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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JUSTIN J.,

Defendant and Appellant.

B241205

(Los Angeles County  
Super. Ct. No. CK38073)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Judgment reversed in part, affirmed in part. Order reversed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel,  
James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

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Justin J. (father) appeals from (1) a judgment declaring his children dependents of the court pursuant to Welfare and Institutions Code<sup>1</sup> section 300, subdivision (b),<sup>2</sup> and (2) a subsequent order requiring him to participate in a substance abuse program. He contends that the evidence was insufficient to support the trial court's finding that he had a current substance abuse problem or to support the trial court's order requiring him to participate in a substance abuse program. We agree and will reverse the judgment (in part) and the order.

### ***FACTUAL AND PROCEDURAL BACKGROUND***<sup>3</sup>

Father and Stephanie S. (mother) have three children together:<sup>4</sup> Joshua J., born in 2002; J.J., born in 2004; and Ju.J., born in 2006. The children came to the attention of the Department of Children and Family Services (DCFS) on January 11, 2012 through a referral alleging that they were the victims of physical abuse by both parents. Father, however, was incarcerated at the time and had been since October of 2011.

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<sup>1</sup> All section references are to the Welfare and Institutions Code unless otherwise noted.

<sup>2</sup> Section 300 states, in relevant part, "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] . . . (b) 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 inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse. . . ."

<sup>3</sup> The factual and procedural background is drawn from the record, which includes a two-volume Clerk's Transcript and a one-volume Reporter's Transcript.

<sup>4</sup> Mother also had three children from prior relationships: Jazmine M., Tania C., and Julio M., Jr. These three children were the subject of prior DCFS involvement and mother failed to reunify with them. None of these children is the subject of this appeal or the case below. Mother is not a party to this appeal.

Mother stated that she believed a woman named Murjani M., who had had an affair with father previously and may have had a child by him, was responsible for the allegations. Mother also stated that she believed father was incarcerated due to Murjani's falsely accusing him of domestic violence.

In response to the referral, a DCFS social worker interviewed the children.<sup>5</sup> The social worker asked Ju.J. if she knew what drinking alcohol and doing drugs were. Ju.J. responded that her aunt drinks beer but that neither her mother nor her father drinks. She stated that "her mom and dad smoke cigarettes and blunts (brown things that she call [sic] cancer bars)" but did not provide any further explanation. Ju.J. recanted in a subsequent interview stating, " 'Nobody does drugs.' " When asked about drugs and alcohol, J.J.<sup>6</sup> responded that "her dad drinks and her mom and dad smoke weed." She

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<sup>5</sup> As father only challenges the finding relating to his alleged substance abuse, we omit facts to the extent they are not relevant to that charge.

<sup>6</sup> During the interview, the DCFS social worker began to become concerned about J.J.'s mental health. The social worker reported that J.J.'s statements were erratic and the child appeared to display attention seeking behavior. For example, J.J. stated she was once on the couch and it flipped over. She said she hit her head and saw blood on the floor but failed to tell her parents for fear she would be punished. She also stated " 'my mom hits me a lot,' " that mother had recently hit her in the neck and kicked her in the leg, and that father had thrown a shoe at her. J.J. also reported she had nightmares, that her aunt also hits her, and that mother screams at her and calls her bad words. J.J. stated that on December 24, "a white lady touched her[] and gave her kool aid that tasted nasty." J.J. claimed to have been kidnapped and sexually assaulted as well. However, after being examined at the hospital, the social worker reported that there was no physical evidence of sexual or physical abuse. While at the hospital, J.J. reported seeing people and ghosts, seeing blood on the floor, and being afraid that people would cut off her limbs. She later reported that she and her siblings had been locked in the bathroom and left home alone at night and that she had tried to hang herself in the past because demons told her to do it. J.J. was placed on a psychiatric hold and transferred to Kedren, a mental health center. It should be noted that the

recanted in a subsequent interview, however. Joshua stated that “nobody drinks” at home and “that his parents only smoke cigarettes, they don’t smoke weed.”

With respect to father’s alleged marijuana abuse, DCFS reported that a “collateral contact that has had a professional relationship with the family for years” stated that she suspected that there was marijuana use in the home but provided no evidence or explanation as to why she had that suspicion. DCFS also reported that mother denied that father was a current abuser of marijuana stating, “ ‘He is a clean and sober man.’ ” According to DCFS’s records, father tested positive for methamphetamine and marijuana on January 9, 2009 and had admitted to a history of substance abuse but denied any current usage.

The petition was filed on January 31, 2012. The family has had 10 DCFS investigations prior to the one that led to this appeal. The trial court found that a prima facie case for detention was made. The children were placed in the home of their maternal aunt and uncle.

At the adjudication hearing on April 11, 2012, the trial court sustained, as amended, counts b-3<sup>7</sup> and b-10<sup>8</sup> against mother and father, count b-8<sup>9</sup> against mother,

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maternal grandmother has a history of schizophrenia, Joshua has been diagnosed with a mood disorder, and father has been diagnosed with bipolar disorder.

<sup>7</sup> Count b-3 stated that mother inappropriately disciplined the children and that father, who was aware of such inappropriate discipline, failed to protect them from mother.

<sup>8</sup> Count b-10 stated that Joshua was diagnosed with a mood disorder and that both mother and father “medically neglected . . . Joshua by failing to ensure the child regularly take [sic] the child’s psychotropic medication.”

and count b-9 against father. Father only appeals from count b-9, which stated, “The children[’s] . . . father . . . has a history of substance abuse, and is a current abuser of marijuana. On prior occasions, the father possessed, used, and was under the influence of illicit drugs while the children were in the father’s care and supervision. The father’s substance abuse endangers the children’s physical health and safety, creates a detrimental and endangering home environment, and places the children at risk of physical harm, and damage.” The trial court stated with respect to count b-9, “I’m sustaining the drug allegation because there’s a reference about smoking [a] blunt. There’s a discussion about recreational marijuana. I do not know that there is a nexus between the use of marijuana and the failure to appropriately parent and provide [for the children’s needs] as required. [¶] So, the court does not think this is a case where it’s use of marijuana.”

The dispositional hearing was held on April 30, 2012. The trial court ordered father to complete a substance abuse program, to attend parenting and individual counseling, and to have monitored visitation with the children (with DCFS having discretion to liberalize). Father filed a notice of appeal on May 10, 2012.

### ***CONTENTIONS***

Father contends that the record does not support the trial court’s finding that he had a current substance abuse problem and, therefore, jurisdiction based on such finding

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<sup>9</sup> Count b-8 stated that mother has a 13-year history of substance abuse and is a current abuser of marijuana and is thus unable to provide regular care for the children. It also stated that her three older children from prior relationships received permanent placement services due to her substance abuse history.

was erroneous. He also contends that, because such finding was not supported by the evidence, the trial court's order that he participate in a substance abuse program based on such finding was an abuse of discretion. He does not challenge any of the other bases for jurisdiction nor does he challenge any of the court's other orders.

### ***DISCUSSION***

#### ***1. The Merits of Father's Appeal Should Be Addressed***

DCFS pointed out in its opposition that should we reverse the judgment as to father with respect to this one finding, the unchallenged findings as to father and to mother will continue to support dependency jurisdiction pursuant to section 300, subdivision (b). (See, *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) As a result, DCFS argues that reaching the merits of father's appeal will have no practical impact on the dependency proceeding. We disagree.

“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 [trial] 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 such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) However, as we noted in *In re Drake M.* (2012) \_\_\_\_ Cal.App.4th \_\_\_\_, \_\_\_\_ (*In re Drake M.*), “we generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal

[Citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [Citations]; or (3) ‘could have other consequences for [the appellant], beyond jurisdiction’ [Citation].”

Here, father also challenges an order made subsequent to the judgment at the dispositional phase of the proceedings, the basis for which was the court’s jurisdictional finding. Thus, although dependency jurisdiction over the children will remain in place because other findings are unchallenged, we will review father’s appeal on the merits.

2. *There is No Substantial Evidence To Support the Trial Court’s Jurisdictional Finding With Respect to Father’s Alleged Substance Abuse*

“We review the juvenile court’s jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible. [Citation.] ‘However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, “[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.] “The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.” [Citation.]’ [Citation.]” (*In re David M.* (2005) 134 Cal.App.4th 822, 828.)

The gravamen of count b-9 against father is that he has a history of substance abuse, was a current abuser of marijuana, and, as a result, was unable to provide regular care for the children. Thus, to support the trial court's finding, DCFS must have produced evidence showing that, pursuant to section 300, subdivision (b), the children suffered, or there was a substantial risk that they will suffer, serious physical harm or illness, as a result of father's inability to provide regular care for the children due to father's substance abuse. DCFS does not argue that any of the children suffered serious physical harm or illness and thus the question is whether the evidence was sufficient to find there was a *substantial risk* that they will suffer serious physical harm or illness at the time of the jurisdictional hearing.

The first issue that must be addressed is whether the record supports a finding that father had a current substance abuse problem. We held in *In re Drake M.*, that such a finding must be supported by "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." (*In re Drake M., supra*, \_\_\_ Cal.App.4th at p. \_\_\_.) Here, there was nothing in the record showing that father had been diagnosed as having a current substance abuse problem and, therefore, we look to see if the record contains evidence establishing that he had a substance abuse problem as defined in the DSM-IV-TR.

"The full definition of 'substance abuse' found in the DSM-IV-TR describes the condition as '[a] maladaptive pattern of substance use leading to clinically significant



impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period: [¶] (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home . . . [; ¶] (2) recurrent substance use in situations in which it is physically hazardous . . . [; ¶] (3) recurrent substance-related legal problems . . . [; and ¶] (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance . . . .’ (DSM-IV-TR, at p. 199.)” (*In re Drake M.*, *supra*, \_\_\_ Cal.App.4th at p. \_\_\_.) Our analysis of the record shows that DCFS failed to produce facts sufficient to satisfy this definition.

First, there was no evidence showing that father failed to fulfill any of his major role obligations at work, school, or home within the most recent 12-month period. Second, there is no evidence that father used marijuana in physically hazardous situations at all. Third, there is no evidence in the record that father’s marijuana usage resulted in any substance-related legal problems within the most recent 12-month period. Although father has a criminal history, his only convictions within the last 12 months are for robbery and inflicting corporal injury on a spouse (not mother). Bad as these convictions may be, there is no evidence in the record linking them to any marijuana usage. Finally, there is no evidence in the record that father continued to use marijuana despite having persistent or recurrent social or interpersonal problems *caused or exacerbated* by it within the most recent 12-month period. The only positive drug test result for father that DCFS presented was from three years prior. Evidence gathered

as part of an investigation from years past without any more recent data is insufficient. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 831.)

Our analysis of the record shows that it contains no evidence that father has a substance abuse problem. Additionally, even setting aside any potential issues with the children's credibility as we must, the evidence, at most, supports a finding that father *used* marijuana. Usage alone does not support a finding of jurisdiction. (*In re Drake M.*, *supra*, \_\_\_\_ Cal.App.4th at p. \_\_\_\_ ; *In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 453; *In re Destiny S.* (2012) 210 Cal.App.4th 999, \*6.) As a result, the trial court's finding that jurisdiction based on father's alleged substance abuse is not supported by the evidence and, thus, does not comply with section 300, subdivision (b).

3. *The Trial Court's Family Maintenance Orders Based on Its Erroneous Finding Constitute an Abuse of Discretion*

“At the dispositional hearing, the [dependency] court must order child welfare services for the minor and the minor's parents to facilitate reunification of the family. [Citations.] The court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion. [Citations.] We cannot reverse the court's determination in this regard absent a clear abuse of discretion. [Citation.] [¶] The reunification plan ‘ “must be appropriate for each family and be based on the unique facts relating to that family.” ’ [Citations.] Section 362, subdivision (c) states in pertinent part: ‘The program in which a parent or guardian is required to participate shall be designed to eliminate those

conditions that led to the court's finding that the minor is a person described by Section 300.' [Citations.]" (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.)

As we noted above, there is nothing in the record to indicate that father has a substance abuse problem. Additionally, there is nothing in the record to indicate that his use of marijuana led to the finding of dependency jurisdiction as we have found that the record does not support count b-9 against him. We see no reason why the additional burden of attending a substance abuse program should be placed on father. Such a burden fails to address the remaining conditions from which dependency jurisdiction was obtained and only serves to present an unnecessary obstacle to his reunification with the children. Thus, the order was an abuse of discretion. (See, e.g., *In re Basilio T.* (1992) 4 Cal.App.4th 155, 172-173 [concluding that a reunification plan including substance abuse counseling and drug testing was not reasonably designed to eliminate the conditions that led to the trial court's finding that the minor came under the court's jurisdiction pursuant to section 300 because the record included no evidence showing the parents had substance abuse problems].)

***DISPOSITION***

The judgment is reversed in part as to the jurisdictional finding that pertains to count b-9. In all other respects, the judgment is affirmed. The order requiring father to participate in a substance abuse program is reversed.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.