumstances: (1) a child ‘has suffered’ serious physical harm as a result of the failure or inability of his or her parent to adequately supervise or protect the child, (2) ‘there is a substantial risk’ the child will suffer serious physical harm as a result of the failure or inability of his or her parent to adequately supervise or protect the child, or (3) the child has suffered serious physical harm or there is a substantial risk that the child will suffer serious physical harm ‘by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.’ [¶] In short, there are three elements for jurisdiction under section 300, subdivision (b), namely, (1) neglectful conduct or substance abuse by a parent in one of the specified forms, (2) causation, and (3) serious physical harm to the child, or a substantial risk of such harm. [Citations.]” (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 724-725 (Rebecca C.)) “[DCFS] has the burden to prove the jurisdictional facts by a preponderance of the evidence. [Citations.]” (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.)

1. Allegation b-2

Here, Mario’s conduct with Nathaniel confers jurisdiction and supports a finding that Laila was at substantial risk of harm due to Mario’s repeated physical abuse of Nathaniel. The repeated nature of Mario’s physical abuse of Nathaniel indicates that physical violence in the home was an ongoing problem and that had in the past affected

Laila. (See *In re Marquis H.* (2013) 212 Cal.App.4th 718,727 [jurisdiction over child not recipient of physical abuse proper where grandparents abused his siblings].)

2. Allegation b-5

In *In re Drake M.*, *supra*, 211 Cal.App.4th 754, the dependency court found jurisdiction over a child whose father smoked legal marijuana. *Drake M.* considered the issue of whether habitually smoking legal marijuana constituted conduct that rendered a father incapable of providing regular care and supervision to a child, and found that such conduct could fall within the purview of section 300, subdivision (b), if a child has suffered or was at substantial risk for suffering serious physical harm or illness as a result of: (1) a parent's inability to provide regular care due to substance abuse or (2) the parent's failure to adequately supervise or protect the child. (*Drake M.*, at p. 763.) *Drake M.* held that a finding of substance abuse must be based on "evidence sufficient to (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the [American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders]." (*Drake M.*, *supra*, at p. 766.)²

In the case before it, *Drake M.* determined that DCFS had failed to prove the father was a substance abuser in the absence of evidence from a medical professional because

² The indicia of a substance abuse problem include: "(1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school or home (e. g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)[; ¶] (2) recurrent substance use in situations in which it is physically hazardous (e. g., driving an automobile or operating a machine when impaired by substance use)[; ¶] (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)[; and ¶] (4) continued substance use despite having or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights.)" (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.)

there was no evidence that the father suffered from any recurrent substance abuse problems. (*Id.* at pp. 767-768.) The father had a legal, medical recommendation to use marijuana for recurring knee pain and could adequately care for the child. The child had food, water, and shelter; there was no evidence of abuse in the home; and no evidence showed that the child was not supervised. (*Id.* at pp. 768-769.)

However, in *Rebecca C.*, *supra*, 228 Cal.App.4th 720, the court observed that the facts of *Drake M.* did not support the rule that a diagnosis of a substance abuse problem was required in order to establish a substance abuse problem sufficient to support jurisdiction. “On the contrary, the rule to be taken from [*Drake M.*] is that the absence of a medical diagnosis of substance abuse, and a lack of evidence of life-impacting affects of drug abuse, will not support a finding that a parent has a substance abuse problem justifying the intervention of the dependency court.” (*Id.* at pp. 726.)

Here, although Mario had a medical marijuana card and he contends there was no evidence his use affected his ability to care for the children, we find that his marijuana use had a sufficient impact on his family life that it justified the assertion of dependency jurisdiction. Nathaniel’s severe behavior problems at school can be attributed not only to the physical abuse in the home, but Mario’s marijuana use. Mario tested positive both times he was tested, and Nathaniel, who did not know what marijuana was, told the social worker that both Mother and Mario smoked cigars, indicating Mario was a frequent user of marijuana and his use affected his ability to care for the children. The facts that the dependency court did not order drug or alcohol treatment and counseling and the dispositional order was based upon only two drug tests does not change our analysis.

IV. Dispositional Orders

At the dispositional hearing, the dependency court must order child welfare services for the minor and the minor’s parents to facilitate reunification of the family. (§ 361.5, subd. (a); Cal. Rules of Court, rule 5.695(h).) “The court has broad discretion to determine what would best serve and protect the child’s interest and to fashion a

dispositional order in accord with this discretion.” Here, Mario offers no other basis for our review of the dispositional order other than his assertion of a lack of jurisdiction, we also affirm the court's dispositional order.

DISPOSITION

The orders of the superior court are affirmed.

KIRSCHNER, J.*

We Concur

TURNER, P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.