Affirmed and Memorandum Opinion filed October 20, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00130-CV
NO. 14-21-00132-CV

ROGER JENKINS, Appellant

V.

RONNIE WAYNE WILLS II, Appellee

On Appeal from the 246th District Court
Harris County, Texas
Trial Court Cause Nos. 2020-66572 and 2020-62982

MEMORANDUM OPINION

Appellant, the father of two children, applied for protective orders based on alleged family violence against the children by appellee, their stepfather. Following a bench trial, the court granted the stepfather a directed verdict, denied the protective orders, and signed findings of fact and conclusions of law. The father appeals, contending that the evidence is legally and factually insufficient to support the trial court's findings. We affirm.

I. Findings Required for Protective Order

The father applied for protective orders under Title 4 of the Family Code. Under these provisions, at the close of a hearing on an application for a protective order, "the court shall find whether: (1) family violence has occurred; and (2) family violence is likely to occur in the future." Tex. Fam. Code § 85.001(a). If the court makes both findings in the affirmative, the court shall render a protective order. *See id.* § 85.001(b).

As relevant to the parties' arguments in this case, "family violence" is defined as "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).

Here, the trial court granted a directed verdict denying the protective orders and found that the stepfather did not commit an act of family violence.[1] The court did not expressly find whether family violence was likely to occur in the future.

II. Standards of Review

In reviewing a legal-sufficiency challenge, we consider evidence in the light most favorable to the finding and indulge every reasonable inference that would support it. *Coffman v. Melton*, 448 S.W.3d 68, 71 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). If more than a scintilla of evidence exists, then it is

[1] When, as here, the court grants a judgment to the defendant at the close of the plaintiff's case, "the trial court, acting as fact finder, is presumed to have ruled not only on the legal sufficiency of the evidence, but also on the weight of the evidence and the credibility of the witnesses." *Martin-Simon v. Womack*, 68 S.W.3d 793, 796 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303–05 (Tex. 1988)). After granting such a judgment, the trial court may properly make findings of fact and conclusions of law. *Id.*

legally sufficient, and we will uphold the finding. *Id.* To rise above a scintilla, the evidence offered to prove a vital fact must do more than create a mere surmise or suspicion of its existence; it must rise to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.*

In reviewing a factual-sufficiency challenge, we weigh all of the evidence in the record. *Id.* We will overturn the finding only if it is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Id.*

The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* We will not substitute our judgment for that of the trial court merely because we might reach a different conclusion. *Id.* The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse the judgment. *Teel v. Shifflett*, 309 S.W.3d 597, 603 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

In considering the sufficiency challenges, we note that undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

III. Evidence

At the time of the alleged family violence in October 2020, the children—BJ and JJ—and their mother and stepfather lived together. BJ was a fourteen-year-old girl and JJ was an eleven-year-old boy.[2]

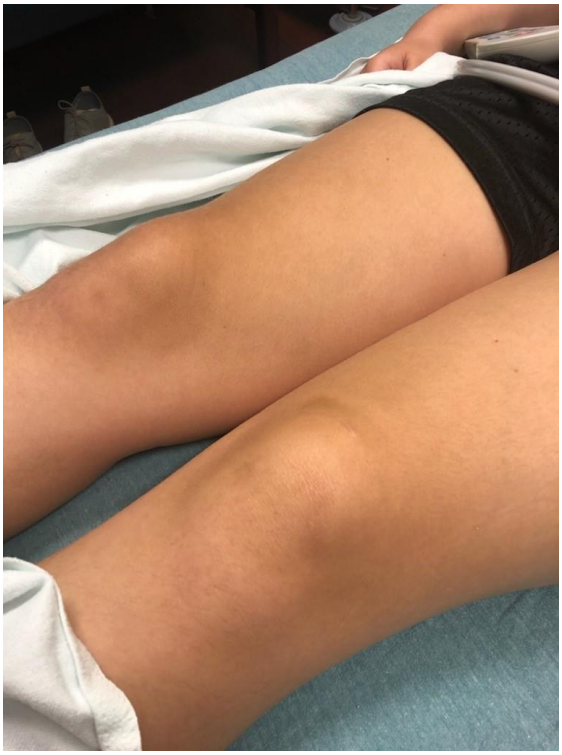
The family's neighbor testified that, one night in October 2020, BJ knocked on the neighbor's door and came inside. She was upset and said that her stepfather

[2] Some testimony indicates BJ was transgender. The parties use she/her pronouns to refer to BJ, so we follow their convention.

had strangled her, and she was afraid he was going to "come after her." The neighbor testified, "I think she had a scratch on her face, if I remember correctly," but the neighbor could not see any signs of choking. The neighbor called the police.

A deputy with the Harris County Sheriff's Office testified that he responded to the scene and saw no injuries to BJ that would indicate choking, although he was trained to identify such injuries. The officer did not look at BJ's knees, wrist, or other body parts because BJ didn't complain of any such injuries. The officer saw injuries to the mother's neck and chest and the stepfather's earlobe. The stepfather told the deputy that BJ attacked him. The deputy testified that family violence occurred that night, but he later clarified that he believed the violence was committed against the adults. The deputy did not take anyone into custody.

On the following day, the father took BJ to a hospital because BJ was complaining about her knees being sore and bruised. The father took pictures of BJ's knees, wrist, and face, which were admitted as exhibits. The father testified that these pictures showed bruising to BJ's knees and wrist and a scratch on her face:

The stepfather was the only witness who was present during the alleged family violence. He testified that he was 6'1" and weighed 196 lbs. BJ was about

5’5” and weighed about 150–160 lbs. He testified that BJ punched him in the face and then was “putting hands all over” the mother. He testified that he got in between BJ and her mother, pushed BJ down, held her on the ground, and got on top of her. He testified that his intention “was never to inflict harm” to BJ. He testified that he felt his response was appropriate and he would do it again if she needed to be subdued and there was no other option.

The stepfather testified that they have about twelve video cameras in their home. Thus, most of the incident was recorded on camera with audio, and two videos were admitted as exhibits. The family members were not on the screen during all of the videos. The videos show the mother and stepfather arguing with BJ. One of the videos shows, among other things, BJ and the mother putting their hands on each other. The stepfather then got between them and put his arms around BJ and fell with her to the ground. While on top of her, the stepfather said, “I have never put my hands on you, but if you keep acting the way you’re doing, it’s going to happen.”

The video shows that JJ was present during most of the incident. He moved away from the other family members when the altercation became physical. He later said, “That was scary,” and, “I almost got trampled on.” He also asked, “Do you think [BJ] is going insane or something?”

IV. Ruling and Findings

The trial court granted the stepfather a directed verdict in both cases, denied the father’s applications for protective orders, and signed findings of fact and conclusions of law. The trial court found, among other things, that the video evidence showed the stepfather “confronting the child, [BJ], after the child, [BJ], assaulted her mother,” and the stepfather “grabbing the child, [BJ] and trying to calm her down.” The court found that it was the deputy’s belief “that family

violence did not occur." The court concluded that the stepfather "did not commit an act of family violence."

V. Analysis

The father presents two issues in each case related to each child, contending that the trial court erred by denying his requests for protective orders because (1) the evidence was conclusive that the stepfather engaged in family violence against BJ and JJ and (2) the finding that the stepfather did not engage in family violence against BJ and JJ was so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The father contends that this court should conduct a de novo review of the facts and determine "whether the undisputed facts establish the showing required for a family violence protective order." Within these issues, the father challenges several specific findings of fact by the trial court, such as findings that BJ assaulted the mother and that the deputy believed family violence did not occur.

We disagree with the father's contentions. The ultimate facts in this case are not undisputed, and the video evidence is not conclusive of whether the stepfather committed an act of family violence. *Cf. Tucker v. State*, 369 S.W.3d 179, 187 n.1 (Tex. Crim. App. 2012) (Alcala, J., concurring) ("Rarely will videotape evidence actually be 'indisputable.' Audio and video recordings can be conclusive as to what and how events transpired, but their evidentiary value often depends on other factors, even when that evidence captures events as they are transpiring.").

The court heard the stepfather's testimony that he did not intend to harm BJ when he grabbed her and held her on the ground. Thus, the trial court reasonably could have found that the stepfather did not commit "an act . . . that [was] ***intended*** to result in physical harm, bodily injury, assault, or sexual assault." *See* Tex. Fam. Code § 71.004(1) (emphasis added). Similarly, the trial court reasonably could

have found that the stepfather's act of grappling BJ after she had assaulted the mother was not "an act . . . that is a threat that reasonably place[d] [BJ or JJ] in fear of imminent physical harm, bodily injury, assault, or sexual assault." *See id.* The trial court reasonably could have concluded that the stepfather's warning that he would "put hands on" BJ if she kept acting the way she was, i.e., assaulting him and the mother, was not a "threat that reasonably place[d] [BJ] in fear of imminent physical harm, bodily injury, assault, or sexual assault." *See id.*; *see also Cox v. Waste Mgmt. of Tex., Inc.*, 300 S.W.3d 424, 439 (Tex. App.—Fort Worth 2009, pet. denied) ("A threat is 'imminent' when it is a threat of present harm, not future or conditional harm.") (citing *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989)); *Gonzalez v. Rangel*, No. 13-05-00641-CV, 2006 WL 2371464, at *3–4 (Tex. App.—Corpus Christi-Edinburg Aug. 17, 2006, no pet.) (mem. op.) (legally insufficient evidence to support finding of family violence based on alleged threat that the applicant would die if he did not come home). The trial court reasonably could have concluded that it was not the stepfather's actions but instead BJ's that caused JJ to fear being "trampled."

The father does not cite any case addressing a trial court's finding that family violence did not occur. Although the father cites cases that have upheld a trial court's finding of family violence under various circumstances,[3] such cases

[3] *See, e.g.*, *Sylvester v. Nilsson*, No. 14-19-00901-CV, 2021 WL 970924, at *4–5 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, no pet.) (mem. op.) (sufficient evidence to uphold protective order when the respondent punched the applicant and threatened to kill him); *Caballero v. Caballero*, No. 14-16-00513-CV, 2017 WL 6374724, at *1–5 (Tex. App.—Houston [14th Dist.] Dec. 14, 2017, no pet.) (mem. op.) (sufficient evidence when the respondent pushed the applicant into a wall and held her there, slammed her between a door and doorframe, followed her and blocked her car, and pounded on her car window and screamed at her, among other things); *Kuzbary v. Kuzbary*, No. 01-14-00457-CV, 2015 WL 1735493, at *4–5 (Tex. App.—Houston [1st Dist.] Apr. 14, 2015, no pet.) (mem. op.) (sufficient evidence when the respondent slapped the applicant's face repeatedly back and forth and pushed her neck hard enough to cause her to fall); *Boyd v. Palmore*, 425 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (sufficient evidence when the respondent followed the applicant's car,

are of little persuasive value when evaluating the sufficiency of the evidence to support a contrary finding that family violence did ***not*** occur because the trial court could have resolved conflicting evidence in the stepfather's favor, and the video evidence is not conclusive of whether the stepfather committed an act of family violence. Even if the evidence in this case could have supported a finding of family violence, we must defer to the trial court's findings that are also supported by the evidence. We cannot supplant our judgment for that of the trial court's. *See Coffman*, 448 S.W.3d at 71.

Regarding the father's challenges to specific findings, we note that ample evidence—a video exhibit, the stepfather's testimony, and the deputy's testimony—supports the findings that refer to BJ assaulting the mother. The deputy's testimony was not clear on the subject of whether he believed the stepfather committed an act of family violence, but even if this finding is disregarded, the trial court's ultimate finding that the stepfather did not commit an act of family violence is nonetheless sufficient, and any erroneous finding regarding the deputy's testimony did not cause the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a); *Merry Homes, Inc. v. Chi Hung Luu*, 312 S.W.3d 938, 950 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

In sum, more than a scintilla of evidence supports the trial court's findings that the stepfather did not commit an act of family violence, and the findings are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The evidence is legally and factually sufficient, and the father's issues are overruled.

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blocked her car, and jumped on the hood); *Lakner v. Van Houten*, No. 01-09-00422-CV, 2011 WL 1233381, at *4–5 (Tex. App.—Houston [1st Dist.] Mar. 31, 2011, no pet.) (mem. op.) (sufficient evidence when the respondent engaged in threatening conduct over a span of six months, such as making death threats and following the applicant's vehicle while driving erratically).

VI. Conclusion

Having overruled the father's issues, the trial court's judgments are affirmed.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Poissant, and Wilson.