In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00311-CV

WILLIAM DURAND CARSON II, APPELLANT

V.

SABRA LEANN CARSON, APPELLEE

On Appeal from the County Court at Law No 2
Randall County, Texas
Trial Court No. 69,944-L-2, Honorable Ronald Walker, Jr., Presiding

September 29, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

The underlying dispute before us arises from an application of a protective order filed by Sabra Carson against her soon-to-be ex-husband William Durand Carson, II. She sought the application after William and Sabra's father, Roger Turner, engaged in a physical altercation at a pet cemetery while the group attempted to bury a dead family dog. Divorce proceedings (which could be described as less than amicable) had already begun by then.

Present at the grave site were Sabra, William, their children, Roger, and Roger's wife. As Roger and William dug with their respective shovels, the handle of Roger's shovel contacted William's scalp. Roger apologized, deeming the contact an accident. William did not believe the apology, and the fight ensued. Roger soon found himself on the ground being hit and kicked by William. William professed that he acted in self-defense. The trial judge concluded that William committed family violence, would likely do so in the future, and entered the protective order. So too did it award Sabra attorney's fees for securing the order.

William argues that legally and factually insufficient evidence supports issuance of the order. Because of that, the order as well as the award of attorney's fees founded upon it must be reversed, in his estimation. We affirm.

Authority

The applicable standard of review is subject to debate. Some courts hold that when a litigant challenges the sufficiency of the evidence underlying a protective order issued under § 81.001 *et. seq.* of the Family Code, the reviewing court utilizes the standard of abused discretion; others hold that the traditional method of gauging the sufficiency of the evidence is applied. *See In re E.A.K.*, No. 05-16-00724-CV, 2017 Tex. App. LEXIS 5110, at *9–10 & n.1 (Tex. App.—Dallas June 1, 2017, no pet.) (mem. op.) (discussing the conflict). We have used the latter in the past without necessarily explaining why. *See, e.g.*, *Houchin v. Houchin*, 07-12-00373-CV, 2013 Tex. App. LEXIS 6762, at *4–6 (Tex. App.—Amarillo May 31, 2013, no pet.) (mem. op.). And, William mentioned it in his brief. Assuming *arguendo* that it is the appropriate one, William's contentions will be measured against it.

Per the traditional standard and when assessing the legal sufficiency of the evidence, we must decide whether the evidence presented would enable a reasonable and fair-minded fact-finder to reach the conclusion it did. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Houchin*, 2013 Tex. App. LEXIS 6762, at *4. If it would, then the evidence is legally sufficient to support the finding. And, in making that decision, authority requires us to view the evidence in a light most favorable to the finding. *See Houchin*, 2013 Tex. App. LEXIS 6762, at *4. So too must we (1) accept as true that evidence favoring the decision if a reasonable fact-finder could do so, (2) disregard contrary evidence unless a reasonable fact-finder could not disregard it, and (3) remember that the fact-finder is the sole judge of a witness' credibility and the weight to be assigned to his testimony. *See id.* at *4–5.

When assessing the factual sufficiency of the evidence, we need not defer solely to the evidence supporting the decision. Instead, our duty is to consider all of the evidence in a neutral light and determine whether the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong, regardless of whether the record contains some evidence supporting the decision. *See Walker v. Parmer*, No. 07-15-00247-CV, 2016 Tex. App. LEXIS 2315, at *5–6 (Tex. App.—Amarillo Mar. 3, 2016, no pet.) (mem. op.). Yet, that does not give us carte blanche to substitute our decision for the fact-finder. We must still defer to its authority to resolve credibility disputes and weigh the evidence. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *Walker*, 2016 Tex. App. LEXIS 2315, at *6. We must still recognize that the fact-finder has advantages unavailable to us, such as the ability to see the witnesses' demeanor and bodily cues while testifying and factor

those into its credibility determinations. So, the judgment of the reviewing court cannot merely be substituted for the factual conclusions derived by the fact-finder at trial. *See Walker*, 2016 Tex. App. LEXIS 2315, at *5.[1]

As for the matter of the protective order itself, the legislature mandated, through § 81.001, that a court "shall render [it] as provided by Section 85.001(b) [of the Family Code] if the court finds that family violence has occurred and is likely to occur in the future." TEX. FAM. CODE ANN. § 81.001 (West 2014). Through § 85.001(b), the legislature also said if the court "finds that family violence has occurred and that family violence is likely to occur in the future, the court . . . (1) shall render a protective order . . . applying only to a person found to have committed family violence; and (2) may render a protective order . . . applying to both parties that is in the best interest of the person protected by the order or member of the family or household of the person protected by the order." *Id.* § 85.001(b) (West 2014).

Next, "family violence" includes "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself." *Id.* § 71.004(1) (West Supp. 2016). And, the term "family" includes "individuals related by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code." *Id.* § 71.003 (West 2014). Finally, individuals are related by "affinity" if they are married to

[1] Given the standard of review (especially that pertaining to question of legal sufficiency), the practical burden of the appellant is to address the evidence favoring the decision and explain why it is deficient. It is of little moment for the appellant to merely reiterate evidence contradicting that favoring the decision and argue that such contrary evidence should have been believed.

each other, *see* TEX. GOV'T CODE ANN. § 573.024(a)(1) (West 2012), or "the spouse of one of the individuals is related by consanguinity to the other individual." *Id.* § 573.024(a)(2).

Discussion

With the foregoing in mind, we turn to the record and arguments before us. It is not clear whether William questions whether Roger fell within the scope of "family." Yet, it is clear that at the time of the cemetery fight, William and Sabra still were married and that Sabra was the daughter of Roger. Thus, Sabra and Roger were related by consanguinity. *See* TEX. GOV'T CODE ANN. § 573.022 (West 2012) (providing that two individuals are related by "consanguinity" if "one is a descendant of the other" or if "they share a common ancestor"). That means, in turn, William and Roger were related by affinity. So, their relationship fell within the definition of "family."

Next, William does not question that his fight with Roger caused both parties physical harm or bodily injury. His dispute lies in whether he acted in self-defense. As said above, "family violence" excludes "defensive measures to protect oneself." *See* TEX. FAM. CODE ANN. § 71.004(1).

Despite William's disbelief in the verity of Roger's apology for contacting his scalp with the shovel handle as the two dug, evidence appears of record indicating that it was an accident for which Roger apologized, defensive measures were unnecessary due to the contact being accidental, and William nonetheless took umbrage to the act and began striking Roger. Other evidence indicates that while the two dug, William began to sob, disparage Sabra, repeatedly called Roger a liar inches from Roger's face, and "chest bump" Roger as he attempted to walk away from William. Of course, William

testified that Roger was the aggressor. Yet, despite the latter and because the trial court, as fact-finder, had the sole authority to so resolve conflicts in the evidence and determine whose testimony to believe, it was free to accept the version of events proffered by Roger. It was free to believe the contact with the shovel handle was accidental, to believe that Roger apologized, to believe that William was under no threat of aggression, to believe William was the aggressor, and to conclude that William had no basis for taking defensive measures. What we are not free to do is ignore that credibility decision.

It matters not that the police who investigated the melee supposedly thought William to be credible. They were not present at the scene. Nor did they witness the fight and the circumstances from which it arose. And, most importantly, they were not the fact-finder at trial. Their testimony was subject to acceptance or rejection by the trial judge just like that of any other witness. In short, the record contains some evidence enabling a reasonable fact-finder to infer that William engaged in family violence and was not acting in self-defense. Furthermore, the contrary evidence is not so overwhelming as to render the decision manifestly unjust or clearly wrong.

As for William's suggestion that the evidence was insufficient to establish that family violence is likely to occur in the future, we observe that "[o]ftentimes, past is prologue; therefore, past violent conduct can be competent evidence which is legally and factually sufficient to sustain the award of a protective order." *In re Epperson*, 213 S.W.3d 541, 544 (Tex. App.—Texarkana 2007, no pet.). A past history or pattern of family violence is not needed to support a finding of family violence. *See Boyd v. Palmore*, 425 S.W.3d 425, 432 (Tex. App.—Houston [1st Dist.] 2011, no pet.). As said

in *Boyd*, the language of § 81.001 of the Family Code does not require that a likelihood of future violence be based on more than one act of past violence. *Id.* So depending upon its circumstances, one act of family violence could conceivably support a finding of likely future violence for purposes of § 81.001. *See id.* Indeed, it must be remembered that the remedial nature of the statutes at issue suggests that courts should broadly construe its provisions to effectuate its humanitarian and preventive purposes. *See id.* at 430.

Here, we have evidence of William injuring a family member at the pet cemetery. The record also contains evidence of William shoving Sabra to the ground in their laundry room, of his repeated and unwanted texts to Sabra about saving the marriage, of her repeated and unheeded directives to him to stop harassing her, of his puffing his chest at his mother-in-law, of his bumping Roger with his chest at the cemetery, of his entering the home of Roger uninvited once the divorce began, of his passive-aggressive derogation of Sabra by continually mentioning a prior infidelity, of his monitoring Sabra's cellphone calls with third-parties, and of his following Sabra. Considered together, that evidence allows a reasonable fact-finder to rationally infer the likelihood of future violence, and the contrary evidence is not so weighty as to make the finding manifestly unjust or clearly wrong.

William also complains of the protective order's breath. It seeks to restrict certain of his conduct directed not only at Sabra but also the children, Roger, and Roger's wife. As previously illustrated, evidence of William's hostilities being directed towards more than just Sabra appears of record. Furthermore, statute permits the trial court to prohibit a person found to have committed family violence from "going to or near the

residence or place of employment or business of a person protected by an order ***or a member of the family or household of a person protected by an order***." *See* TEX. FAM. CODE ANN. § 85.022(b)(3) (West Supp. 2016) (emphasis added). So too may the trial court issue an "order . . . applying to both parties that is in the best interest of the person protected by the order ***or member of the family or household of the person protected*** by the order." *Id.* § 85.001(b) (emphasis added). Nor may we forget the remedial nature of the statutes and the need to construe them broadly to effectuate their humanitarian and preventive purposes. Taken together, the evidence, the statutes, and their purpose enabled the trial court to issue an order protecting Sabra and the other family members named in the decree. *See Vives v. Gersten*, No. 05-13-01463-CV, 2014 Tex. App. LEXIS 13834, at *11 (Tex. App.—Dallas Dec. 29, 2014, no pet.) (mem. op) (rejecting appellant's complaint that protective order applied to applicant's family when applicant only sought protection of herself by observing that § 85.022(b)(3) specifically authorizes such relief).

In sum, we conclude that both legally and factually sufficient evidence supports the trial court's decision to issue the protective order and, therefore, overrule appellant's first issue. Because his second issue regarding the award of attorney's fees against him is dependent upon his succeeding in his first, we overrule it as well.

The trial court's protective order is affirmed.

Brian Quinn
Chief Justice