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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re REYNALDO G., A Person
Coming Under the Juvenile Court Law.

B245361
(Los Angeles County
Super. Ct. No. CK93998)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Appellant,

v.

LEONARD G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Veronica McBeth, Judge. Reversed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant
and Appellant.

John F. Krattli, Office of the County Counsel, James M. Owens, Assistant
County Counsel and Aileen Wong, Deputy County Counsel, for Plaintiff and
Appellant.

Appellant Leonard G. (Father) appeals the juvenile court’s jurisdictional and dispositional orders. Father contends the court violated due process by providing him no opportunity to contest the allegations in the original Welfare and Institutions Code section 300 petition, and by materially amending the petition without providing additional notice and opportunity to defend.¹ Father further contends that the amended allegation does not support jurisdiction under section 300. Respondent Department of Children and Family Services (DCFS) cross appeals, contending the evidence presented at the jurisdictional hearing obliged the court to find that jurisdiction was appropriate under section 300, subdivision (d) (sexual abuse). We conclude that the court could reasonably find, based on the evidence presented, that minor Reynaldo G., the son of Father and Guadalupe M. (Mother), was not at risk of sexual abuse.² We find, however, that the court’s alternate finding, that on one occasion, Father “made inappropriate physical gestures and inappropriate comments that caused the child to experience nervousness, to change his sleeping and eating habits, and to express fear,” did not support the court’s finding of jurisdiction under section 300, subdivision (b) (failure to protect) and did not support jurisdiction under any other provision of section 300. Accordingly, we reverse the jurisdictional and dispositional orders.³

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

² No allegations were asserted or sustained with respect to Mother, who is not a party to this appeal.

³ Because we reverse on other grounds, we need not resolve Father’s contention that the court violated his due process rights when it disallowed his counsel’s requests to present evidence in his defense and when it amended the allegations of the petition to shift the focus from sexual abuse to other types of harm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2012, Reynaldo, who was then almost six, reported to Mother and a DCFS caseworker that Father had lifted his shirt and asked Reynaldo if he wanted to suck or kiss his “chi[-]chis” (a slang term for breasts) and then took off his pants and underwear and asked if Reynaldo wanted to suck or kiss his “pee pee.” Reynaldo reenacted the incident, making it appear that Father had sucked his own breast and touched his own penis when he made the alleged statements. Reynaldo stated that nothing further happened -- he had not touched Father and Father had not touched him. Reynaldo later repeated the allegations to police officers, further stating that Father also exposed his buttocks and that the incident occurred when they were getting ready for bed. Prior to reporting the incident to Mother, Reynaldo had told his grandmother that Father had lifted his shirt and grabbed his “breast,” but said nothing about Father touching or displaying his penis or buttocks.⁴ DCFS detained Reynaldo from Father and filed a petition alleging that Father “sexually abused the child,” in that “[Father] asked the child to kiss [Father’s] penis” and “suck [Father’s] nipples,” “exposed [Father’s] penis to the child,” and “masturbate[d] . . . in the child’s presence.” The petition sought assertion of jurisdiction under subdivisions (b) (failure to protect) and (d) (sexual abuse).

Prior to the jurisdictional hearing, the caseworker re-interviewed Reynaldo. This time the boy stated that Father had “grabbed his [Father’s] chi-chis and his pee-pee and his butt” and “tasted it.” Reynaldo’s described Father’s actions as

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Father was interviewed and denied the allegations.

“gross.”⁵ Mother reported that Reynaldo had again reenacted the incident by trying to kiss his own breasts while taking a shower. Both Father and Reynaldo were in therapy at the time.⁶ Reynaldo’s therapist, Dr. Rolando Espinoza, stated that the boy had reported Father exposing himself and touching different parts of his own body, including his penis, but not touching Reynaldo. Father continued to insist that the allegations were not true and contended that Mother had induced the child to make the allegations.⁷

At the September 24, 2012 jurisdictional hearing, counsel for Reynaldo called the child’s therapist, Dr. Espinoza, who testified that in June, Reynaldo had said Father stood naked in front of him and asked Reynaldo to touch his genitals or “pe[e] pe[e].” Reynaldo told the therapist Father’s actions were “gross” and indicated being disgusted by them. The boy became clingy and fearful of sleeping in his own bed for a time. It took several months after the incident for Reynaldo to enjoy visiting Father again.

Minor’s counsel next called Reynaldo who testified that on one occasion, when he and Father were getting ready to go to bed, Father took off his clothing, grabbed his “boobies” and “pe[e] pe[e]” and asked if Reynaldo wanted to touch his “pe[e] hole” or “pe[e] pe[e]” or “smell his butt.” When Reynaldo testified, he demonstrated by grabbing his own breast area. Reynaldo testified he had not touched Father, but said the incident made him feel “really bad.” Reynaldo said he

⁵ At that time, Reynaldo said he was afraid to visit Father, not because of the incident but because his older half-brother was physically abusive and had once locked Reynaldo in a room.

⁶ Father apparently suffered from a generalized anxiety disorder and had been in therapy for some time. His therapist reported that Father denied all the allegations in therapy.

⁷ At the time, Father and Mother were involved in divorce proceedings where Father’s visitation rights were at issue.

was not afraid of Father, but did not like to visit Father's home because Father and Reynaldo's half-brother did "scary things" and the half-brother sometimes hit him. Mother was called by DCFS and testified she had not coached Reynaldo or encouraged him to do anything but tell the truth.

After these three witnesses had testified, Father's counsel moved for dismissal of all the allegations under section 350, subdivision (c)."⁸ After listening to counsel's argument, the court stated its belief that the incident happened essentially as described but that it was not sexual molestation. According to the court, Father had acted "incredibly inappropriate[ly]" and "like a buffoon," but there had been nothing sexual in his conduct or in his intent. The court concluded that because Father's intent was not sexual, the incident did not "rise[] to the level of what ha[d] been pl[ed]." The court indicated an intent to sustain the petition based on inappropriate behavior, not sexual abuse.

The next day, counsel for Father argued that Mother had coached Reynaldo to make the accusation. The court stated: "I don't think [Mother] planted anything in this child's head. I think he reported to her something that happened. And I'll tell [you] what I think it was that happened later" The court further stated: "There's absolutely no sexual intent shown anywhere in any of the testimony. . . . The case is about a couple of things. Your client needs to learn how to act appropriately in front of his son. I don't believe a number of things that were said. I'll tell you later what I believe happened between the two of them." Minor's counsel argued in favor of dismissing the sexual abuse allegation, stating she

⁸ Section 350, subdivision (c) provides that after the presentation of evidence in support of the petition, the court, on its own motion or the motion of a parent or other interested party, may dismiss the petition, return the minor, and/or terminate jurisdiction. The statute further provides: "If the motion is not granted, the parent or guardian may offer evidence without first having reserved that right."

believed Father had “some boundary issues” and “a way of . . . interacting that is not appropriate,” but agreed that the incident did not rise to the level of sexual abuse. DCFS’s counsel argued in favor of sustaining the allegations as pled under both subdivision (b) and subdivision (d). During this argument, the court stated, “I believe that the father squeezed his own breast while he was looking in the mirror and they were brushing their teeth, getting ready for bed.” But the court found “not . . . one shred of sexual intent,” repeating that the conduct “wasn’t sexual in nature” When DCFS’s counsel referred to evidence that Father had asked Reynaldo to touch his penis, the court responded, “That is not the behavior that I have found.”

In making its jurisdictional ruling, the court stated that it believed the incident described by Reynaldo had happened, but not “every single word.” The court found that “Father and son were in the bathroom and Father . . . did squeeze [Father’s] breasts.” The court also found true that Father played too rough and in ways that were “scary” to Reynaldo, and that Father needed to “have some boundaries.” The court found that as a result of Father’s actions, Reynaldo was “afraid to sleep in his own bed for a little while,” he became “a little more aggressive,” and “his appetite increas[ed] a bit,” indicating “possible emotional harm to the child by [Father’s] inappropriate behavior.” The court went on to explain that Father’s behavior “places the child at risk of emotional harm as verified by his therapist, as verified by the testimony I heard from the child.” The court indicated its intent to dismiss the allegations of the petition and draft an allegation to state that on one occasion, Father engaged in annoying, inappropriate

behavior that placed Reynaldo at risk.⁹ Significantly, the court added: “I toyed with a [section 300, subdivision] ‘c’ [allegation] except I don’t . . . think the therapist[’s testimony] rose to the level of ‘c’.”¹⁰ The parties went on to discuss disposition, and the court issued its dispositional order.¹¹

When the parties returned on October 3, the court presented them with the following allegation it had drafted to replace those in the original petition: “[Father] lacks appropriate parental boundaries and parental judgment that causes the child to suffer stress and anxiety. On one occasion [Father] made inappropriate physical gestures and inappropriate comments that caused the child to experience nervousness, to change his sleeping and eating habits, and to express fear. [Father’s] failure to appropriately parent and provide parental supervision and to understand the consequences of his inappropriate conduct places the child at risk of physical and emotional harm and danger.” Counsel for Father objected to the proposed allegation, stating it had been her understanding that the amendment would say “on one occasion [Father] exhibited inappropriate behavior which places the child at risk.” The court sustained the petition as amended, finding jurisdiction appropriate under subdivision (b). Father appealed. DCFS cross appealed.

⁹ The petition contained another allegation pertaining to failure to protect the child from Father’s female companion. That allegation was dismissed and is not at issue in this appeal.

¹⁰ Section 300, subdivision (c) provides that jurisdiction is warranted when the child is suffering from serious emotional damage or is at substantial risk of suffering serious emotional damage.

¹¹ The case plan required Father to participate in a parenting class, individual counseling, and conjoint counseling with Mother, and provided Father monitored visitation.

DISCUSSION

A. The Juvenile Court Could Reasonably Conclude that Father's Actions Did Not Constitute Sexual Abuse

We first address DCFS's contention as cross-appellant that the court erred in dismissing the allegations as pled and in finding that the evidence did not support sexual abuse or assertion of jurisdiction under subdivision (d). Jurisdiction is appropriate under section 300, subdivision (d) if "the child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code" by a parent, guardian, or other member of his or her household. Section 11165.1 defines sexual abuse as conduct in violation of certain criminal statutes. The parties agree that the only statute potentially applicable here is Penal Code section 647.6. DCFS contends that under the evidence presented, the court was compelled to find a violation of section 647.6. Based on the factual findings of the court, we disagree.

Penal Code section 647.6 is violated where "a person engage[s] in acts or conduct, directed at a child under the age of 18, which would unhesitatingly disturb or irritate a normal person, if directed at such person" and "[s]uch acts or conduct were motivated by an unnatural or abnormal sexual interest in [the child]." (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1125, quoting CALJIC No. 16.440; see *People v. Shaw* (2009) 177 Cal.App.4th 92, 103 [explaining that "there can be no normal sexual interest in any child"] (Italics omitted).) To complete the crime "[i]t is not necessary that the acts or conduct actually disturb or irritate the child, or that the body of the child be actually touched." (*People v. Maurer*, *supra*, at p. 1125, quoting CALJIC No. 16.440; see e.g., *People v. Brandao* (2012) 203 Cal.App.4th 436, 440 [defendant sent multiple inappropriate text messages to teenage girls indicating interest in their bodies]; *People v. Thompson* (1988) 206 Cal.App.3d 459, 461-462, 466-467 [defendant slowly followed 12-year old victim

in his car while staring at her legs and making ambiguous gestures].) Because the conduct of a person who violates Penal Code section 647.6 need not involve touching and may not appear overtly sexual, the motivation of the defendant is key to establishing the crime: “There is no doubt that in proving the mental state element of the section 647.6 offense, the prosecution must show that the acts or conduct ‘were motivated by an unnatural or abnormal sexual interest.’” (*People v. Maurer, supra*, at p. 1127; accord, *People v. Brandao, supra*, 203 Cal.App.4th at p. 445 [Penal Code section 647.6 “is limited to a ‘comparatively narrow province,’ i.e., to offenders whose conduct, in addition to being objectively irritating and disturbing, is motivated by an unnatural or abnormal sexual interest in children.”].) A defendant who is not motivated by sexual interest in minors is not guilty of the crime, however inappropriate his conduct. (See *People v. Maurer, supra*, 32 Cal.App.4th at p. 1131 [where defendant high school teacher engaged in frank and graphic sexual discussions with teenagers, jurors “could have determined that defendant’s conduct was motivated by other than an unnatural or abnormal sexual interest” if comments were made in “a joking way” or “a counseling mode”].)

Where the party bearing the burden of proof appeals the trier of fact’s conclusion that its burden was not met, “the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law” and specifically, “whether the appellant’s evidence was (1) “uncontradicted and unimpeached” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” [Citation.]” (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 967, quoting *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) In undertaking this analysis, “[i]t is not our function to retry the case.” (*In re I.W., supra*, at p. 1528.)

To support its contention that the evidence irrefutably established that Father engaged in criminal sexual conduct, respondent relies on the most extreme conduct described by Reynaldo in his statements and testimony, suggesting it was indisputable that Father exposed and touched his penis and asked Reynaldo to kiss or suck it. A court, acting as the trier of fact, is not obliged to conclude that a generally credible witness's testimony is accurate in every detail, but may "accept or reject all or any part of the testimony of any witness" (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 409.) Here, the court observed that Reynaldo had told different versions of the incident over time, and made clear it did not believe "a number of things" the boy said. Ultimately, the court found the evidence established that Father had grabbed his own breasts and pretended to suck them. There is no basis on this record to reach a different conclusion as a matter of law. Reynaldo was not quite six years old when the incident occurred, and his statements and testimony regarding it were not always consistent. He was, however, consistent in stating that Father had lifted his shirt, grabbed his breasts, and pretended to suck them. And in reenacting the incident, the boy invariably grabbed his own breasts and attempted to pull them toward his mouth. This behavior on Father's part, while inappropriate, was not necessarily sexual, and the court made express findings that in the circumstances described, it was not. There was no evidence that on any other occasion Father had expressed a sexual interest in Reynaldo or young children in general. On this record, the court could reasonably conclude that Father's conduct was not motivated by sexual interest in Reynaldo.

B. The Court's Finding that on One Occasion, Father Made Inappropriate Physical Gestures and Inappropriate Comments that Caused Reynaldo to Experience "Emotional Harm and Danger" Did Not Support Jurisdiction

The court found that Father's inappropriate actions and comments supported assertion of dependency jurisdiction under section 300, subdivision (b). Father contends the court's factual findings did not support jurisdiction under that provision. We conclude the court's factual findings did not support jurisdiction under subdivision (b) or any other provision of section 300.

Section 300, subdivision (b) provides a basis for assertion of dependency jurisdiction 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 . . . to adequately supervise or protect the child, or the willful or negligent failure of the child's parent . . . to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left . . . or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . mental illness, developmental disability, or substance abuse."

"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 child, 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 A.G.* (2013) 220 Cal.App.4th 675, 683, quoting *In re James R.* (2009) 176 Cal.App.4th 129, 135.) "Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness."

(*In re Noe F.* (2013) 213 Cal.App.4th 358, 366, italics omitted, quoting *In re Rocco M.* (1991) 1 Cal.App.4th 814, 823; see *In re T.V.* (2013) 217 Cal.App.4th 126, 132.)

Here, the court found true that Reynaldo was placed at risk of “physical . . . harm and danger”; however, nothing in the record indicates how or in what way Father’s admittedly inappropriate antics placed the boy in physical danger. The court’s specific findings focused on the evidence that Reynaldo was suffering from or at risk of emotional distress. At the hearing, the court stated that as a result of Father’s actions, Reynaldo was “afraid to sleep in his own bed for a little while,” became “a little more aggressive,” and “his appetite increas[ed] a bit,” acknowledging that this indicated only “possible emotional harm to the child by [Father’s] inappropriate behavior.” The court drafted and sustained an allegation that Reynaldo suffered “stress and anxiety,” “nervousness,” and “fear,” and that his “sleeping and eating habits” were disrupted. These statements indicate the court’s conclusion that Reynaldo had suffered and was at risk of suffering emotional harm of some type. But subdivision (b) requires “serious physical harm” or a “substantial risk of serious physical harm,” and does not permit assertion of jurisdiction based on emotional harm. (§ 300, subd. (b); *In re Noe F.*, *supra*, 213 Cal.App.4th at p. 366, italics omitted; *In re Daisy H.* (2011) 192 Cal.App.4th 713, 718.) Accordingly, the court’s finding of jurisdiction under subdivision (b) cannot be affirmed.

Nor does any other provision of section 300 permit the court to assert jurisdiction over a minor based on the emotional distress described by the court and included in its jurisdictional finding. Subdivision (c) provides for assertion of jurisdiction where the child is at risk of “emotional damage,” but only if it is “serious” and evidenced by “severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others” (§ 300, subd. (c); see, e.g., *In re*

Patrick S. (2013) 218 Cal.App.4th 1254, 1261-1263 [diagnosis of “anxiety” and “adjustment disorder” did not support finding of detriment]; *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1377, 1378-1380 [although conflict between parents caused child to exhibit “upset, confusion and gastrointestinal distress” and to express “deep dislike and fear” of his father, subdivision (c) of section 300 jurisdiction not established].) Here, there was no evidence that Reynaldo was suffering from severe anxiety, depression, withdrawal, or untoward aggressive behavior toward himself or others. Indeed, the court specifically found that Reynaldo’s emotional distress did *not* reach the level necessary to establish jurisdiction under subdivision (c). Nothing in the record suggests the court was uninformed about the magnitude of Reynaldo’s emotional suffering or the level necessary to support jurisdiction under subdivision (c). It follows that we cannot affirm the court’s jurisdictional finding on an alternate ground and must reverse both the jurisdictional order and the dispositional order that relied on it.

Our conclusion is in line with that of the court in *In re Daisy H.* There, the father made derogatory statements about the children’s mother, referring to her as a ““bitch, hoe [sic] and prostitute,”” and issued threats against her in the children’s presence. (*In re Daisy H.*, *supra*, 192 Cal.App.4th at p. 715.) The juvenile court found insufficient evidence the children were suffering severe emotional distress to support jurisdiction under subdivision (c) of section 300, but sustained jurisdiction under subdivisions (a) and (b) on the ground the father “emotionally abuse[d]” the children. (*Ibid.*) The Court of Appeal agreed that the evidence was insufficient to establish that the children were at risk of serious emotional damage, and further held that the juvenile court could not rely on the same inadequate evidence of emotional harm to find that the children were subject to jurisdiction under section 300, subdivisions (a) and (b): “Neither section 300, subdivision (a) nor (b) provides for jurisdiction based on ‘emotional harm.’ Subdivisions (a) and (b) state

that the court may adjudge a child a dependent of the court if ‘[t]he child has suffered, or there is a substantial risk that the child will suffer, serious *physical* harm’ [Citation.] Nor does any other provision of the dependency law support jurisdiction on the ground of ‘emotional harm.’ The court had no authority to assert jurisdiction on grounds not contained in the code.” (192 Cal.App.4th at pp. 717-718.) We reach the same conclusion on the record before us.

The court here understandably sought to protect Reynaldo from a repeat of Father’s inappropriate behavior and to assist Father in attaining some level of understanding of the proper boundaries between a parent and a young child. However, there was nothing to suggest that Reynaldo was at risk of physical injury. If Father’s conduct did not expose the boy to the risk of sexual abuse under subdivision (d) as the court found, and the distress suffered by the boy did not rise to the level necessary to support jurisdiction under subdivision (c) as the court also found, the court could not base its jurisdictional finding on a provision enacted to protect children from serious physical injury.

DISPOSITION

The court's jurisdictional and dispositional orders are reversed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.