Opinion issued December 15, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00604-CV

STEPHEN DAVIS, Appellant

V.

STASHA SAMPSON, Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Case No. 1012890

MEMORANDUM OPINION

Appellant Stephen Davis appeals from the entry of a protective order for the benefit of Stasha Sampson. *See* TEX. FAM. CODE ANN. § 85.001 (West 2008). Davis argues that the trial court erred by denying his special appearance and that

the evidence was legally and factually insufficient to support the protective order. We affirm.

Background

Davis and Sampson had an intermittent relationship that began in 2005 in Atlanta, Georgia. In December 2006, they had a son. Four months later, while living together in Atlanta, they had an argument relating to Davis's other son. Sampson testified that Davis slapped her face in front of the child. After she hit him back, Davis slapped her so hard that she fell off the bed where she had been sitting. Davis denied hitting Sampson, testifying instead that Sampson swung at him.

Another eight months later, Sampson decided to move out of their shared apartment. When she went to gather her belongings, an argument ensued and Davis hit her chin with his open hand, leaving a cut inside her mouth. When she threatened to call the police, Davis said, "I don't give a f— about the police. Do you think I care about the police?" Sampson testified that Davis shoved her into a walk-in closet, bruising her arm. She later moved out.

Sampson later moved to Oklahoma, though she testified that she and Davis remained involved "emotionally and intimately." According to Sampson, she returned to Atlanta frequently, as the couple divided their son's time between them. In contrast, Davis testified that their son lived primarily with him in Atlanta

and that Sampson visited the child there. Several months after moving to Oklahoma, in February 2009, Sampson moved to Houston with her son. She testified that her son subsequently spent time in both Atlanta and Houston.

Sampson testified that she had a phone conversation with Davis on February 17, 2010, in which he threatened her. According to Sampson, Davis told her that he had hired a private investigator to watch her for the past year, and he confronted her about her relationship with another man. Sampson testified that Davis told her that he "was driving on I-10 from Atlanta on his way to Houston with a loaded .45 under his seat and an extra clip." She also said that Davis threatened to bring 15 armed men with him. Throughout the same day, Davis sent her approximately 20 threatening text messages.

Sampson read some of the text messages into the record and testified that she felt threatened and immediately feared for her life. Some of these text messages, which were sent between approximately 8:15 p.m. and 10:40 p.m., said:

> Stash, I'm getting farther and farther from the A ain't gone b no turnin round in a minute u lock us into this sh— aint no coming out till somebody f—ed up
>
> I'm on the road stash the more u dont pick up the madder you make me u can only keep him from me so long you about to destroy all the little sh— u done worked 4
>
> You asked for this stash. When I get out there its gone be too late to start himin and hawin. I keep telling u. u dont want no problems from me but ima show u.

> your motherf—ing guard. You better tell that f— n— to come see about you. I'm going to teach your little retarded ass.
>
> Yeah, just called that f— n— too. His ho ass aint answered. All yall . . . .
>
> I'm letting you know right now from now on the streets ain't safe. watch ya self at all times. u f— piece of shit. Goddamn u got it coming.
>
> F— it. Let's do it. See you when I see you n—. Have
>
> Tell my baby goodnight. And you watch ya self. F—ing whore.
>
> From here on out, we enemies. You better kill me.
>
> Uh uh. Don't sleep. I'm coming baby. no mo sleep for you.
>
> Thought about it tho. You prob want somebody to put you retarded ass outa your misery. Being at CC house and gone save u neither. Just gone get her sh— f'ed up.

C. Martin, Sampson's friend, testified that Davis called her twice during the day on February 17, 2010. Martin said that Davis belittled Sampson, accused her of sleeping with another man, and said that he had engaged a private investigator to follow Sampson in Houston. Martin also testified that Davis threatened that Sampson would not "live to see her next birthday," and that "he was willing to die to go to jail—go to prison for his respect and she disrespected him." She believed that Davis was going to "come do something" to Sampson, but that he was choosing his words carefully. She also saw text messages from Davis on Sampson's phone in which he threatened to kill Martin before killing Sampson.

Later, when Martin was in the car with Sampson, Davis called Sampson. Sampson held the phone up so that Martin could hear, and he told Sampson that he had called Martin "to ask her how her best friend wanted to die. Did she want to get her head chopped off or did she want to get shot in her face." Martin said she took Davis's statements as threats and believed that he was capable of following through on them.

Sampson testified that Davis did not communicate with her directly after February 17, 2010, but she alleged that his other son's mother came to Houston and harassed and threatened her on his behalf.

Davis testified at the hearing on the protective order. He said that he had never been to Texas before and that he was in Texas to testify at the hearing and to turn himself in on a criminal warrant. He denied ever threatening to harm Sampson in any manner. He denied ever being physically violent with Sampson. He also denied owning a .45-caliber gun. Davis testified that Sampson had lied to him, had been involved with illegal drugs, and had been irresponsible with their child.

Davis testified that the phone number from which the text messages were sent was not his personal mobile phone number. He, his mother, and the mother of his older son all testified that the threatening messages came from a phone that was used as a "house phone" at their home in Atlanta. They said that all household

members had access to that phone, including a cousin who was asked to leave the house because of her disruptive behavior. The mother of Davis's older son testified that the cousin was using the phone "most of the day" that Sampson received the threatening text messages.

Davis described a complicated and contentious relationship with Sampson, but he said his two sons got along well. Davis said that he asked the mother of his older son to bring him to Houston to spend several days a week at the same day care with his brother because the older son missed him.

Davis admitted to prior convictions for trespassing and disorderly conduct. At the time of trial on the protective order, Davis had been charged with terroristic threat and verbal harassment related to the threats communicated to Sampson. He had been communicating with the private investigator in Houston regarding the protective order.

Davis filed a special appearance, but he did not obtain a ruling on it before testifying at the hearing on the protective order. After the hearing, the trial court granted the protective order as to Sampson, but not as to their son.

Analysis

I. Special appearance

In his first issue, Davis contends that the trial court erred in denying his special appearance because Sampson did not plead specific facts sufficient to show

a connection with the State of Texas. In the alternative, Davis contends that if Sampson's jurisdictional pleadings were sufficient, then the alleged phone calls and text messages are an insufficient basis for jurisdiction because his actions took place in Atlanta, Georgia.

A party may challenge personal jurisdiction by filing a special appearance. TEX. R. CIV. P. 120a; *see Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985). But a special appearance is waived by participation in the trial. *See* TEX. R. CIV. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with this rule is a general appearance."); *Milacron Inc. v. Performance Rail Tie, L.P.*, 262 S.W.3d 872, 875 (Tex. App.—Texarkana 2008, no pet.); *see also Exito Elecs. Co., Ltd. v. Trejo*, 142 S.W.3d 302, 304 (Tex. 2004) ("[A] party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court."). "A specially appearing defendant may not go to trial on the merits of the case without first obtaining a ruling on his special appearance." *Milacron*, 262 S.W.3d at 875. "For this reason, Rule 120a requires that the specially appearing defendant timely request a hearing, specifically bring that request to the trial court's attention, and secure a ruling on the preliminary question of personal jurisdiction." *Id.* at 875–76 (citing TEX. R. CIV. P. 120a).

Davis filed a special appearance, but the record does not reflect any ruling on the special appearance. Davis contends that the lack of a record showing the trial court's denial of his special appearance is not fatal to his complaint on appeal, relying on *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 782–84 (Tex. 2005). That case is inapposite. There was no issue in *Michiana* about whether the trial court actually had denied the special appearance, *see Michiana*, 168 S.W.3d at 781, and the error-preservation issue addressed by the Texas Supreme Court related to the failure to obtain a record of the non-evidentiary special-appearance hearing, *see id*. at 781–84. Thus, because the record does not reflect that Davis obtained a ruling on his special appearance before he appeared and testified at trial, his jurisdictional objection is waived. *See* TEX. R. CIV. P. 120a; *Milacron*, 262 S.W.3d at 876. We therefore hold that he has waived his first issue on appeal.

II. Sufficiency of the evidence

Davis challenges the legal and factual sufficiency of the evidence to support the entry of the protective order. A court shall render a protective order if the court finds that family violence has occurred and is likely to occur in the future. TEX. FAM. CODE ANN. §§ 81.001, 85.001 (West 2008). "Family violence" is defined, in pertinent part, as

> [A]n act by a member of a family . . . against another member of the family . . . 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). "Family" is defined to include individuals who are parents of the same child. *Id.* § 71.003. In his second, third, and fourth issues, Davis contends that the evidence was inadequate to show that family violence occurred or was likely to occur in the future.

When the trial court acts as a fact finder, we review its findings under the legal and factual sufficiency standards. *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000); *Vongontard v. Tippit*, 137 S.W.3d 109, 112 (Tex. App.—Houston [1st Dist.] 2004, no pet.). When a party who does not have the burden of proof at trial challenges the legal sufficiency of the evidence, we consider all of the evidence in the light most favorable to the prevailing party, indulging every reasonable inference in that party's favor and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *City of Houston v. Hildebrandt*, 265 S.W.3d 22, 27 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (citing *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 285–86 (Tex. 1998)). "If there is any evidence of probative force to support the finding, i.e., more than a mere scintilla, we will overrule the issue." *Hildebrandt*, 265 S.W.3d at 27 (citing *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005)).

In reviewing a factual sufficiency challenge, we examine the entire record and consider and weigh all the evidence, both in support of, and contrary to, the challenged finding. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Vongontard*, 137 S.W.3d at 112. Having considered and weighed all the evidence, we should set aside the verdict only if the evidence is so weak, or the finding is so against the great weight and preponderance of the evidence, that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We cannot merely substitute our opinion for that of the trier of fact and determine that we would reach a different conclusion. *Hollander v. Capon*, 853 S.W.2d 723, 726 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

A. Past family violence

Davis contends that there was no evidence or factually insufficient evidence of past family violence. In his second issue he contends there was insufficient evidence of an "imminent" threat. The term "imminent" in Family Code Section 71.004 refers to a present threat, not a threat of future bodily injury or death. *See Robertson v. State*, 175 S.W.3d 359, 362 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (citing *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989)). "Imminent" means "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."

Devine, 786 S.W.2d at 270 (quoting BLACK'S LAW DICTIONARY 676 (5th ed. 1979)).

Davis argues that the threats were not imminent because he was in Atlanta and Sampson was in Houston at the time the text messages were sent and the phone calls were placed. The inquiry, however, is whether the threats reasonably made Sampson fear imminent physical harm. *See* TEX. FAM. CODE ANN. § 71.004(1). Although Davis testified that he was in Atlanta, the text messages indicated that he had left Atlanta. For example, he wrote, "I'm getting farther and farther from the A," "I'm on the road," and "When I get out there[,] it's gone [sic] be too late to start himin and hawin [sic]." These text messages were sent between approximately 8:30 p.m. and 10:45 p.m., and they indicated that Davis was traveling from Atlanta to Houston. He also sent a text message saying she should watch herself "at all times," and not sleep, "no mo sleep for you." These text messages reasonably could be understood to threaten imminent physical harm because it was near at hand or about to happen. *See Devine*, 786 S.W.2d at 270.

In addition, Davis argues that the evidence reflected that Sampson believed he was in Atlanta on the day the threats were made. This argument mischaracterizes the record because Sampson's testimony to that effect was made in specific reference to Davis's whereabouts at 7:30 a.m. on February 17, 2010. She received the threatening text messages between approximately 8:30 p.m. and

10:45 p.m. that night, and she testified that as she received the messages in Houston, she feared for her life. The text messages indicated that Davis was on his way to Houston and that he intended to harm her, just as he had threatened in his phone calls the same day. In the context of the record, a reasonable fact finder could have believed that Sampson's earlier statement that she thought Davis was in Atlanta pertained only to the morning and did not contradict her testimony that she feared for her life when she received the text messages that night.

Viewing the evidence in the light most favorable to the verdict, we conclude that there is some evidence of probative force to support the trial court's ruling pertaining to the imminence of the threat. *See Hildebrandt*, 265 S.W.3d at 27. Viewing the evidence favorable and contrary to the court's ruling, we conclude evidence is not so weak, nor is the finding so against the great weight and preponderance of the evidence, that it is clearly wrong and unjust. *See Cain*, 709 S.W.2d at 176. We hold that the evidence is legally and factually sufficient to show that the threatened harm was imminent, and we overrule Davis's second issue. Because we conclude that the evidence of Davis's threats was sufficient to establish that family violence had occurred, *see* TEX. FAM. CODE ANN. §§ 81.001, 85.001, we need not address Davis's third issue, which challenges the sufficiency of the evidence of other past physical acts of family violence that occurred in Atlanta.

B. Future family violence

In his fourth issue, Davis challenges the sufficiency of the evidence to support the trial court's finding that he was likely to commit future acts of family violence. His sole argument, that past violence will not support an inference of a likelihood of future violence absent a "long-standing history of family violence," is unavailing. "The statutory language of Title IV does not require that a likelihood finding be based on more than one act of family violence." *Boyd v. Palmore*, No. 01–10–00515–CV, 2011 WL 4500825, at *5 (Tex. App.—Houston [1st Dist.] Sept. 29, 2011, no pet. h.) (citing TEX. FAM. CODE ANN. §§ 81.001, 85.001). "On the contrary, courts have recognized 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.'" *Id.* (quoting *In re Epperson*, 213 S.W.3d 541, 544 (Tex. App.—Texarkana 2007, no pet.); *accord Banargent v. Brent*, No. 14–05–00574–CV, 2006 WL 462268, at *1–2 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, no pet.) (mem. op.). Under this principle, Sampson's testimony about Davis's prior acts of family violence, including the threatening and future-looking nature of his threats, supports a finding that he was likely to commit such acts in the future. *See id.*

Viewing the evidence in the light most favorable to the verdict, we conclude that there is some evidence of probative force to support the trial court's rulings

pertaining to past and future acts of family violence. *See Hildebrandt*, 265 S.W.3d at 27. Viewing the evidence favorable and contrary to the court's rulings on past and future family violence, we conclude evidence is not so weak, nor is the finding so against the great weight and preponderance of the evidence, that these rulings are clearly wrong and unjust. *See Cain*, 709 S.W.2d at 176. We hold that the evidence is legally and factually sufficient to show that Davis committed past acts of family violence and was likely to commit such acts in the future, and we overrule his third and fourth issues.

Conclusion

We affirm the order of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.