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Division III
State of Washington
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COA No. 36156-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CRYSTAL A. UGOLINI:

Respondent,

v.

FRANK BYRON UGOLINI,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The court erred by entering an order for protection against Frank Byron Ugolini.

Issues Pertaining to Assignment of Error

A. Was Mr. Ugolini acting within his legal authority to discipline his son, Brandon, pursuant to RCW 9A.16.100? (Assignment of Error 1).

B. Did the court thus err by relying on that lawful discipline to enter the order for protection since domestic violence was not shown as defined in RCW 26.50.010? (Assignment of Error 1).

C. Did the court err by entering the order for protection under RCW 26.50.060 when Mr. Ugolini acted within his legal authority to discipline his son? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Mr. Ugolini's ex-wife, Crystal, filed a petition for order of protection on May 7, 2018. (CP 1). In the petition, she stated an emergency existed for these reasons:

The children and I fear he will attempt to remove them from school. We fear continued physical violence against the children. The respondent carries a weapon (gun) and has told the children in the past it is for protection against petitioner. (CP 4).

The precipitating factor for the petition, however, was her allegation that Mr. Ugolini slapped their son, Brandon. (CP 5). A temporary order was entered that day without notice and reissued on May 21, 2018. (CP 14, 57).

A hearing on the order for protection was held on May 31, 2018. (RP 1). The court had before it the response declarations of Mr. Ugolini, Melanie Ugolini (his present wife), and Byron Ugolini, the eldest son. (CP 27, 30, 37, 58, 64, 68). In his declaration, Mr. Ugolini said the incident with Brandon involved parental physical discipline as he acknowledged slapping Brandon on the cheek. (CP 61). Crystal did not file any reply to these declarations. (RP 8). In a police report, the investigating officer did not see any red marks on Brandon's face. (CP 55).

Addressing Crystal's claim of fear of continued physical violence against the children, Mr. Ugolini's counsel stated:

Mr. Ugolini is honest. He does physically discipline the children. But, as Byron's statement says, it's Ms. Ugolini who has used a closed hand against the children, not Mr. Ugolini. (RP 9).

As for Crystal's allegation of the kids being removed from school, the court told her "[t]hat's absolutely irrelevant to domestic violence." (RP 10). It went on to explain what the issue was:

I think a lot of you focused on parenting plan issues, which I'm not going to entertain at this point. This is whether or not a DV order should be entered and it says whether somebody has [caused] physical harm, bodily injury, assault, including sexual assault or the threat thereof. (*Id.*).

After hearing further argument from Crystal, the court issued its oral ruling:

Um the request before the Court is for an order for protection, as I already stated. The standard for order for protection is whether or not an individual has caused physical harm, bodily injury, assault, including sexual assault or the threat thereof. I had to look at this file several times because I thought for certain the statement of Melanie Ugolini was the petitioning party's statement. It's the responding party's statement and she says to the – regarding [Brandon], the eleven year old, Frank told him to be quiet or he would get smacked. Crystal instantly replied, that is now how we discipline. Physical punishment is not okay. The children are too old. Um going down further, finally Frank stepped forward and smacked him on the cheek. Um there's – that's just one incident. That's domestic violence right there. Um that's why I didn't really need to go any further. . . What I have is to look at whether or not the petitioner has given a basis for an order for protection to have been granted. And, with the respondent's own witnesses, there's a basis for me to enter this order.

So I will be doing so. . . [A]t this point I'm issuing the order for protection in its entirety pending any modifications with family court. (RP 13-14).

Finding Mr. Ugolini committed an act of domestic violence as defined in RCW 26.50.010, the court entered a one-year order for protection. (CP 70). He appealed. (CP 83).

III. ARGUMENT

A. The court erred by entering the order for protection because Mr. Ugolini acted within his legal authority to physically discipline his son and his action was not domestic violence under RCW 26.50.010.

RCW 26.50.010(3) defines domestic violence:

“Domestic violence” means:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.

The court stated it was relying on the one incident when Mr. Ugolini slapped Brandon on the cheek in order to find domestic violence and it did not need to go any further. (RP 14).

But the court failed to take into account Mr. Ugolini’s defense that he was simply physically disciplining him as was his legal right. Indeed, the investigating officer found no physical harm or bodily injury. (CP 55). The legislature has specifically exempted the use of reasonable and moderate physical discipline by a parent for the

purpose of correcting a child from the definition of abuse or neglect.

RCW 9A.16.100; *In re Dependency of H.S.*, 188 Wn. App. 654,

664, 356 P.3d 202 (2015). RCW 9A.16.100 provides:

It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. . .

The following actions are presumed unreasonable when used to correct or restrain a child:

- (1) Throwing, kicking, burning, or cutting a child;
- (2) striking a child with a closed fist;
- (3) shaking a child under age three;
- (4) interfering with a child's breathing;
- (5) threatening a child with a deadly weapon;
- (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

Mr. Ugolini claimed to have acted lawfully by physically disciplining Brandon. (CP 61). The statute clearly applies and he had the right

to use reasonable and timely punishment to discipline his minor child within the bounds of moderation and for the best interest of the child. *State v. Singleton*, 41 Wn. App. 721, 723, 705 P.2d 825 (1985). The inquiry is whether, viewed objectively in light of all the circumstances, the slap on the cheek could be deemed excessive, immoderate, or unreasonable. *In re Dependency of H.S.*, 188 Wn. App. at 664-65. It cannot.

H.S. involved corporal punishment where the father had slapped or “popped” his 16-year-old daughter in the mouth. 188 Wn. App. at 665. The trial court stated no child of that age “should be popped in the mouth or slapped in the face as a form of discipline” and found the child dependent. *Id.* This Court determined, however, that the finding did not comport with the law, which stated reasonable and moderate physical discipline of a child was acceptable.

As noted in the declarations of Frank and Melanie, Brandon’s talking back and unruly behavior was escalating and reasoning with him was not working so an open-handed slap on the cheek ensued. As stated by the *H.S.* court, “[t]he use of an open hand as shown in this record to slap is permissible so long as it does not ‘cause bodily harm greater than transient pain or minor

temporary marks.” 188 Wn. App. at 665 (citing RCW 9A.16.100).

This is the same situation of permissible physical discipline.

The petitioner failed to show domestic violence under RCW 26.50.010(3) because the record shows there was no physical harm or bodily injury. Neither was there an assault because Mr. Ugolini acted within his lawful authority to mete out reasonable physical discipline under RCW 9A.16.100. *Singleton, supra*. Moreover, the trial court did not rely on “infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.” The record fails to support such a finding in any event.

Whether to grant or deny a domestic violence protection order is reviewed for abuse of discretion. *Rodriguez v. Zavala*, 188 Wn.2d 586, 590, 398 P.3d 1071 (2017). Discretion is abused when the court makes a legal error. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001). The court here misapplied the law by failing to take into consideration RCW 9A.16.100, which permits physical discipline of a child that is reasonable and moderate for purposes of correcting the child. Mr. Ugolini’s actions were lawful under RCW 9A.16.100 and did not justify entry of an order for protection preventing him from seeing his children for a year or more, if renewed. The court thus abused its discretion in

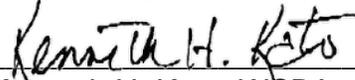
entering the order as it made a legal error using the wrong legal standard to make its decision. *In re Marriage of Spreen*, 107 Wn. App. at 349-50. The court must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ugolini respectfully urges this Court to reverse the trial court and dismiss the order for protection.

DATED this 18th day of January, 2019.

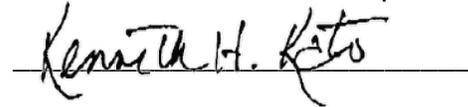
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 18, 2019, I served a copy of the brief of appellant by USPS on Crystal Ugolini, 14516 E. Rockwell, Spokane Valley, WA 99216.



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