

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ALFREDO O.,

Defendant and Appellant.

B257259

(Los Angeles County
Super. Ct. No. DK03103)

APPEAL from orders of the Superior Court of Los Angeles County,
Julie Fox Blackshaw, Judge. Reversed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant
and Appellant, Alfredo O.

Office of the County Counsel, Mark J. Saladino, County Counsel,
Dawyn R. Harrison, Assistant County Counsel, and Peter Ferrera, Principal Deputy
County Counsel, for Plaintiff and Respondent.

The juvenile court asserted jurisdiction over Juana C.'s (mother) and Alfredo O.'s (father) daughters C. and Nicole under Welfare and Institutions Code section 300, subdivision (b) based on a finding that mother's and father's abuse of marijuana put the children at substantial risk of serious physical harm or illness.¹ Father appealed and argues that there was no substantial evidence he abused marijuana or that any such abuse endangered his daughters. We agree and reverse the jurisdictional and dispositional orders with respect to father only.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and father were born and grew up in El Salvador. In 1996, they began a relationship. Mother was already pregnant with C. at the time; however, when C. was born father treated her as his own daughter. At some point mother and father immigrated to the U.S. C. continued to live in El Salvador until 2005 when she moved to the U.S. to join her parents.

In 2008, mother gave birth to Nicole. When Nicole was eighteen months old, mother and father separated because mother was unfaithful. Father moved into his parents' and sister's house, and mother and the children moved into mother's boyfriend's apartment. When they separated, mother told father that he was not Nicole's biological father. Father responded that "he saw the child as his own." He continued to provide for Nicole and to visit with both girls.

In about 2009, mother and father sent C. to stay with relatives in Nevada for six months, to address "behavioral problems" C. was beginning to exhibit. When C. returned, she and Nicole lived mostly with mother but spent weekends and vacations with father.

In January 2014, when C. was seventeen years old, she was admitted to the hospital for a psychiatric evaluation and then transferred to a psychiatric hospital. She was talking to herself, seemed paranoid, and attacked the staff, injuring six people. C.

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

said she had used marijuana two days earlier and that it might have been “ ‘laced’ with something else.”

C. told hospital staff that father had raped her about a year earlier. When questioned by staff, C. became combative and agitated; she refused to provide details but said father had penetrated her with his penis. The next day, C. told a doctor at the hospital that she had been molested -- but not raped -- two years earlier. A police officer who tried to interview C. about the allegations found her to be “very vague” and unable “to give any dates or exact details.” A day later, a Department social worker who tried to speak with C. reported that she jumped from topic to topic, asking if authorities had arrested father and taken him to jail. The social worker asked C. about the sexual abuse. C. refused to speak.

C. told the social worker that her parents “smoke marijuana all day” and that father would give her marijuana whenever she asked for it. She said that she had started using marijuana a year earlier and had used crystal methamphetamine three times, including one week before. C., however, told the police that father “would never give her any” marijuana.

C. also told the social worker that her parents “ ‘have never been there for me. . . . They don’t care about me. . . . They took me away from my mother Daisy. Well, Daisy is my grandmother but she took care of me and they took me from her when I was 9 years old.’ ”

The social worker interviewed Nicole, father, and mother. Nicole, who was then five years old, denied any abuse or neglect by her parents. She said she “did not know what smoking was” and “ha[d] never seen anyone smoke.” Mother denied any wrongdoing by father and said “the kids love him[], they prefer to be with him.”

Father admitted to smoking marijuana “because [he] had bad arthritis.” He showed the social worker his medical recommendation for marijuana. Father denied giving C. marijuana but said “she may have found it” in his home. Two weeks earlier, father had found a bag of what appeared to be crystal methamphetamine in C.’s belongings. He had “tried to confront” her about the drugs but “she shut[] [him] off.”

Father described C. as “ ‘rebellious’ ” and said she had frequently “ ‘run away’ ” from home. He said that he and mother had filed missing person reports with the police and “ ‘[a]fter like 4 or 5 days, we go look for her.’ ” Father, who worked 15 hour days as a sous chef, said he had missed work “4 or 5 times” to look for [C.] and that “she would just come home when she was done partying.” “ ‘She just kept doing it over and over,’ ” so “ ‘[a]fter four or five times we stopped filing police reports.’ ” “ ‘Now, we just hope that she is okay.’ ” Mother told the Department that C. had a history of running away from home. When mother tried “to reason with her,” C. became angry, yelled, paced, and refused to listen. Mother did “not know what to do with her.”

Father consented to the detention of Nicole and C., and cried when he said he did not want to put Nicole at risk of being taken away from mother.

On January 22, 2014, the Department filed a petition alleging that father had “sexually abused” and “forcibly rap[ed]” C. The petition alleged that father had “caused [C.] to smoke marijuana” “on numerous occasions.” The petition also alleged that mother and father had a history of illicit drug use and currently abused marijuana which rendered them “incapable of providing regular care of the children.”²

At the detention hearing, the court found father to be the presumed father of C. and Nicole. The court detained both girls, releasing Nicole to mother’s care. C. remained hospitalized but was later released to shelter care.

In March 2014, the Department interviewed the family again. C. said that “she has always known that [] father smokes marijuana” and that “there were times that she and [] father smoke[d] marijuana together.” Mother said that when she and father lived together, he never smoked in the children’s presence and kept his marijuana either on his person or “up high in their bedroom closet.”

Father also denied that he had ever smoked marijuana in the presence of the children. He said he had stopped smoking marijuana when this case began and he was

² The petition also alleged that father had slapped C. The Department later withdrew that allegation.

willing to drug test. Father admitted he had been convicted in 1991 and 1994 of possessing cocaine.

In April 2014, the Department interviewed mother's boyfriend who had lived with her and the children since mother and father separated. The boyfriend stated that father " 'gives everything for his kids,' " and that father never appeared under the influence of drugs when the boyfriend picked up the children from him.

The jurisdiction/disposition hearing was held in June 2014. C. testified that father tried to have sex with her in 2013. C. testified that father had never inserted his penis or his finger into her vagina. C. said this "attempt" happened at night when she was asleep.

Father denied ever having tried to have sex with C. Father said C. had most recently lived with him in early January 2014. "[S]he was having a lot of misbehavior problems, missing school[,] so I put boundaries, rules in my house that she needed to follow. [S]he didn't want to follow them, so she left." Father and mother "tried to confront [C.] a lot of times [] for missing school so many times," and father also "talk[ed] to [C.] about not using drugs." When C.'s high school caught her with drugs, mother and father met with school staff who said that C. would be "assigned into a therapy or counselors over the drug problem." The school said it would keep mother and father apprised of C.'s progress.

As for the marijuana use, C. testified that father gave her marijuana every time she saw him. Father denied ever giving C. marijuana and said he kept his marijuana with him "at all times with [his] license when [the children] were at home." When he went to work, "[the marijuana] would always be in the trunk of my car with my license, because I didn't want to leave it at home." Evidence was submitted that father had tested negative for drugs on nine separate occasions between February 2014 and June 2014. Father testified that he had stopped smoking marijuana in January because he "wouldn't want this to [a]ffect [] get[ting] my daughters back."

In closing argument, all of the attorneys focused primarily on the allegations of sexual abuse. On the marijuana issue, C.'s counsel argued that "anybody that's had to

do any kind of drug treatment knows that a drug is a drug is a drug. If you stop using drugs, you're supposed to stop using all drugs that are mind-altering. But clearly, that was not something learned. . . . Do you know what it looks like when somebody is really high on pot? Does [father] know what he's doing half the time?" "I think that definitely the drug count [should be] sustained."

Nicole's counsel argued that Nicole was "at risk" because father was giving C. drugs and because father "felt that it's kind of hard to confront [C.], really confront her, not just by telling her it's not a good idea that you're using drugs, but really confront her, getting her into therapy."

The Department's counsel argued that "[the] parents are high every day" and "there is no information that either of these parents were ever really dealing with the problems of the family. . . . [I]nstead of taking some parental responsibility, it's the kid[s'] problems [The parents believe they] didn't have to do anything to try to resolve the issues."

Father's counsel argued "I don't agree with the theory that [] these parents were high as a kite and just trying to toss their kids around. They're trying to protect their kids. . . . [Father now has had] nine negative drug tests. . . . He quit smoking, he goes to work, he doesn't have a bad relationship with the mom. . . . [So] they don't send their kid to parenting class and all the services that we have at DCFS. Well, those aren't available when you're on the streets, when your boots are on the ground There was a school therapist [and] they were doing their best."

The court refused to sustain the counts alleging sexual abuse. The court found father "to be a much more credible witness than [C.]. . . . [H]is statements that [] he cracked down on [C.] because of [her] behavior, and [she] got angry, I found those to be very credible statements. . . . [And] he has asserted paternity because I actually think he does care about the girls, and he really did want them to behave in an appropriate way. I think not being well skilled in parenting tactics, you know, having girls who had a very tumultuous childhood has made that very, very difficult, not to mention the drug use by the parents" The court found "C.'s statements about what happened . . . [to

have been] really inconsistent. At one point, she claimed she was raped, then she was molested, then there was vaginal penetration, then there wasn't vaginal penetration. Then there was digital penetration, there was not digital penetration to the social worker, to the police, to the hospital. And then she refused to even speak in the forensic interview. And in her testimony here, there were different versions every time.” Regarding the marijuana issue, the court stated, “I don’t believe that the father caused [C.] to smoke marijuana. I believe the father’s statements that he kept his drugs locked up in his car to be very credible. I don’t know where [C.] was getting the drugs . . . [but] I do believe her statement that she was angry because her father didn’t give her more drugs.”

Father’s counsel did not request an opportunity to brief the issue of substance abuse as a basis for dependency jurisdiction. The court amended the petition to state that the parents were “recent users, not current users” of marijuana. As amended, the court sustained the petition’s allegations that the parents’ use of marijuana endangered C. and Nicole. The court ordered C. and Nicole removed from father’s custody, and released them to mother. Father and mother were both ordered to participate in drug treatment and testing, a 12-step program, individual counseling, a parenting course, and any conjoint counseling requested by the children’s therapist. Father appealed; mother did not.

CONTENTIONS

Father challenges the court’s jurisdictional findings on the grounds that there is no substantial evidence he abused drugs or that any such abuse endangered C. and Nicole. He also argues that the dispositional orders were an abuse of discretion.

DISCUSSION

1. Applicable Law

“A juvenile court may order children to be dependents thereof if the Department establishes by a preponderance of the evidence that allegations made pursuant to section 300 are true.” (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.) We review the jurisdictional findings for substantial evidence and will affirm if “there is

reasonable, credible evidence of solid value to support them. [Citations.]” (*Id.* at p. 1319.) “ ‘[W]hile substantial evidence may consist of inferences, 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.* (2005) 131 Cal.App.4th 1387, 1393.)

Here, the juvenile court sustained jurisdiction against father under section 300, subdivision (b). Section 300, subdivision (b)(1) provides for jurisdiction when “[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 inability of the parent [] to provide regular care for the child due to the parent’s [] mental illness, developmental disability, or substance abuse.”

“When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction, a reviewing court can affirm the [juvenile] court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) However, we may also exercise our discretion to reach the merits of a challenge to any jurisdictional finding when the finding may be prejudicial to the appellant. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015.) Because the finding that father neglected his children may be used against him in future dependency proceedings, we reach the merits of his appeal.

2. *There Was No Substantial Evidence Supporting the Court’s Finding that Father’s Prior Use of Medical Marijuana Put the Children At Substantial Risk of Serious Physical Harm or Illness*

Here, the court sustained the allegation that father’s “history of illicit drug use and [] recent abuse[] of marijuana . . . renders [him] incapable of providing regular care of the children.” “[J]urisdiction based on ‘the inability of the parent [] to provide regular care for the child due to the parent’s . . . substance abuse’ must necessarily include a finding that the parent at issue is a substance *abuser*. (§ 300, subd. (b).)” (*In re*

Drake M. (2012) 211 Cal.App.4th 754, 764.) The “use of medical marijuana, *without more*, cannot support a jurisdiction finding that such use brings the minors within the jurisdiction of the dependency court” (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 453 [finding “more” where father smoked marijuana in the presence of his children exposing them to “the negative effects of secondhand marijuana smoke,” and father’s “use of marijuana ha[d] a negative effect on his demeanor towards the children”]; see also *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 [“It is undisputed that a parent’s use of marijuana ‘without more’ does not bring a minor within the jurisdiction of the dependency court”].)

“[A] finding of substance abuse for purposes of section 300, subdivision (b), 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 [Diagnostic and Statistical Manual of Mental Disorders (DSM)].” (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) Here, there was no evidence that father had been diagnosed as having a substance abuse problem. Therefore, the Department had the burden of showing that father fit the definition of a substance abuser as set forth in the DSM.

The “substance use disorders” classification in the most recent edition of the DSM “identifies 11 relevant criteria, including cravings and urges to use the substance; spending a lot of time getting, using or recovering from use of the substance; giving up important social, occupational or recreational activities because of substance use; and not managing to do what one should at work, home or school because of substance use. The presence of two or three of the 11 specified criteria indicates a mild substance use disorder; four or five indicate a moderate substance use disorder; and six or more a severe substance use disorder.” (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218, fn. 6.)

The Department contends that father met the DSM criteria for substance abuse because he “failed to meet his obligations at home as a parent” due to his marijuana use

and he continued to use marijuana “despite recurrent interpersonal problems exacerbated by the drug[.]” Specifically, the Department argues father “neglected C.’s needs” by “fail[ing] to address [her] substance abuse and behavioral issues” and “fail[ing] to obtain help for her to address her drug problem” such as “therapy” or “treatment.”

In fact, the evidence showed that father *had* addressed C.’s drug abuse and other problems: he had confronted C. a number of times about her drug use and poor attendance at school. Moreover, the court found father’s testimony credible that he had established rules and boundaries at home in response to C.’s “misbehavior” and “missing school.” In addition, father knew C. was in therapy at school to address her drug use. The Department argues that father was indifferent to C.’s safety because he did not do enough to find her when she ran away. But there was no evidence connecting father’s marijuana use and his eventual resignation about C.’s persistence in running away to “party” with her friends after father had filed numerous police reports and gone out looking for C. on a number of occasions.

Nor did the evidence show that father “continued to use [marijuana] despite recurrent interpersonal problems caused or exacerbated by drug use,” as the Department contends. There was no evidence that father’s use of medical marijuana affected how he parented his children – for example, that he acted differently with his children when he was under the influence of marijuana. (Cf., *In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 453 [finding that father’s use of marijuana made him “irritable, [] not himself, [and caused him to] snap[] at the children and ha[ve] less patience with them”].) In addition, as soon as the Department initiated this case and alleged that the children were endangered by father’s marijuana use, father stopped using marijuana: his drug tests were consistently negative during the five months between the filing of the petition and the jurisdiction/disposition hearing.³

³ C.’s counsel’s argument at the hearing that “a drug is a drug is a drug” was misleading given the Legislature’s stated intent in the Compassionate Use Act “[t]o ensure that patients and their primary caregivers who obtain and use marijuana for

Furthermore, the record lacked evidence of “a specific, defined risk of harm” to either C. or Nicole resulting from father’s use of marijuana. (*In re David M.* (2005) 134 Cal.App.4th 822, 830.) At the time of the jurisdiction/disposition hearing, father had not used marijuana for five months and C. was enrolled in therapy at school. Therefore, the Department’s argument that father’s marijuana use had caused him to neglect C.’s need for therapy was no longer an issue. In addition, there was no evidence showing how Nicole was at risk of “serious physical harm or injury” caused by father’s marijuana use. (§ 300, subd. (b).) Although Nicole might be considered of “such tender years that the absence of adequate supervision and care poses an inherent risk to [her] physical health and safety,” the record still does not show that father’s marijuana use impaired his parenting skills or judgment so that he would not provide Nicole with such care or supervision. (*In re Drake M., supra*, 211 Cal.App.4th at p. 767.)

In re Drake M., supra, 211 Cal.App.4th 754 is directly on point. Drake’s father used marijuana several times a week for arthritis. (*Id.* at pp. 759-761.) He had a medical marijuana recommendation. (*Id.* at p. 760.) Drake’s mother had a history of drug abuse and mental health issues. (*Id.* at pp. 758-759.) Father told the Department, and later testified, that he never smoked marijuana in Drake’s presence, that he smoked only in the garage, and that other family members cared for Drake when father was in the garage. (*Id.* at pp. 758-761.) Father kept the marijuana in a locked tool box on a shelf in the garage. (*Id.* at p. 761.) Father admitted having smoked marijuana recreationally when he was younger. (*Id.* at p. 760.) Drake appeared to be healthy and well cared for, though he was due for some immunizations. (*Id.* at pp. 758, 760.) The trial court found father’s use of medical marijuana placed Drake at substantial risk of serious physical harm within the meaning of section 300, subdivision (b). This court reversed, finding no substantial evidence to support the trial court’s order.

Accordingly, for all of these reasons, the record did not contain substantial evidence supporting jurisdiction under section 300, subdivision (b) based on father’s use

medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.” (Health & Saf. Code, § 11362.5, subd. (b)(1)(B).)

of marijuana. There was insufficient evidence father abused marijuana or that any such abuse placed the children at substantial risk of serious physical harm or injury.⁴The court, the parties, and counsel understandably were focused on and very concerned about the allegations of sexual abuse. But, once the court found C. not to be a credible witness, there was no evidence – much less substantial evidence – that father smoked marijuana in the children’s presence or gave C. marijuana.

Although the juvenile court will retain jurisdiction over the children based on the sustained allegations against mother, we must reverse the jurisdictional findings against father. As there was no valid jurisdictional finding against father, the dispositional orders with respect to him must be reversed as well. (See *In re A.G.* (2013) 220 Cal.App.4th 675, 686-687.)

⁴ Father’s cocaine use more than twenty years earlier -- before his daughters were born -- was also insufficient to support the jurisdictional finding against him (nor does the Department argue to the contrary). “While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.]” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

DISPOSITION

The jurisdictional and dispositional orders are reversed with respect to father.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.*

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

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