

Affirmed and Memorandum Opinion filed August 24, 2023.



In The

Fourteenth Court of Appeals

NO. 14-22-00560-CV

ANA DIAZ, Appellant

V.

SIERRA ALSTON, Appellee

**On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 2022-26481**

MEMORANDUM OPINION

Appellant Ana Diaz appeals the protective order entered against her. In three issues she contends the evidence is legally and factually insufficient to support the findings that (1) family violence occurred, (2) family violence was likely to occur in the future, (3) Ana committed an act constituting a felony against appellee Sierra Alston or her son. In her fourth issue Ana contends that the trial court erred in excluding evidence regarding Sierra's alleged assault of an ex-boyfriend. We affirm.

BACKGROUND

Sierra filed an application for protective order against Ana. In the application, Sierra requested protection for herself and her son from Ana communicating with them in a “threatening or harassing manner.” Sierra further requested that Ana not “stalk, follow, or engage in conduct . . . that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass” Sierra and her son.

At the hearing on the application, Sierra testified that she did not know Ana and had never met her in person. Prior to ever talking to Ana, Sierra noticed that Ana was following her on social media and believed Ana to be a “random” follower. Sierra testified that Ana called her a “racist” when talking to Sierra’s followers on social media. After some time, Ana sent a long message to Sierra through social media. The message discussed Ana’s relationship with Sierra’s ex-boyfriend Kevin. Kevin and Sierra have a son together. Sierra testified that the message made her curious about Ana, and the two began talking on the phone and text messaging. After conversing over the course of a few days, Sierra became uncomfortable and decided to cease communication with Ana.

Sierra testified that when she attempted to try to make things work between her and Kevin for their son, Ana became upset. Ana started a group chat where she told Kevin and Sierra that they were bad parents and that their baby is ugly and looks just like his father. Sierra testified that Kevin told Ana to stop communicating with Sierra, and Ana stopped for “a little while.” Kevin and Sierra again began “co-parenting” until another dispute arose, and Sierra “blocked” Kevin. When Kevin could not reach Sierra, Ana began to text photos to Sierra of Sierra’s private parts. Sierra testified that Ana obtained photographs from Kevin. Sierra testified that Ana continued to harass her on social media for two days, “harassing me, taunting me, showing me the pictures that he sent her” and saying crude things about Sierra’s

body. Sierra testified that she blocked Ana from being able to communicate with her on social media, but Kevin and Ana continued to call her from blocked numbers and communicated with Sierra's clients. Sierra testified that Ana told her that her son is ugly and, "I should kill the child because I'm gonna have to look at that face every day. And pretty much stating that she wanted the child gone."

On cross-examination, Sierra testified that around the time of their first conversations, and again a few months later, Ana threatened to "get rid" of her and her son. Sierra testified that Ana threatened her and her son with violence on more than one occasion and threatened to harm Sierra. Sierra testified that Ana threatened to "get rid of [her]" and believed that meant Ana would "hit or shot (sic) or cut" her. During cross-examination Sierra testified that:

[Sierra]. [Ana] said she wanted me pretty much since (sic) done. That means, a hit off on me. I don't know what that tells you, sir. That can mean anything. You know, that can me she can have me poisoned. That can mean that she can have me anything.

[Counsel]. Did she say she was gonna (sic) have you poisoned?

[Sierra]. Why would she directly tell me how she plans to harm me? She just plans to harm me. I mean any person that, you know, plans to do something, I don't know why she would say, I'm gonna poison you. I'm gonna stab you. It just happens. Anger just makes you do things that just happen.

[Counsel]. So she did literally threaten you?

[Sierra]. She did literally threaten me.

Ana testified that she and Sierra spoke on the phone for the first time in February and they had never met in person. Ana testified that Sierra called her multiple times from different phone numbers and was harassing her. Ana testified that the last time that she spoke with Sierra was in April. Ana denied ever threatening Sierra or her son in any way. Ana denied ever sending any "pornographic" images to Sierra. Ana admitted to making "ill remarks" about

Sierra's vagina and body and stating that Sierra's son was ugly and the Sierra was using her son to get money from Kevin. Ana testified that she called the baby ugly because she was mad at Kevin.

After listening to the testimony of both witnesses, the trial court found:

[T]here are reasonable grounds to believe that the applicant is a victim of harassment pursuant to the Texas Penal Code and Chapter 7B of the Code of Criminal Procedure. The Court finds that this protective order is necessary for the safety and welfare of the applicant and the named protected person child, it's in their best interest and for the prevention of further family violence. The Court finds, in addition, that family violence has occurred, it is likely to occur in the future and that the respondent has committed the violence. This particular violence was in the form of a threat that placed the applicant in fear of bodily injury, assault, or a sexual assault when she threatened to get rid of the applicant and the child. And the applicant testified that she did not know exactly what form, but she was afraid for herself and child.

....

. . . I do find that the actions of [Ana] were meant to harass, annoy, abuse, torment, or embarrass.

In the final protective order rendered by the trial court the court found and concluded that Sierra "is a victim of stalking and harassment pursuant to the Texas Penal Code and Chapter 7b of the Code of Criminal Procedure." The trial court further found and concluded that "this protective order can be granted for longer than 2 years based on chapter 7b of the Code of Criminal Procedure."

SUFFICIENCY OF THE EVIDENCE

Ana argues that there is legally and factually insufficient evidence to support the trial court's protective order under the Family Code. However, the trial court also granted Sierra's protective order under the Code of Criminal Procedure. Ana does not specifically raise an issue on appeal that there is legally and factually insufficient evidence to support the trial court's protective order under Chapter 7B

of the Code of Criminal Procedure, nor did she object in the trial court to this finding.¹ However, in her third issue Anna argues that the evidence is legally and factually insufficient to support the trial court’s conclusion that she “committed an act that constituted a felony.”² We construe this issue as arguing the legal and factual sufficiency of the trial court’s finding that Ana engaged in stalking under the Penal Code. Because we conclude that there is legally and factually sufficient evidence to support the trial court’s protective order under Chapter 7B of the Code of Criminal Procedure and no further issues were raised regarding the trial court’s protective order on this ground, we affirm the trial court’s judgment.³

Ana concedes that the trial court found that Sierra was a victim of harassment but argues that the trial court only “noted” there had been stalking. However, in the protective order, the trial court found and concluded that Sierra was “a victim of . . . stalking.” Ana argues that her conduct did not constitute stalking under the Penal Code. We disagree.

A. General Legal Principles

Protective orders are governed by provisions in both the Family Code and the Code of Criminal Procedure. *Shoemaker v. State for Prot. of C.L.*, 493 S.W.3d 710, 715 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Under the Code of Criminal

¹ See *Morott v. Tinch*, No. 14-21-00754-CV, 2023 WL 3243511, at *2 (Tex. App.—Houston [14th Dist.] May 4, 2023, no pet.) (mem. op.) (“Although Tinch applied for a protective order pursuant to Family Code provisions relating to cases involving family violence, the trial court found at the hearing on the application that there were no allegations of family violence and instead issued a protective order based on a finding of harassment Morott did not object in the trial court and does not complain on appeal that the trial court’s judgment does not comport with Tinch’s pleadings.”).

² Ana raises this issue in relation to the findings necessary to obtain a protective order under the Family Code, as opposed to those required under the Code of Criminal Procedure.

³ We need not reach Ana’s other issues as they would not change the disposition on appeal. Tex. R. App. P. 47.1.

Procedure, a person who is the victim of stalking can apply for a protective order. Tex. Code Crim. Proc. Art. 7B.01(a)(1). Stalking is a criminal offense under the Penal Code:

A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:

- (1) constitutes an offense under Section 42.07 [harassment], . . . ;
- (2) causes the other person . . . to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and
- (3) would cause a reasonable person to:
. . .
(D) feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

Tex. Penal Code § 42.072. A person commits the offense of harassment:

if, with the intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:

- (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;
- (2) threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of the person's family or household, or the person's property;
- (3) . . .
- (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
- (5) . . .
- (6) . . .

(7)sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another

Tex. Penal Code § 42.07.

“Evidence is legally sufficient if, viewing all the evidence in the light most favorable to the fact-finding and considering undisputed contrary evidence, a reasonable factfinder could form a firm belief or conviction that the finding was true.” *In re A.C.*, 560 S.W.3d 624, 631 (Tex. 2018). We cannot ignore undisputed evidence contrary to the finding, but we must otherwise presume the factfinder resolved disputed facts in favor of the finding. *Id.* at 630–31.

When reviewing the factual sufficiency of the evidence, we examine the entire record and consider and weigh all the evidence, both in support of and contrary to, the challenged finding. *Id.* “If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonable formed a firm belief or conviction, then the evidence is factually insufficient.” *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

B. Analysis

Viewing all of the evidence in light most favorable to the fact-finding, there is legally sufficient evidence that Ana committed the offense of harassment and stalking. Sierra testified that Ana initiated communication with her and sent her at least one photograph of Sierra’s vagina along with a derogatory statement—Ana admitted to making such a statement. *See* Tex. Penal Code § 42.07(1). Sierra testified that Ana told her that she should murder her infant son because he is ugly—Ana also admitted to making this statement. *See id.* § 42.07(1). Sierra further testified that Ana threatened her and her son on more than one occasion. *See id.* §

42.07(2). Sierra testified that Ana and Kevin repeatedly called her phone even after she “blocked” them. *See id.* § 42.07(4). Sierra testified that Ana sent her messages electronically through social media that were repeated and unwelcome. *See id.* § 42.07(7). Sierra testified that while she and Ana “trauma bonded” at first, it became clear that Ana was attempting to obtain information on Sierra and her son. Sierra testified that Ana was harassing her because Ana viewed Sierra and her son as an obstacle in Ana’s relationship with Kevin, and Ana testified that she contacted Sierra because of her relationship with Kevin.

While Ana denied ever threatening Sierra and accused Sierra of harassing her, we must assume that the factfinder resolved conflicts in the testimony in favor of its findings if it is reasonable to do so. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (“[The factfinder] may choose to believe one witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary.”); *Culver v. Culver*, 360 S.W.3d 526, 534 (Tex. App.—Texarkana 2011, no pet.) (“The trial court could reasonably conclude that Billy was testifying truthfully. The credibility of witnesses is within the sole province of the fact-finder.”). Ana admitted to making “ill remarks” about Sierra’s vagina and calling the baby ugly. Ana made further admissions after being impeached.

Examining the entire record and considering and weighing all of the evidence, the disputed evidence that could not be credited in favor of the finding is not so significant that a factfinder could not have reasonably formed a firm belief or conviction that stalking occurred. We conclude there is legally and factually sufficient evidence for the trial court’s finding that reasonable grounds exist to conclude harassment occurred on more than one occasion and was pursuant to the same scheme or course of conduct, that such harassment caused Sierra to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended and would

cause a reasonable person to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended. *See id.* § 42.072; *see also Dessens v. Argeroplos*, 658 S.W.3d 438, 446 (Tex. App.—Houston [14th Dist.] 2022, no pet.) (email and text message containing accusations of drug use and infidelity were sufficient evidence of harassment and a course of conduct for stalking to uphold protective order); *Shoemaker*, 493 S.W.3d at 718–19 (evidence that perpetrator sent two electronic messages describing the victim as a “high-maintenance woman” and “diva” who would have “trouble finding a mate” were legally and factually sufficient to support the trial court’s conclusion that stalking occurred).

We overrule Ana’s third issue.

EXCLUSION OF EVIDENCE

In her fourth issue Ana argues the trial court erred in excluding evidence of Sierra assaulting Kevin. She argues that such evidence showed Sierra’s motive for applying for a protective order and Sierra’s lack of credibility. Ana argues that a plan or a motive to retaliate for another protective order “has a tendency to make a fact of consequence—i.e., whether [Ana] harassed or threatened [Sierra] or her child—more or less probable.”

We review the trial court’s decision to exclude evidence for an abuse of discretion. *Jones v. Mattress Firm Holding Corp.*, 558 S.W.3d 732, 737 (Tex. App.—Houston [14th Dist.] 2018, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without any reference to guiding rules of principles. *Id.* If there is any legitimate basis for the evidentiary ruling, then the trial court’s ruling must be upheld. *Id.* Evidence is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable. Tex. R. Evid. 401. Generally, relevant evidence is admissible. Tex. R. Evid. 402.

The trial court concluded that the details of Kevin’s protective order against Sierra were irrelevant to the issue of whether Ana committed family violence, harassment, and stalking in this case. We agree. *See Stary v. Ethridge*, No. 01-21-00101-CV, 2022 WL 17684334, at *14 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, pet. filed) (concluding evidence of the applicant’s prior physical abuse of the respondent was irrelevant in protective order proceeding because the evidence “does not have any tendency to make it more or less probable that [the respondent] physically injured the children.”). Here, the evidence of whether Kevin obtained a protective order against Sierra for family violence does not have any tendency to make it more or less probable that Ana harassed or stalked Sierra. *See id.*; *see also* Tex. R. Evid. 401. At the hearing, Ana argued that the evidence is relevant because the “protective order is motive for what’s happened.” On appeal, Ana argues that the evidence is relevant under Rule of Evidence 404(b). *See* Tex. R. Evid. 404(b). Sierra’s motivation for applying for a protective order does not make a fact of consequence, whether family violence, harassment, or stalking occurred, more or less likely. Sierra’s motivation is not a factor to consider in determining whether Ana’s conduct constituted harassment or stalking.

We overrule Ana’s fourth issue.

CONCLUSION

Concluding that there is legally and factually sufficient evidence for the trial court’s finding that reasonable grounds exist to conclude harassment and stalking occurred and that the trial court did not err in excluding evidence, we affirm the judgment of the trial court.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Zimmerer, and Wilson.