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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.C. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

Fabian C.,
Defendant and Appellant.

B287658

(Los Angeles County
Super. Ct. No. 17CCJP01474)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert S. Wada, Referee. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Father appeals from the juvenile court's removal of his three-year-old son, J.C., from his custody. Father contends that substantial evidence does not support either the jurisdictional finding that he had a substance abuse problem that placed J.C. at risk, or the dispositional order removing him from father's care. We find substantial evidence supports the court's findings and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2017, the Department of Children and Family Services (Department) received a referral that J.C.'s mother was using methamphetamine. Mother consented to the Department taking temporary custody of J.C. and he was placed with maternal grandfather.

Father asked for custody of J.C. Father and mother had ended their relationship shortly after J.C. was born. Father said that since J.C. was an infant, father had visited him about once a week. Father denied using drugs or having ever used drugs with mother.

Father had a drug-related criminal history: in 2013, he was convicted of two counts of possession of unlawful paraphernalia and one count of possession of a controlled substance; in 2014, he was convicted of possession of a controlled substance; and in 2016, he was convicted of driving under the influence causing bodily injury.

The Department filed a petition under Welfare and Institutions Code section 300 alleging mother's drug abuse placed J.C. at risk.¹ At the detention hearing, the court ordered J.C.

¹ All statutory references are to the Welfare and Institutions Code.

detained from mother and released to father over the Department's objection.

One month later, November 2017, father acknowledged, contrary to his prior assertion, that he had a history of substance abuse: he had been using methamphetamine every day for the past five years. When he was dating mother, they had smoked methamphetamine on a daily basis. Father had last used methamphetamine in October 2017. He submitted to a drug test in November 2017, the results of which were negative. When he was asked how he was able to stop using drugs, he said he had just stopped.

The Department recommended that J.C. be detained from father, and filed an amended petition adding an allegation under section 300, subdivision (b)(1) that father's substance abuse placed J.C. at risk. In a subsequent interview, father admitted that he had *not* previously had a relationship with J.C.: mother had barred him from seeing J.C. because father was using drugs.

Mother told the Department that she had lived with father's family during her pregnancy with J.C. Father had screamed at her and punched her. When J.C. was one month old, she moved out of father's home, and would not allow father to see J.C. because of his drug abuse.

At the jurisdictional hearing, the dependency investigator testified that methamphetamine can cause paranoia and sleeplessness. In her experience, parents addicted to methamphetamine placed their children at risk by neglecting their needs. Father testified that he had previously completed a substance abuse program but, despite multiple efforts to stop taking drugs, he had relapsed several times. He had enrolled a

week prior in the same drug treatment program he had completed before.

The court sustained a finding that father's substance abuse placed J.C. at risk of harm. The court removed J.C. from his parents' custody and placed him with maternal grandfather. Father timely appealed.

DISCUSSION

1. Substantial Evidence Supports the Jurisdictional Finding Against Father

Father argues that his substance abuse history did not cause a current substantial risk of serious physical harm to J.C. Specifically, he contends that the evidence showed he had not used drugs after J.C. was placed in his care on November 1, 2017, and there was no evidence J.C. had been harmed during the 28 days he lived with father. Father also argues there was no nexus between his prior substance abuse and a risk of harm to J.C. We disagree.

We review the juvenile court's jurisdictional and dispositional orders for substantial evidence. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) "We consider the entire record, drawing all reasonable inferences in support of the juvenile court's findings and affirming the order even if other evidence supports a different finding. [Citation.] We do not consider the credibility of witnesses or reweigh the evidence. [Citation.] Substantial evidence does not mean 'any evidence,' however, and we ultimately consider whether a reasonable trier of fact would make the challenged ruling in light of the entire record. [Citation.] The parent has the burden on appeal of showing there is insufficient evidence to support the juvenile court's order.

[Citation.]” (*In re Isabella F.* (2014) 226 Cal.App.4th 128, 137–138.)

The juvenile court may determine a child is subject to its jurisdiction under section 300, subdivision (b)(1) if it finds by a preponderance of the evidence that “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s . . . substance abuse.”

“Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing [citations], the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child [citation].” (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1215–1216.) Thus, the juvenile court “may consider past events in deciding whether a child presently needs the court’s protection.” (*Id.* at p. 1216.)

Father does not dispute that the evidence established he had a substance abuse problem prior to November 2017. Father contends that the Department did not prove that his substance abuse was current at the time of the jurisdictional hearing on November 28, 2017, or that he posed a risk of harm to J.C. Father points to the evidence that he said he stopped using drugs in October 2017, and that J.C. was safe in his custody during those 28 days.

Given J.C. was a child of “tender years,” father’s substance abuse over the five years prior to J.C.’s detention was prima facie evidence of father’s “inability . . . to provide regular care resulting

in a substantial risk of physical harm.” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766–767.) Father’s drug abuse involved recurrent run-ins with law enforcement and driving under the influence, which also supported the conclusion that his behavior posed a risk to J.C. and impaired father’s ability to care for him.

Although father said he had stopped using drugs less than a month before the jurisdictional hearing, he was an unreliable narrator: he had initially told the Department he had never used drugs and later admitted he lied. He had also initially represented to the Department that he regularly visited with J.C.; that, too, was a lie. In fact, mother had barred father from seeing J.C. because of father’s drug abuse.

Father’s period of sobriety was brief, and his drug abuse not so distant in time that the court could not rely on that evidence to conclude that father’s drug abuse posed a current risk of harm to J.C. at the time of the hearing. That J.C. had not come to harm during the 28 days he had been in father’s care was also not determinative of the court’s ruling; the court was not required to wait for J.C. to be injured in order to sustain a jurisdictional finding against father. (*In re Christopher R.*, *supra*, 225 Cal.App.4th at pp. 1215–1216.)

2. *Substantial Evidence Supports the Disposition Order*

Father contends the juvenile court erred in removing J.C. from his care under section 361, subdivision (c) because J.C. was not residing with him when the petition was initiated. Section 361, subdivision (c) only applies when the juvenile court removes a child from the custody of a parent with whom the child resides at the time the petition is initiated. Respondent contends the juvenile court recognized that father was a noncustodial parent

and correctly applied section 361.2 at the disposition hearing when it declined to place J.C. with father.

At the disposition hearing, the court found “there is clear and convincing evidence that there is a substantial risk of harm” to J.C., and “remov[ed]” J.C. from “both parents.” In the related minute order, the trial court applied “section 361(c)” to “custodial parents” and “section 361.2” to “noncustodial parent(s),” but did not specify whether it found mother or father to be “custodial” or “noncustodial.”

Section 361, subdivision (c) prohibits removal of a child from the physical custody of the parents with whom the child resides at the time the petition was initiated, unless there is clear and convincing evidence of a substantial danger to the child, and no reasonable means to protect the child without removal. Section 361.2 applies here when a child is removed from a custodial parent under section 361, and the parent with whom the child did not reside at the time the petition was initiated requests custody. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 347.) If that non-custodial parent requests custody, the court must place the child with that parent unless there is clear and convincing evidence of detriment to the child. (§ 361.2, subd. (a); *In re Abram L.* (2013) 219 Cal.App.4th 452, 461.)

Although the record suggests section 361 was correctly applied to mother and section 361.2 was correctly applied to father, if we assume that the court removed J.C. from father under section 361, subdivision (c), we agree any error was harmless.

“We cannot reverse the court’s judgment unless its error was prejudicial, i.e., ‘ “it is reasonably probable that a result more favorable to the appealing party would have been reached in the

absence of the error.” ’ ’ (In re Abram L., supra, 219 Cal.App.4th at p. 463.) In “assessing whether this error was prejudicial, we can neither ignore the similarity between these statutes’ mandatory findings, nor disregard the evidence supporting the court’s ‘substantial danger’ finding concerning placement with father. [Citations.]” (In re D’Anthony D. (2014) 230 Cal.App.4th 292, 303.)

Father argues he was prejudiced because substantial evidence does not support the court’s finding of danger to J.C. under the incorrect statute, section 361. Father argues there was evidence he was not currently using drugs and that the social workers had found his home to be appropriate. However, as stated above, father’s drug abuse was very recent, and although he had joined a drug treatment program a week prior to the disposition hearing, he had already relapsed after completing that program previously. Further, as stated above, father was an unreliable witness.

Although J.C. had not been harmed while in father’s care, and both he and paternal grandmother had apparently complied with the Department’s safety plan, there was evidence paternal grandmother did not notice when her son was under the influence of methamphetamine and minimized his drug use. Father’s long-term and recent drug abuse was sufficient evidence of substantial danger were J.C. allowed to reside with father. Given paternal grandmother’s denial of father’s use of methamphetamine and minimization of the problem, there was substantial evidence that relying on paternal grandmother to supervise father’s care of J.C. was not a reasonable alternative to removal.

Substantial evidence supports the trial court’s finding of substantial danger to J.C. and no reasonable means of protection

without a removal finding. The standard of “substantial danger” to the child under section 361 is higher than the detriment standard under section 361.2. (Seiser & Kumli, Cal. Juvenile Courts Prac. & Proc. (2018) § 2.126[2][a], p. 2-432.) It follows that the court’s finding of risk under section 361 would undoubtedly have been the same if the court had applied section 361.2. We therefore cannot say it is “reasonably probable” the court would have made a different finding had it considered whether the placement would be detrimental to J.C. under section 361.2.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

STRATTON, J.

DUNNING, J.*

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