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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.V., a Person Coming
Under the Juvenile Court Law.

B284548

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

(Los Angeles County
Super. Ct. No. DK21068)

Plaintiff and Respondent,

v.

M.R.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of
Los Angeles County, Lisa R. Jaskol, Judge. Affirmed in part,
reversed in part and remanded with directions.

Paul A. Swiller, under appointment by the Court of Appeal,
for Defendant and Appellant.

Mary C. Wickham, County Counsel and Kim Nemoy,
Principal Deputy County Counsel, for Plaintiff and Respondent.

M.R. (father) challenges the juvenile court's order exercising jurisdiction over his son A.V. (born Nov. 2012). (Welf. & Inst. Code, § 300, subd. (b)(1).)¹ He contends the court's sustained factual allegations against him for (1) failing to protect his son from the risk of serious physical harm, and (2) being an abuser of marijuana, should be stricken because they are not supported by substantial evidence.

Since the filing of father's appeal, the juvenile court terminated its jurisdiction over the matter, arguably rendering this appeal moot. The Los Angeles County Department of Children and Family Services (DCFS) moved to dismiss the appeal, but otherwise did not object to father's request. We denied DCFS's motion. Because the juvenile court's jurisdictional findings could detrimentally affect father in the future, we considered the merits of father's appeal.

We agree with father and reverse the juvenile court's findings against him. In all other respects, the order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND²

Father is married and lives with his wife, four children (including A.V.), his mother and his grandmother. Father was never in a relationship with mother, but had an affair that ceased when he got caught by his wife. Mother later informed father of her pregnancy with A.V. Father and mother thereafter went to court over custody of A.V. Mother was granted physical and legal custody of A.V., and father had visitations on Tuesday, Wednesday, and every other weekend. Father and mother did

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Ashley V. (mother) is not a party to this appeal. Mother also has another child, A.R., who is unrelated to father. We have omitted facts relating to A.R. as such facts are not relevant to father's appeal.

not communicate regularly. Mother lived with maternal grandmother, who father stated took care of A.V. because mother was never home. Father coordinated his visits with A.V. through maternal grandmother.

A. The Referral

On December 16, 2016, DCFS received a referral alleging A.V. was the victim of neglect by mother. The referral stated mother had recently posted a video on Facebook Live of mother smoking cocaine and marijuana in front of A.V., then four years old. There were also two videos on the internet concerning mother. The first video, dated December 13, 2016, was of mother and A.V., with mother holding a lighter and what appeared to be an apple with a “joint” inside of it. The second video, dated November 29, 2016, was of mother alone, but she mentioned she had been through a lot and had used cocaine and other drugs in the past.

The same day as the referral, the social worker interviewed father, his wife, his mother, and A.V. at father’s home. The social worker described father’s home as “appropriate.” It consisted of four bedrooms and two bathrooms, and had a kitchen, living room, dining room, and backyard. The social worker noted the home was clean, had ample food, all utilities were in working condition, and had no safety hazards.

Father told the social worker that he recently saw a few videos on social media of mother smoking marijuana in front of A.V. He had concerns with A.V. being under the care of mother because she was “out and about.” Father’s wife and his mother also expressed concerns to the social worker of A.V. being under the care of mother. They recently saw the videos on social media of mother smoking marijuana in front of A.V.

The social worker observed that A.V. was clean, well groomed and free of any visible bruises or marks. A.V. told the

social worker that father never used foul language or derogatory words towards him. A.V. stated mother drank beer and smoked something with a “funny smell” outside the home and also in front of him. A.V. had also seen father smoke something with “a funny smell” outside the house. Father never smoked in front of him. A.V. denied being afraid of either mother or father, and stated he felt safe in both homes.

The social worker also met with mother and maternal grandmother at mother’s home. When questioned about the videos on the internet, mother admitted she smoked marijuana, but denied recently using other drugs. She stated marijuana was prescribed by a doctor and had a letter from a medical clinic with an expiration date of November 9, 2017. Maternal grandmother told the social worker that she was aware mother used marijuana, but did not believe mother used other drugs. Mother was not allowed to use marijuana inside the home.

B. The Dependency Petition / Detention Report

On January 25, 2017, DCFS filed a petition under section 300, subdivision (b)(1). Under count b-1, the petition alleged: Mother has a history of substance abuse, including using methamphetamine, cocaine and marijuana, which rendered her incapable of providing regular care for A.V. On December 12, 2016, and on other occasions in 2017, mother was under the influence of illicit drugs while A.V. was under her care and supervision. Mother also had a criminal history of convictions for controlled substances. Although father knew of mother’s substance abuse, father allowed mother to have unlimited access to A.V., thereby placing A.V. “at risk of serious physical harm, damage, danger and failure to protect.”

Under count b-2, the petition alleged: Father is a current abuser of marijuana. On December 21, 2016, father tested positive for marijuana. Because A.V. was of such a young age

requiring constant care and supervision, father's substance abuse endangered A.V.'s "physical health and safety" and placed A.V. "at risk of serious physical harm, damage and danger."

That same day, DCFS issued a detention report. It noted DCFS received a prior referral back in September 2015 of general neglect of A.V. by mother. The referral stated mother had a history of drug use and was severely depressed and possibly suicidal. Following an investigation, DCFS ruled the allegations of neglect were inconclusive. The investigation determined maternal grandmother and maternal aunt assisted mother in providing care for A.V.

Following a hearing, A.V. was removed from mother's physical custody and placed with father. Mother was allowed monitored visits with A.V. three times a week.

C. The Jurisdictional/Disposition Report

On March 24, 2017, DCFS submitted its Jurisdictional/Disposition Report. Despite repeated attempts, mother did not make herself available for an interview for the report.

Father stated to DCFS that he suspected mother was currently using methamphetamine and marijuana. Sometimes when he picked up or dropped off A.V. with mother, "she didn't want to look [him] in the eyes, because she knew [he] could tell she was high." Father did not "follow" mother on social media and was unaware of the behavior mother was documenting on the internet until friends told him. Father continued to leave A.V. in mother's care because he was obligated to share custody with her due to a court-ordered custody agreement. Father also knew mother lived with maternal grandmother who made sure A.V. was being properly taken care of. According to father, "At the end of the day, I know [maternal grandmother] would be there because [mother] would always leave [A.V.] behind." However,

father also stated maternal grandmother was “scared of [mother], she ha[d] no control over [mother].”

Father admitted to smoking marijuana. Initially, father denied using any type of drugs until he was told that A.V. knew he smoked. Father stated he did not know his children were aware that he smoked because he never smoked inside his home. He had been smoking marijuana since the age of 13, and in 2010, he was prescribed marijuana by a doctor. Father had no criminal convictions; he had been arrested three times, including once for possession of marijuana and other charges in 2007, and another time in 2010 for driving under the influence of alcohol or drugs. Father stated his use of marijuana did not affect him from being a father and taking care of his children. Father was a forklift operator working the night shift, and was the sole provider for his family. He worked for the same company for four years. His wife did not work and cared for the children.

From December 21, 2016, to March 20, 2017, DCFS requested father test for drugs five times. Father failed to show twice for a test, and tested positive three times for marijuana, but with decreasing levels. On March 15, 2017, father voluntarily enrolled himself in a substance abuse program. He stated he was willing to do “whatever it takes” to ensure A.V. was safe and remained in his care.

DCFS recommended A.V. remain with father.

D. Jurisdiction/Disposition Hearing

On April 11, 2017, a combined jurisdictional/disposition hearing was held concerning A.V. As to count b-1, DCFS argued father failed to protect A.V. by allowing A.V. to remain with mother when he could tell mother was “on something.” DCFS further argued father’s reliance on maternal grandmother to protect A.V. was unreasonable because, as father himself stated, maternal grandmother had “no control” of mother. As to count b-

2, DCFS argued father's admission that he smoked marijuana outside his home indicated that he returned inside the home impaired and was unable to care for A.V.

The juvenile court sustained the petition's allegations in its entirety under section 300, subdivision (b)(1). It did not provide any further explanation as to its findings against father under count b-1. As to count b-2, the court stated it was "excellent" that father was attending substance abuse classes, and that it was "very pleased" father was no longer using marijuana. Because of the "young age presumption," however, the court sustained the factual allegations against father as to that count.

The juvenile court ordered A.V. to remain in the care of father. It further ordered that mother was allowed one monitored visit with A.V. per week at the DCFS office until visits in a therapeutic setting could be scheduled.

E. Father's Appeal

On May 3, 2017, father filed a timely appeal.

F. Termination of Juvenile Court Jurisdiction

On December 14, 2017, while father's appeal was pending, the juvenile court terminated its dependency jurisdiction over the matter and awarded joint legal custody of A.V. to mother and father, and sole physical custody to father. It also granted mother visitations with A.V. on certain afternoons and weekends.

DISCUSSION

Father contends the juvenile court's jurisdictional findings against him under section 300, subdivision (b)(1) are not supported by substantial evidence. In its letter brief, DCFS reiterates its argument that this appeal should be dismissed, but otherwise does not object to this court reversing the sustained jurisdictional findings against father.

A. Standard of Review

We review the juvenile court’s findings for substantial evidence. (*In re I.C.* (2018) 4 Cal.5th 869, 892.) “It is well settled that the standard is not satisfied simply by pointing to “isolated evidence torn from the context of the whole record.” [Citations.] Rather, the evidence supporting the jurisdictional finding must be considered ‘in the light of the *whole record*’ ‘to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value. . . .’ [Citation.]” (*Ibid.*)

B. Section 300, subdivision (b)(1)

Section 300, subdivision (b)(1), authorizes dependency jurisdiction when 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, or . . . the inability of the parent or guardian to provide regular care for the child due to the parent’s . . . substance abuse.” (§ 300, subd. (b)(1).)

C. Analysis

Before declaring jurisdiction under section 300, a juvenile court generally must find: “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820, abrogated on another ground, *In re R.T.* (2017) 3 Cal.5th 622, 628–629 (*R.T.*).)

1. Failure to Protect

In determining whether a parent failed to protect a child from serious physical harm, “[t]he court may consider past events in deciding whether a child presently needs the court’s protection. [Citation.] A parent’s “[p]ast conduct may be probative of current conditions” if there is reason to believe that the conduct

will continue.” (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216; *In re J.N.* (2010) 181 Cal.App.4th 1010, 1023 (*J.N.*); *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.) Nonetheless, “[e]vidence of past conduct, without more, is insufficient to support a jurisdictional finding under section 300. There must be some reason beyond mere speculation to believe the alleged conduct will recur.” (*In re James R.* (2009) 176 Cal.App.4th 129, 136 (*James*), abrogated on another ground, *R.T.*, *supra*, 3 Cal.5th at p. 628; but see *In re J.K.* (2009) 174 Cal.App.4th 1426, 1434 [showing of prior physical harm, standing alone, sufficient to establish dependency jurisdiction].) Courts look at the totality of the circumstances to determine whether a child is at risk of serious future harm. (*J.N.*, *supra*, 181 Cal.App.4th at p. 1025.)

Here, although the record revealed father suspected mother used illicit drugs, and that father may have knowingly left A.V. with mother while she was under the influence, those facts were not enough to warrant jurisdictional findings in this case against father. There was no evidence of actual physical harm to A.V., or that father’s alleged failure to protect caused A.V. serious physical harm. (See *James*, *supra*, 176 Cal.App.4th at p. 136.) To the contrary, the social worker observed A.V. was clean, well groomed and free of any visible bruises or marks.

The record also revealed father was obligated to leave A.V. with mother due to a court-ordered custody agreement. To that end, father never dropped off A.V. in mother’s care alone, but coordinated the drop offs with maternal grandmother. Other than the recent videos posted on the internet, father was unaware mother was smoking marijuana in front of A.V. Maternal grandmother stated mother did not use marijuana inside mother’s home. There was also no evidence maternal grandmother failed to properly take care of A.V.; rather DCFS

previously closed an investigation against mother for neglect of A.V. based, in part, on the support A.V. was receiving from maternal grandmother.

There was also insufficient evidence to support a finding that father would not adequately protect A.V. from mother's illicit drug use in the future. At the time of the jurisdictional hearing, father had sole physical custody of A.V. and mother's contact with A.V. was limited to monitored visits.

Given the totality of the circumstances, and the lack of evidence of risk of physical harm to A.V. at the time of adjudication, we reverse the juvenile court's findings against father for failure to protect under count b-1.

2. Marijuana Abuse

In determining whether a parent suffers from "substance abuse," a court may consider "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 DSM-IV-TR."³ (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766 (*Drake*)). A finding of "substance abuse" may also be based on evidence of a parent's repeated drug use. (*In re Rebecca* (2014) 228 Cal.App.4th 720, 726 [finding of substance abuse supported by mother's "involvement in the criminal court system and dependent court system as the result of the use of drugs, her prior involvement in a drug program and her 'relapse,' her lying about her use of drugs, rationalization for the use of drugs, and her admission

³ "DSM-IV-TR" refers to "[t]he American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000)." (*Drake, supra*, 211 Cal.App.4th at p. 765.)

that she had a substance abuse problem”].) Mere drug use is not enough to support jurisdiction; there must also be evidence that the parent failed or was unable to adequately supervise or protect the child. (*Drake, supra*, at p. 768.)

The Court of Appeal’s ruling in *Drake, supra*, 211 Cal.App.4th at p. 768, is instructive. There, the court reversed a jurisdictional finding that father was a substance abuser. (*Ibid.*) In so ruling, the court noted the lack of evidence in the record concerning father’s use of marijuana, mainly, (1) there was no substance abuse diagnosis by a medical professional, (2) there was no current substance abuse problem as defined in the DSM–IV–TR, (3) there were no problems concerning work, and (4) there were no substance-related legal problems. (*Drake, supra*, at pp. 767–768.)

Here, as in *Drake*, although father admitted to using marijuana since the age of 13, and even tested positive for marijuana during the dependency proceedings, there was no evidence in the record to support the finding that father’s use of marijuana rose to the level of “substance abuse.” (*Drake, supra*, 211 Cal.App.4th at p. 768.) There was no evidence of the frequency and duration of father’s marijuana use in the past or the present. There was no evidence father had been diagnosed with a substance abuse problem by a medical professional, or that he had a current substance abuse problem as defined in DSM–IV–TR. Further, there was no evidence father failed to fulfill his work obligations or that he suffered from any substance-abuse legal problems. Rather, the record showed father was gainfully employed as a forklift operator on the night shift, had been working with the same company for four years, was the sole provider for his wife, four children, and extended family members, and had a valid medical prescription for marijuana.

The record also showed that when confronted with a positive drug test, father voluntarily enrolled in substance abuse classes. And at the time of the jurisdictional hearing, father had not used marijuana for a month. The juvenile court acknowledged it was “very pleased” with father’s current situation. DCFS recommended A.V. remain with father during the pendency of the dependency proceedings.

Given our analysis of the record, we conclude father was not a substance abuser. (*Drake, supra*, 211 Cal.App.4th at p. 768.)

The record is also devoid of any evidence that father’s use of marijuana caused, or was likely to cause in the future, physical harm to A.V. The social worker described father’s home as “appropriate,” and noted it was clean, had ample food, all utilities were in working condition, and had no safety hazards. There was no evidence father used foul language or derogatory words towards A.V. Although A.V. revealed he had been exposed to secondhand smoke from father’s use of marijuana, there was no evidence such exposure by father was recurring, or that A.V. was at risk of imminent physical harm from that exposure. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004 (*Destiny*) [“No evidence suggested that Destiny was at risk of imminent physical harm caused by the secondhand smoke from [m]other's use of marijuana”].) There was also no evidence father cared for A.V. while he was under the influence. Father’s wife and extended family lived in father’s home and also took care of A.V.

Given the lack of evidence of harm to A.V. resulting from father’s use of marijuana, we reverse the juvenile court’s findings against father under count b-2 in its entirety. (*Drake, supra*, 211 Cal.App.4th at p. 769; *Destiny, supra*, 210 Cal.App.4th at p. 1003 [illicit drug use, without more, is insufficient to support dependency jurisdiction].)

DISPOSITION

The juvenile court's findings against father under section 300, subdivision (b)(1) are reversed. The matter is remanded to the juvenile court to strike count b-2 in its entirety, and to modify count b-1 by deleting the second to last sentence in its entirety that, "The child [A.V.'s] father, [] failed to protect [A.V.] in that the [] father knew of the mother's substance abuse and allowed the mother to have unlimited access to [A.V.]," and the phrase from the last sentence referring to, "[father's] failure to protect [A.V.]." The juvenile court's order is affirmed in all other respects.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ