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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0494**

In re the Matter of: Susan Ann Ericson o/b/o Minor, petitioner,
Respondent,

vs.

Darryl Wayne Millner, Sr.,
Appellant.

**Filed March 18, 2019
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-DA-FA-17-8338

Michael D. Dittberner, Linder, Dittberner, & Winter, Ltd., Edina, Minnesota (for
respondent)

Darryl W. Millner, Sr., Brooklyn Center, Minnesota (pro se appellant)

Randy Crooms, Minneapolis, Minnesota (guardian ad litem)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's grant of an order for protection, arguing
that the district court erred in its factual findings and credibility determinations and that his

conduct does not constitute domestic abuse, but reasonable discipline. Because the district court's findings are supported by the record and establish domestic abuse occurred, we affirm.

FACTS

In October 2017, appellant Darryl Wayne Millner, Sr. slapped his ten-year old son M.D.M., knocking him to the ground. Appellant claimed that he slapped M.D.M. because M.D.M. had lied to him about texting his mother, respondent Susan Ann Ericson. Respondent, who was present during the altercation but did not visually observe it, described hearing appellant screaming at M.D.M. before she heard the sound of skin being hit and then a thunk. Respondent eventually removed M.D.M. from appellant's house.

Respondent petitioned the district court for an ex parte order for protection (OFP) on behalf of M.D.M. against appellant, alleging domestic abuse, which the district court granted. Appellant requested an evidentiary hearing on respondent's allegations; the court appointed a guardian ad litem, and a hearing was held.

At the hearing, the district court heard testimony from respondent, appellant, the guardian ad litem, and E.M., appellant's daughter who was present during the incident. Both appellant and E.M. testified that appellant hit M.D.M. on the shoulder, but that he did not strike him hard. They also testified that M.D.M. did not fall because of the strike but because he was being dramatic or putting on an act. The district court found that testimony to be less credible than respondent's.

The guardian ad litem testified that during his interview with M.D.M., the child reported that appellant slapped him and that he felt the impact on his face and neck before

falling to the ground. M.D.M. also reported to the guardian ad litem that appellant scares him and that it is the yelling, slaps, and threats that are frightening to him. M.D.M. reported that he wants to see appellant without being yelled at and having to be afraid.

The district court found that M.D.M.'s fall was not the result of him being dramatic but resulted because appellant struck him hard enough to cause him to fall to the ground. The district court found that this type of conduct was excessive and that striking M.D.M. in this manner was not reasonable discipline. The district court concluded by finding that appellant committed domestic abuse. It found specifically that appellant caused "physical harm, bodily injury, or assault" by striking M.D.M. hard enough to cause him to fall down on the floor. It issued the OFP. Appellant appeals pro se.

D E C I S I O N

I. The district court's finding that appellant struck M.D.M. hard enough to cause him to fall to the ground is not clearly erroneous.

Appellant argues that the district court clearly erred when it found that appellant struck M.D.M. hard enough to knock him to the ground. "We review the district court's findings of fact for clear error." *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) (citation omitted). In doing so, we view the evidence in the light most favorable to the district court's finding. *Id.* The resolution of conflicting evidence and witness credibility determinations "are exclusively the province of the factfinder." *Id.*

The district court's finding is not clearly erroneous. It is undisputed that appellant struck M.D.M. and that M.D.M. fell. Appellant's contention with the district court's finding appears to center on how much force appellant used to hit M.D.M. and whether

M.D.M. was being dramatic when he fell. But the evidence that supports appellant's characterization of the altercation was based on the testimony of appellant and his daughter, which the district court found less credible.

Taking the evidence in the light most favorable to the finding, the district court heard testimony from respondent who stated that she heard appellant hit M.D.M. and then heard him fall. That testimony was supported by the guardian ad litem, who stated that M.D.M. reported that he felt the strike to his face and neck before he fell. M.D.M. was also ten at the time. The evidence reasonably supports the district court's finding that M.D.M. fell as a result of appellant's strike.

II. The district court did not err when it found that striking M.D.M. to the ground was excessive and constituted domestic abuse.

Appellant also argues that the district court erred when it found that his conduct constituted domestic abuse, which provided the basis for issuing the OFP. We review a district court's decision to grant an OFP for an abuse of discretion. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). The Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 (2018), establishes an action for an OFP "in cases of domestic abuse." Minn. Stat. § 518B.01, subd. 4. Unsupported factual findings and misapplications of the law constitute an abuse of discretion. *Pechovnik*, 765 N.W.2d at 98.

For a district court to find domestic abuse, the petitioner must show "(1) physical harm, bodily injury, or assault" or "(2) the infliction of fear of imminent physical harm, bodily injury, or assault" committed against a family or household member by a family or household member. Minn. Stat. § 518B.01, subd. 2(a). An OFP petitioner must either

establish physical harm or establish that the alleged abuser has an intention to inflict either physical harm or fear of imminent physical harm. *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). The district court found that appellant caused “physical harm, bodily injury, or assault” by striking M.D.M. hard enough to cause him to fall down to the ground.

Appellant argues that the district court erred when it found that he inflicted physical harm, bodily injury, or assault because there were no physical injuries resulting from the fall. But appellant offers no binding authority for the proposition that the statute requires some physical manifestation of the injury. Moreover, this court has found that striking a family or household member constitutes “physical harm.” See *Gada*, 684 N.W.2d at 515 (concluding that kicking a household member in the back constituted physical harm). Consequently, the district court did not err when it concluded that appellant’s conduct of striking M.D.M. to the ground caused “physical harm, bodily injury, or assault” which supported its finding of domestic abuse.

Appellant nonetheless argues that his conduct should be seen as reasonable discipline, not domestic assault, and argues that the district court erred in finding that striking M.D.M. hard enough to cause him to fall to the ground was excessive.

To support his argument, appellant relies on *Johnson v. Smith*, 374 N.W.2d 317, 320-21 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985), a custody case in which this court stated that there was no competent evidence of unlawful child abuse or that a child was presently endangered despite evidence of the parent spanking the child, slapping him once or twice, pushing him, hitting the child with a broomstick on the arm, and hitting

him once on the back with a fist. However, in *Johnson* this court overturned the district court's finding that a child was endangered because "three witnesses—the child's guardian ad litem, a child abuse investigator, and the author of a comprehensive social report—interviewed the boy and testified that he was not in danger." *Johnson*, 374 N.W.2d at 321. But here, the evidence supported the district court's finding that appellant's use of force was "excessive and striking [M.D.M.] in this manner [was] not 'reasonable discipline.'" See *Oberg v. Bradley*, 868 N.W.2d 62, 65-66 (Minn. App. 2015) (in determining whether repeatedly spanking a child can be considered unreasonable discipline, this court acknowledged that the evidence in *Johnson* did not support the finding that the child was endangered, but concluded that the evidence in *Oberg* supported issuing the OFP).

Accordingly, the district court did not err in its findings that appellant struck M.D.M. hard enough to cause him to fall to the ground and that striking M.D.M. in this manner was excessive. Because physically striking a family or household member to the ground constitutes domestic abuse, the district court did not abuse its discretion when it granted respondent's petition for an OFP.

Affirmed.