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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re LUKE E., a Person Coming Under the Juvenile Court Law.	B234961
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. BERNARD E., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK51315)

APPEAL from orders of the Superior Court of Los Angeles County, Sherri S. Sobel, Referee. Affirmed in part; reversed in part.

Lauren Kelly Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel and Peter Ferrera, Deputy County Counsel, for Plaintiff and Appellant.

Bernard E. (father) appeals from the orders declaring his son, Luke E., a dependent child pursuant to Welfare and Institutions Code section 300, subdivision (b) (§ 300(b)), and removing Luke from father's custody.[1] Father contends insufficient evidence supported both the jurisdictional and dispositional orders. The Los Angeles County Department of Children and Family Services (DCFS) cross-appeals from the order striking a section 300, subdivision (d) allegation (§ 300(d)). We reverse the jurisdictional finding under section 300(b) and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Luke E. was born in September 2002. In late February 2011, his parents were divorced and had shared custody. DCFS received a referral from Kaiser Hospital stating that mother had brought Luke to the hospital claiming he had been sexually and physically assaulted by father.[2] But Luke showed no signs of physical or sexual abuse, mother had a history of drug abuse and appeared "agitated" and "immature," so the hospital contacted father, who presented as "more credible and forthcoming with information." Father told the hospital social worker that he had been naked in front of his son, but had never been inappropriate with him.

A few days later, DCFS social worker Norma Martinez interviewed Luke at mother's home. Luke denied that father hit him, but said that he (Luke) had been watching television at father's home when father, who was nude and on his way to take a shower, "came from behind and 'put his privates on my bottom,' Luke stated that it hurt when father did this and it made him feel 'uncomfortable.' " Father stopped when Luke asked him to stop. When asked how many times this had happened before, Luke said,

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

[2] This was not the family's first encounter with the dependency system. In January 2003, DCFS filed a section 300 petition as to Luke's half siblings based on mother's drug abuse and mental problems. At that time, Luke was placed with father. Jurisdiction was terminated in April 2005. In December 2005, mother was arrested for domestic violence.

"for as long as I can remember." When a police officer interviewed Luke that same day, Luke repeated his description of the incident but claimed it happened just that one time. The officer next interviewed mother, who denied having coached Luke, but admitted that she told Luke "if he was able to tell the truth and tell the story, we could go to Hawaii." When the officer interviewed Luke a second time, Luke said he had been abused in the same manner on three occasions. DCFS social worker Martinez interviewed father later that same day. Father denied ever abusing Luke and accused mother of fabricating the story. Regarding walking around the apartment naked, father said, "[H]e's my son, don't fathers walk naked in front of their sons? Is it a crime for me to walk naked in my own apartment? I'm a hippie I have nothing to hide, if my son has seen me naked it's when I'm going in the shower, because the apartment is so small. I don't want my son to be ashamed of his body." Finding insufficient evidence to arrest father, the police officer turned the case over to detectives.

On March 3, while one social worker interviewed Luke, a detective and social worker Martinez observed from behind a glass panel. Luke repeated the accusation against father and this time said that it had happened more than once. Luke said he knew his father did not touch him while he was asleep because he had set up a video camera to record during the night; in response to the social worker's request to see the video, Luke said it got run over by a car on the way to the hospital. The detective concluded that there was insufficient evidence to file charges against father, but said he would present the case to the District Attorney. The district attorney subsequently interviewed Luke and also found insufficient evidence to prosecute father.

After meeting with Luke twice, Psychologist Charlene Underhill told social worker Martinez that she (Underhill) credited Luke's accusation. Underhill recommended that visits with father cease until father received treatment. Luke was detained from father and placed with mother.

On March 15, DCFS filed a section 300 petition which alleged that on multiple occasions father sexually abused Luke by placing father's nude body and penis against Luke's buttocks. Based on this conduct, the petition alleged that Luke was a person

described by section 300, subdivisions (b) and (d). Following a detention hearing, the court found a prima facie case had been established under both subdivisions. Luke was released to mother, and father was given weekly monitored visits in a neutral setting.

On April 4, mother tested positive for drugs.[3] At a Team Decision Making meeting on April 8, mother blamed her relapse on father's sexual abuse of Luke; father maintained he did not abuse Luke and that mother had persuaded Luke to make the accusations in exchange for a promised trip to Hawaii. Luke was detained from mother and, over father's objection, placed with maternal grandmother. An amended section 300 petition was filed which added an allegation that mother's drug use rendered her incapable of caring for Luke, endangered his physical well-being and put him at risk of physical harm within the meaning of section 300(b).[4]

The contested adjudication trial took three days over two months (May & June).[5] The court received into evidence the March 15 detention report, the April 12

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[3] Mother's prior drug test in late March was inconclusive. The director of the toxicology lab told the dependency investigator that the test showed that mother drank "massive amounts of water before taking the test . . . ." The amount was not consistent with thirst quenching. On April 4, the dependency investigator told mother to retest that day. Mother tried to make excuses why she could not test that day, but eventually complied.

[4] Luke's 17-year-old half sister (Chiany D.) and 15-year-old half brother (Claudio D.) were also detained and a new section 300 petition was filed as to them based on mother's drug use. Claudio was placed with maternal grandmother; Chiany was placed under the grandmother's supervision but remained at her boarding school in Ojai, California. Mother enrolled in an outpatient drug treatment program and on April 11 tested negative for drugs. On the first day of the jurisdictional hearing as to all three children, mother submitted on the petition as to Chiany. The dependency court subsequently found Claudio a person described by section 300(b). Mother is not a party to this appeal.

[5] In the middle of the trial, father reported to the police that mother was living in maternal grandmother's home in violation of the monitored visitation order. When a police officer went to the home, he found that mother was not there and the children were safe. Maternal grandmother denied that mother, who was living in a residential treatment program, was living with her. In a Last Minute Information to the Court recounting these

Jurisdictional Report, an April 13 Detention Report, an April 13 Last Minute Information to the Court Officer, and the May 11 Jurisdictional Report.

Luke testified that he was eight years old, understood the difference between the truth and a lie and that there would be consequences for lying. It was the truth when Luke told people that father put his private part on Luke's bottom. Luke thought it happened two times. When it happened, Luke was at his father's house lying on his belly on the sofa, watching television. Luke was dressed, father was not. Luke said, "Stop," but his father just kept doing it. Father did not say anything. Luke did not remember telling the therapist, the social worker on anyone else that it hurt. No one told Luke to make up this story; mother did not promise to take him to Hawaii.

Mother testified that she first learned what happened on February 24, when Luke told her about it upon returning from father's home. Luke had been becoming increasing reluctant to go his father's home and had hinted that something was wrong there. Mother immediately took Luke to the Manhattan Beach police station where she was told to report the incident to the Redondo Beach police because that was where father lived. From the police station, mother took Luke to Kaiser Hospital. At Kaiser, Luke told part of what happened, but then retracted it. After six hours at Kaiser, Luke told them most of what had happened. Mother denied discussing Hawaii with Luke in connection with the allegations against father.

Father testified that he never touched his son in a sexual way. He never laid on Luke without having any clothes on. Father believed that mother was coaching Luke to make the accusation. Father does not shower with Luke, but Luke sees father undressed before father takes a shower.

Joseph Paolella testified that he has been a polygraph examiner for 40 years and has done approximately 20,000 polygraphs. Before becoming a licensed private

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events, DCFS was critical of father for exposing the children to undue stress and anxiety about being detained again. In the same document, DCFS praised mother's performance in her treatment program and stated that maternal grandmother wanted to enroll Claudio in the same boarding school his sister attended.

investigator, Paolella was with the United States Secret Service for about 20 years. Paolella opined that polygraph tests are about 95 to 96 percent accurate. On May 4, Paolella administered two polygraph tests to father. The testing process took about two hours. In addition to some irrelevant questions, the four relevant questions Paolella asked were: (1) Did you ever anally penetrate your son, Luke's, anus with your penis or any object? (2) Did you ever touch or rub against your son's "bottom" for your own sexual pleasure? (3) Did you ever touch Luke anywhere for your own sexual pleasure? (4) Did you ever make Luke touch you for your own sexual pleasure? Father responded negatively to each question and Paolella found no indication of deception.[6]

City of Redondo Beach police officer Luis Velez testified that he took the initial report of the allegations against father on February 25. At the time, mother paced back and forth and had trouble making eye contact. Luke told different versions of the story and Luke's story was different than his mother's. Because their accounts "were all over the place," Velez asked mother if she had coached Luke. Mother said that she promised to take Luke to Hawaii if he tells the story. In Velez's police report, he wrote that mother told Luke "that it was okay to let it out. And if he was able to tell the truth and tell the story, we can go to Hawaii. . . ."

After hearing argument, the dependency court struck paragraph d-1 of the petition (the sexual abuse allegation), but sustained paragraph b-1 of the petition, amended as follows: "On 2/23/11 and on prior occasions [father] exhibited seriously inappropriate behavior and inappropriate sexual boundaries with his child in his home. Such of the child [*sic*] by the father endangers the child's physical health and safety, and places the child at risk of physical harm, damage, danger and sexual abuse." The court explained that it believed father believed he had not done anything wrong, "But, of course, he did.

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6 After Paolella testified, DCFS filed a written objection to the polygraph evidence on the grounds that it did not satisfy the *Kelly/Frye* test. (See *People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.) The trial court stated it "did not need the lie detector test," and DCFS makes no legal argument on the subject on appeal.

[¶] He has no problem at all with the fact that he walks around his house, naked. He doesn't see anything wrong with it at all. As he states, I'm a hippy and I don't see anything wrong with anything I've done. But his son does. And his son told him so. And his son has told everybody else. He doesn't like it. And maybe on the way to the shower, dad hugged his kid. I don't know what he did. Whatever he did made Luke . . . feel uncomfortable." The court continued: "[I]f you raise a child from birth that his body is fine and everybody walks around naked and that's the way the household runs, you know, it isn't everybody's choice but it's that family's choice. In this case it was the father's choice. Nobody else's. And he put that choice on his child after he knew that the child found it, at the very least, extremely uncomfortable." The court concluded, "Sexual abuse is – is interesting in our context here. It's almost automatic that when you touch a child inappropriately, it doesn't really matter what your intention is. It's the child's perception of what's going on that is what's happening here. I don't get that Luke felt that he was being sexually abused by his father. What I get is that Luke would prefer his father had a different way of interacting with him. . . . What I get out of this is that dad was just not paying attention and that he was not paying attention to such a degree that Luke felt at some point sexually threatened by his dad."[7]

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[7] This last comment reflects a misunderstanding of the intent element of child sexual abuse. For example, an element of the crime of lewd or lascivious conduct in violation of Penal Code section 288, subdivision (a) is the perpetrator's "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." And misdemeanor molestation, in violation of section 647.6, subdivision (a)(1) does not require a touching but does require (1) conduct a normal person would unhesitatingly be irritated by, and (2) conduct motivated by an unnatural or abnormal sexual interest. (*People v. Brandao* (2012) 203 Cal.App.4th 436, 440 (*Brandao*).) The court in *Brandao* explained that the offense " 'is not concerned with the child's state of mind, but rather refers to the defendant's objectionable acts that constitute the offense. [Citation.] [¶] Accordingly, to determine whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective* test not dependent on whether the child was in fact irritated or disturbed. [Citations.]' [Citation.]" (*Id*. at pp. 440-441.) At least for misdemeanor annoyance or molestation, the perpetrator's intention *does* matter and the victim's perception (as opposed to a normal person's perception) *does not* matter.

The court found by clear and convincing evidence that substantial danger existed to Luke's physical health and/or Luke was suffering from severe emotional damage, and that there were no reasonable means to protect him without removal from father's custody. Father was ordered to participate in counseling to address "sexual boundaries." Father timely appealed.[8] DCFS cross-appealed from the order striking the section 300(d) allegations.

DISCUSSION

A. *The Jurisdictional Finding Is Not Supported by Substantial Evidence*

Father contends the finding that Luke is a person described by section 300(b) is not supported by substantial evidence. We agree.

We begin, as always, with the standard of review. We review a dependency court's determination that a child will suffer a substantial risk of harm under the substantial evidence test. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.) Although DCFS must prove by a preponderance of the evidence that the child is a person described by section 300 (and must demonstrate by clear and convincing evidence that removal of the child is justified because of a danger to the child's health (§ 361, subd. (c)), that is not the appellate standard of review. On appeal from a judgment that must be based upon the preponderance of the evidence or clear and convincing evidence, the trial court's test disappears and " ' "the usual rule of conflicting evidence is applied, giving full effect to respondent's evidence, however slight, and disregarding appellant's evidence however strong." [Citation.]' [Citation.]" (*In re E.B.* (2010) 184 Cal.App.4th 568, 578; see also *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598.) Substantial evidence means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144.) While it may consist of inferences, they must be a product

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[8] On August 9, the court granted father a hearing on a section 388 petition, but the record on appeal does not include the results of that hearing.

of logic and reason and not the result of speculation or conjecture. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394.)

A child comes within the jurisdiction of the dependency court under section 300(b) upon a showing that 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 or guardian to adequately supervise or protect the child . . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

Jurisdiction under section 300(b) requires evidence that the child is exposed to a substantial risk of serious physical harm or illness. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 399 (*Alysha S.*).) In determining what constitutes a substantial risk of serious physical harm, courts have taken guidance from subdivision (a) of section 300, which uses the same language to authorize jurisdiction where " ' "[t]he minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm inflicted nonaccidentally upon the minor by the minor's parent or guardian." For purposes of that 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 minor or the minor'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." (§ 300, subd. (a).)' [Citation.]" (*Ibid*.) Substantial evidence may consist of inferences, but 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.]" (*In re Savannah M.*, *supra*, 131 Cal.App.4th at pp. 1393-1394, italics omitted.) Jurisdiction cannot be based on a "possible harm[] that *could* come to pass" or on harm that is "merely speculative." (*In re David M.* (2005) 134 Cal.App.4th 822, 830.)

Alysha S. is instructive. In that case, the court held that a child is a person described by Welfare and Institutions Code section 300(b) if the child's parent fails to protect the child from lewd conduct, including lewd conduct by that parent or the other

parent. (*Alysha S., supra*, 51 Cal.App.4th at p. 398.) But the mother's allegation that the father, over one year before the filing of the petition, touched the child's "privates in a manner the mother felt was inappropriate" did not alone establish a reason for government interference. (*Id*. at p. 399.) Here, DCFS has cited no case, and our independent research has found none, in which dependency jurisdiction was based exclusively on the fact that a parent walked around the family home nude in the presence of a same sex child. In the cases which discuss a parent's nudity, it is usually an opposite sex parent and the nudity is in addition to some kind of sexual abuse; at the very least misdemeanor molestation as defined in Penal Code section 647.6, subdivision (a)(1). (See, e.g., *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1211 [father frequently walked around home naked, he also inappropriately touched his daughter, or forced her to touch him, on several occasions].)

Here, the dependency court struck the section 300(b) allegation that father sexually abused Luke by placing his nude body and penis against Luke's buttocks, thus finding the evidence insufficient to support that count. Instead, the court based section 300(b) jurisdiction on a finding that father "exhibited seriously inappropriate behavior and inappropriate sexual boundaries with his child in his home." The court's comments make clear that it was not convinced that father had sexually abused Luke. Rather, it believed father walked around the house naked, causing Luke discomfort. But a child's discomfort with his parent's lifestyle choices is not the standard for dependency court jurisdiction. To establish the possibility of future harm in the form of sexual abuse, the parent's past conduct must amount to at least misdemeanor molestation. In other words, it must be: (1) conduct a normal person would unhesitatingly be irritated by, and (2) conduct motivated by an unnatural or abnormal sexual interest. (*Brandao, supra*, 203 Cal.App.4th at p. 440.) The court's own statement that if everyone in the family walks around naked it is an appropriate family choice, cannot be reconciled with a finding that a father walking around naked in front of his eight-year-old son is conduct a normal person would be unhesitatingly irritated by. Under these circumstances, the jurisdictional finding is not supported by substantial evidence.

Our conclusion that the jurisdictional finding is not supported by substantial evidence renders moot father's contentions regarding the removal order – that order must also be reversed.

Regarding DCFS's cross-appeal, implicit in the trial court's striking of the section 300(d) allegation and amendment of the section 300(b) allegation is a finding that Luke's inconsistent statements about father inappropriately touching him were not credible. DCFS's argument that the court believed the touching occurred but struck the child abuse allegation anyway, is not supported by the record. Accordingly, we affirm the order striking the section 300(d) allegation.

DISPOSITION

The juvenile court's jurisdictional findings as to father are reversed, as is the order removing Luke from father's custody. In all other respects, the orders are affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.