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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ROGER R., a Person Coming
Under the Juvenile Court Law.

B271619

(Los Angeles County
Super Ct. No. DK11894)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ERIC T.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Emma Castro, Juvenile Court Referee. Reversed and remanded with directions.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Serobian Law and Liana Serobian for Mother Jennifer R.

In juvenile dependency proceedings alleging that Eric T. sexually abused his young son Roger R., the juvenile court determined that the evidence did not support a determination that Eric T. had engaged in sexual abuse. However, the juvenile court amended the dependency petition to allege that Roger R.'s allegations of sexual abuse themselves justified a declaration that he was a dependent of the juvenile court under Welfare and Institutions Code¹ section 300, subdivision (b), and found that Roger R.'s "consistent allegations of sexual touching create[] a detrimental parent/child relationship placing the child at risk of harm." Eric T. appeals from the jurisdictional finding and dispositional orders declaring Roger R. a dependent of the juvenile court. Because the evidence is insufficient to support a finding that Roger R. suffered, or was at a substantial risk of suffering, serious physical harm or illness as a result of the failure or inability of Eric T. to adequately supervise or protect him, we reverse the judgment and remand the matter to the juvenile court with instructions to dismiss the petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. Investigation and Filing of Petition

Roger R. was born in March 2011 to Jennifer R. and Eric T., who had discontinued their relationship before his birth. Jennifer R. had primary custody of Roger R., but beginning in 2013, Roger R. spent alternate weekends with his father.

In May 2015, Jennifer R. reported that four-year-old Roger R. had alleged that he was sexually abused by Eric T. Roger R. stated that Eric T. had placed his finger in his "booty" and touched his "wee-wee." Roger R. said that his father had a snake that hissed and lived under the bed and under the covers. Law enforcement reported that Eric T. was hard to understand due to his young age and easily distracted; he also said that the abuse had happened the night before, although Roger R. had not been with his father the previous night. A physical examination revealed no indicia of abuse.

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

In June 2015 Roger R. told the social worker from the Department of Children and Family Services that his buttocks were his “booty” and his penis was his “wee-wee.” He repeated his allegation that his father had touched his penis and inserted his finger into his anus, and said that it hurt. Roger R. said that it happened three times, most recently the night before, and that it happened in his father’s room. He told the social worker that his father had a black snake that was under his bed, that he liked to go to his father’s home, and that everyone at his mother’s and father’s homes was nice to him. Roger R. denied being hit or spanked, and his mother reported that no corporal discipline was used with him. The social worker found no marks or bruises on his body.

Eric T. denied any inappropriate touching of Roger R. He believed that Roger R. was being coached by his mother’s family, who had never liked Eric T. Now, when Eric T. was unable to pay child support, he believed that Roger R.’s maternal family was attempting to keep Roger R. away from him. Eric T. denied having snakes or any pets, and had no idea where Roger R.’s idea of a snake at his home came from. Eric T. had not seen Roger R. since May 17 and wanted to visit with him, but agreed to DCFS’s request to have no contact with Roger R. for the time being during the investigation.

Lauren Maltby, Ph.D., conducted a forensic interview with Roger R. on June 12, 2015. During this interview, Roger R. appeared to be developing within normal limits, with age-typical attention and motor activity, although Maltby noted that Roger R.’s speech was somewhat poorly articulated and sometimes difficult to understand. Roger R. was sometimes avoidant when discussing the allegations, and he displayed limitations normal for his age, such as initially describing the abuse happening at his mother’s home before stating that it happened at his father’s. Maltby reported that Roger R. stated that Eric T. touched Roger R.’s penis, caused Roger R. to insert his finger and his penis into Eric T.’s anus, and inserted his finger and penis into Roger R.’s anus. Roger R. reported that the touching occurred three times.

According to DCFS, Maltby stated afterwards that “it is evident something happened between father and Roger [R.]. Dr. Maltby stated that she has been interviewing children for a long time and Roger does not seem

coached.” Maltby’s written report of the interview does not include either of these conclusions.

A forensic examination of Roger R. performed on June 12, 2015, neither confirmed nor negated sexual abuse.

DCFS filed a petition on June 23, 2015, alleging that Roger R. came within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse). For each of these subdivisions, DCFS alleged that Eric T. “sexually abused the child by sodomiz[ing] the child by placing the father’s penis in the child’s anus. The father forced the child to place the child’s penis in the father’s anus. The father digitally penetrated the child’s anus and fondled the child’s penis, causing the child pain. Such sexual abuse of the child by the father endangers the child’s physical health and safety, and places the child at risk of serious physical harm, damage, danger and sexual abuse.”

Pending the adjudication of the petition, Eric T. received weekly visits with Roger R. that were monitored by DCFS. DCFS reported that Roger R. was “very comfortable” in the presence of his father and that the two played games. However, at the close of a September 2015 visit, Roger R. yelled, “You’re the bad guy.” His statement surprised the social worker who monitored the visits. The following week, at the end of the visit, Roger R. yelled, “I don’t want to go home with you.” This outburst struck the monitoring social worker as odd because there had been no discussion of Roger R. going home with Eric T. The social worker met privately with Roger R., who disclosed that his mother told him to make the statement.

At subsequent visits over the next two months, the DCFS monitor found that that Roger R. appeared to enjoy his visits with his father and exhibited no sign of distress. During visits Roger R. and Eric T. were appropriately affectionate with each other. Roger R. sat on his father’s lap, and they often watched movies together.

II. Law Enforcement Investigation

The Los Angeles County Sheriff’s Department investigated the allegations of sexual abuse. A deputy interviewed Roger R. on June 2, 2015, and found him difficult to understand. Roger R. repeated the statement that

Eric T. had hurt him by touching his “booty” and “wee-wee,” pointing to his body parts as he spoke. When asked when this occurred, Roger R. said “Last night. I tell him three times,” although Roger had not seen his father since May 17. Roger R. said his father had a snake that hissed, and said that the snake was “in the pond, at the beach.” Roger R. told the deputy that he did not want to see his dad “[b]ecause he hurt me. My mommy said no. Eric has three snakes under his bed.” Roger R. spread his hands apart farther and farther to show the length of the snakes, concluding by speaking unintelligibly and then stating, “My mommy told me.” Roger R. was unable to state where he and his father were when the sexual touching took place. He first said that Eric T. said something when he touched Roger R., but then that he did not know. When asked how his father hurt him, he said he did not know. The deputy observed that Roger R. “would only say that Eric [T.] touched his ‘bootie’ and his ‘wee-wee’ but was never able to articulate under what circumstance, in his own words.”

Eric T. repeatedly denied any wrongdoing and requested a polygraph test. Eric T. passed the polygraph examination.

The deputy reviewed the recording of Maltby’s interview of Roger R. The deputy noted that at the start of the interview, Roger R. promised to tell the truth and then twice said that he was going to tell lies. Roger R. misstated his mother’s name and said he did not know who “Eric” was.² At first Roger R. said nothing about the touching when asked about Eric T., but when Maltby prompted him with, “I heard something about a boot[y]” and asked him to tell her “everything about a boot[y],” Roger R. mumbled that his father touched his penis and buttocks. Roger R. said Eric T. was screaming loudly but could not articulate anything more about it. The deputy noted that Roger R. said the abuse happened, “Three times, two times, one time,” and stated that it occurred at his mother’s house before saying it happened at Eric T.’s home. When asked about the snake, Roger R. first said he did not know, and then said, “My mommy” before continuing unintelligibly. The recording included the allegations that Maltby had set forth in her report, but Roger R. also denied that anyone’s penis entered his “boot[y]” and repeatedly said he did not know in response to questions.

² Roger R. called his father by his first name.

The Sheriff's Department closed the case without referring it for prosecution. The investigating deputy concluded, "Based on my interview with the child, the forensic interview, the suspect's denial during the interview with him and polygraph examination along with the lack of physical and corroborating evidence, I find that there is insufficient evidence to proceed with the investigation."

III. Adjudication and Disposition

Roger R. had recently turned five years old at the time of the adjudication hearing. He testified in chambers, and he was the only witness to testify at the hearing. During initial questioning concerning his competency to testify, Roger R. correctly identified a piece of blue paper as blue, but then twice said it would be true to say the paper was white. When the exercise was repeated, Roger R. testified that identifying the paper as a different color than the color it was would be a lie and not the truth. Roger R. told the court that it was bad to tell the truth, that if he told a lie he got a big hug, and that it was good to tell a lie. On further questioning he said it was not a good thing to tell a lie but that he could not remember why. Roger R. then testified that it was better to tell the truth.

Roger R. recognized that the judge was female, but stated that it would be the truth to say that the judge was a boy. He knew it would be a lie to say that a black stapler was red. Roger R. denied that he had ever lied to either of his parents and also said that he did not get in trouble when he told lies at home. Roger R. said that he would not tell lies to the court, but he also told the court he could not remember what would happen if he told the court a lie. The court said, "The court does have some questions whether or not this child is competent to provide testimony," and asked the attorneys to decide whether to conduct further voir dire or to object to his competence. Counsel neither objected nor further questioned Roger R., and Roger R. proceeded to testify.

Roger R. testified that his father had touched his penis five times. He denied seeing Eric T.'s penis. Eric T. had touched his "booty," and said that it hurt.

On cross-examination, Roger R. confirmed that there had been five instances, all at his father's home. He did not know what he had been doing when the touching occurred and he did not know when he had told his mother about the touching. Roger R. testified that he had told the social worker that Eric T. had touched him five times. He could not remember if any of the touching was in the course of a bath. He testified that each time, Eric T. touched his penis and his buttocks. He had never seen Eric T.'s penis. He could not remember what Eric T. did, but it hurt. Roger R. testified that he did not like spending time with his father because his father hurt him. He said he could not remember what it meant that his father "hurt" him. Roger R. then testified that he had not ever told his mother that Eric T. hurt him, and that he had never told anyone that Eric T. hurt him. Roger R. testified that this was the first he was telling that Eric T. had hurt him. When asked why he did not tell his mother, he said, "because I don't like Eric."

The court asked Roger R. if Eric T. was his father, and Roger R. replied, "No more." He testified that he did not know what name he used to refer to Eric T. or when they last had a visit together, and he testified that he had never had a visit with his father that was good. He claimed that before the touching he did not like to visit Eric T., and that he had never had fun at Eric T.'s home.

Roger R. said he did not want to visit with Eric "[b]ecause he hurt me in my booty and my wee[-]wee." When asked why he was mad at Eric T., Roger R. said, "Because Eric hurt my booty and my wee[-]wee." Later in his testimony, Roger R. was asked why he did not like Eric T., and he again responded, "He hurt my booty and my wee[-]wee."

When Roger R. was asked to show how Eric T. touched him, he cupped his hand in the area of his buttocks. He testified that Eric T. touched Roger R.'s penis with his phone and that he never touched his penis with anything else.

He testified that his mother did not like Eric T. and that she told Roger R. so. Roger R. testified that he did not think his father liked his mother and that his father said mean things about his mother. Roger R. did not think that his mother liked his paternal grandparents. He liked his grandmother but did not like his grandfather.

Roger R. testified that his mother told him to tell the court something when he went to court, but he did not remember what. Later he testified that she told him to tell the truth. When asked if his mother told him to say that Eric T. had touched his “booty,” Roger R. said yes. Counsel asked, “Why did she tell you that?” “Because I don’t like Eric,” Roger R. responded.

The court observed that “[t]his case is disturbing.” The court observed that Roger R.’s “testimonial competence was minimal.” The court noted that it did not expect a child as young as Roger R. to have command of time or an extensive vocabulary, but the court found Roger R.’s consistent assertion that the touching occurred five times “a little surprising.” The court observed, “He never varied from that five times, and he would say five times without even thinking sometimes. So he would immediately say five times after the question was asked, yet when he was interviewed previously, he stated it was only three times. [¶] Part of that may just be the fact that he is a five-year-old child, but the problem the court has in finding the [section 300, subdivision] (d) allegation is the child’s ability to be clear in his testimony[,] to provide honest and credible testimony.”

The court also commented on the inconsistency between Roger R.’s testimony that he did not like visiting with his father and the social worker’s observations that they had pleasant visits. “The court was concerned that he kept saying in his testimony that he didn’t like his dad. That he didn’t want to see his dad and that he was mad at his dad. [¶] More than one question was asked of him regarding his relationship with his dad, and he was very consistent with regard to his negative feelings towards his dad, and yet I have evidence before the court . . . that the social workers have viewed him to have very positive and affectionate visits with his dad at the social worker’s office.” At the same time, the court observed, inconsistency was to be expected when a five-year-old child was being questioned by five attorneys.

The court said, “It’s very difficult to determine credibility and truth with a child who is so young without physical evidence.” The court mentioned Maltby’s interview and her conclusion that his statements were consistent, and noted that “basically” Roger R. testified in chambers to what he had told Maltby in the forensic interview. The court then noted, “Dr.

Maltby believes that something happened,” but “[s]he never has stated in the report that the child was a victim of child sexual abuse.”

The court addressed the issue of the parents’ relationship and the question of coaching. “He did say that his parents don’t like each other. He did say on one occasion his mother told him what to say, and I know that there ha[ve] been allegations that perhaps the mother coached the child, but then I have to look at the fact that [the] mother has been cooperative with the visitation schedule. So what was the mother’s motive to coach the child?”

“Frankly,” the court concluded, “I cannot find by a preponderance of the evidence that the allegations on the [section 300, subdivision] (d) count are true.” The court struck the allegation of sexual abuse under section 300, subdivision (b) and dismissed the allegation under section 300, subdivision (d), and but then amended the petition on its own motion to conform to proof by adding a new allegation under section 300, subdivision (b). This new allegation, which the court labeled a second count under section 300, subdivision (b), read as follows: “The child Roger R[.] alleges father has engaged in inappropriate sexual touching of him, and father adamantly denies said sexual touching. [¶] The child’s consistent allegations of sexual touching create[] a detrimental parent/child relationship placing the child at risk of harm.” The court sustained this allegation and declared Roger R. a dependent child of the juvenile court under section 300, subdivision (b). Eric T. appeals.

DISCUSSION

We review the juvenile court’s jurisdictional findings for substantial evidence. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) Substantial evidence is “evidence which is reasonable in nature, credible, and of solid value.” (*Ibid.*) Under this standard of review, we examine the whole record in a light most favorable to the findings and conclusions of the juvenile court and defer to the lower court on issues of credibility of the evidence and witnesses. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733.) We determine only whether there is any substantial evidence, contradicted or uncontradicted, that supports the juvenile court’s order, resolving all conflicts in support of the determination and indulging all legitimate inferences to

uphold the lower court's ruling. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.)

Our starting point is the juvenile court's conclusion that the evidence was insufficient to demonstrate by a preponderance of the evidence that Eric T. sexually abused Roger R. and its dismissal and striking of the allegations of sexual abuse under section 300, subdivisions (b) and (d). There was no evidence, nor any allegation by DCFS, that Eric T. abused or neglected Roger R. in any other way. In the absence of evidence establishing that it was more likely than not that Eric T. had sexually abused his son, the court justified asserting dependency jurisdiction over Roger R. on the basis that the mere fact of the contested allegations of sexual touching leveled by Roger R. against his father created a detrimental relationship between the two that "plac[ed] the child at risk of harm."

Section 300, subdivision (b) provides that a child is within the jurisdiction of the court if "[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." "A jurisdictional finding under section 300, subdivision (b) requires: "(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." [Citation.]' [Citations.] The third element 'effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).' [Citation.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

Viewing the record in the light most favorable to the judgment, there is no evidence that Roger R. had suffered or was at substantial risk of suffering serious physical harm or illness as a result of his numerous sexual abuse allegations, as a result of his relationship with Eric T., or as a result of any conduct by or within the control of Eric T. The court's finding that the abuse allegations caused Eric T. and Roger R. to have a "detrimental parent/child relationship" suggests that the court was concerned that the allegations impaired the parent-child relationship in a manner that caused Roger R. to

suffer or to be at risk of suffering emotional harm of some type. But section 300, subdivision (b) requires “serious physical harm” or a “substantial risk of serious physical harm,” and this subdivision does not permit assertion of jurisdiction based on emotional harm.³ (§ 300, subd. (b); *In re Daisy H.* (2011) 192 Cal.App.4th 713, 718; *In re Jesus M.* (2015) 235 Cal.App.4th 104, 111-114.) The evidence is insufficient as a matter of law to support the juvenile court’s jurisdictional finding under section 300, subdivision (b).

Because the evidence is insufficient to support the court’s finding on the only count remaining in the petition, we reverse the judgment and remand with directions to dismiss the petition.

DISPOSITION

The judgment is reversed. On remand, the juvenile court is instructed to dismiss the dependency petition.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

³ No allegation was made under section 300, subdivision (c), which provides for juvenile court jurisdiction over a child who is suffering serious emotional damage or is at a risk of suffering serious emotional damage. The court made no findings under that subdivision, and Mother does not argue that the court’s jurisdictional finding could be sustained on that basis.