



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-22-00479-CV

Z.S., Appellant

V.

L.S., Appellee

On Appeal from County Court at Law No. 1
Parker County, Texas
Trial Court No. CIV-22-0389

Before Kerr, Birdwell, and Wallach, JJ.
Opinion by Justice Wallach

OPINION

L.S.¹ filed an application for a protective order against Z.S. for the benefit of the parties' minor child, A.S. The trial court signed a final protective order that is permanent in duration. Z.S. appeals from the trial court's order, and argues in five issues that the evidence is legally and factually insufficient to support the trial court's findings, that the trial court abused its discretion by granting the State's request to interview A.S. in chambers and denying him the opportunity to cross-examine A.S., and that the trial court abused its discretion by refusing admission of an exhibit. Holding that the trial court abused its discretion by granting the State's request to interview A.S. in chambers and that the evidence was legally insufficient to support the trial court's findings, we will reverse.

I. BACKGROUND

Z.S. and L.S. married in December 2004, and they are the parents of six children. A.S., the subject of the protective order, is the oldest child.

On June 5, 2022, two police officers and a representative from the New Mexico Children, Youth, and Families Department² (CYFD) arrived at the family's home in

¹We will refer to the parties by initials to protect the minor's identity. *See* Tex. Fam. Code Ann. § 109.002(d).

²CYFD is the equivalent to the Texas Department of Family and Protective Services in Texas.

New Mexico and informed L.S. of allegations that Z.S. had sexually abused A.S. A.S. was thirteen years old on that day, but she turned fourteen a few days later.

A.S. denied the allegations on the day that CYFD came to the residence, and L.S. did not believe the allegations of sexual abuse by Z.S. The family cooperated with the investigation, and five of the children underwent a forensic examination with CYFD. On July 25, 2022, CYFD sent a letter to the family stating that the investigation was complete and that the allegations were unsubstantiated.

On June 23, 2022, L.S. left New Mexico with all six children bound for Texas. L.S. admitted that she did not leave New Mexico to get the children away from Z.S. because she thought he sexually abused A.S., but rather she was operating a fireworks stand in east Texas. L.S. left her four girls, including A.S., in Albany, Texas, with Z.S.'s mother. She then took her two boys with her to her parents' home in Malakoff, Texas. Z.S. later went to Albany and stayed two or three nights at his mother's house with the four girls. While A.S. was staying in Albany, she made an outcry to L.S. who then went to Albany and picked up all four of the girls.

On July 1, 2022, L.S. filed an application for a protective order as the parent of A.S. In her affidavit supporting the application, L.S. stated:

[A.S.] has since told me that before the forensic interview, [Z.S.] told her that she 'better make this all go away.' [A.S.] has told me that when she was 5 years old, [Z.S.] put his penis in her mouth. [Z.S.] told [A.S.]: 'Just do it.' [A.S.] has told me that she has awoken to [Z.S.] being next to [A.S.] in her bed with [A.S.'s] shirt being pulled all the way up and her pajama pants being pulled down and [Z.S.] was touching [A.S.'s] genitals.

The trial court held a hearing on the application on August 31, 2022. At the hearing, A.S. talked to the trial court in chambers. Z.S. was not permitted to cross-examine A.S., and there is no record of the conversation between the trial court and A.S. The trial court noted on the record that “[A.S.] is very shy and very upset. She confirmed everything that is in [L.S.’s] affidavit that I’ve read and is part of the record. And she said she didn’t want to see [Z.S.] again.” The trial court found that family violence had occurred and that it is likely to occur in the future. The trial court signed a permanent protective order prohibiting Z.S. from communicating with A.S. or a member of her family or going within 200 yards of A.S. or a member of her family except as authorized by a family law court with continuing jurisdiction over the parties.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

When the trial court acts as factfinder, we review its findings under the legal- and factual-sufficiency standards. *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000); *see also Watts v. Adviento*, No. 02-17-00424-CV, 2019 WL 1388534, at *3 n.3 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.) (mem. op.); *Jakobe v. Jakobe*, No. 2-04-068-CV, 2005 WL 503124, at *1 n.4 (Tex. App.—Fort Worth Mar. 3, 2005, no pet.) (mem. op.).

1. Legal Sufficiency

We may sustain a legal-sufficiency challenge—that is, a no-evidence challenge—only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital

fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018); *Huskins v. Garcia*, No. 02-21-00328-CV, 2022 WL 3905083, at *2 (Tex. App.—Fort Worth Aug. 31, 2022, no pet.) (mem. op.). In determining whether legally sufficient evidence supports the challenged finding, we must consider evidence favorable to the finding if a reasonable factfinder could, and we must disregard contrary evidence unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We indulge “every reasonable inference deducible from the evidence” in support of the challenged finding. *Gunn*, 554 S.W.3d at 658 (quoting *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017)).

2. Factual Sufficiency

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all the pertinent record evidence, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh’g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

Findings of fact are the exclusive province of the factfinder. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 744 (Tex. 1986). Acting as factfinder, the trial court is

the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). An appellate court must not substitute its judgment for that of the factfinder. *Id.*

B. Applicable Law

The application for protective order was brought under Chapter 7B of the Texas Code of Criminal Procedure and Title 4 of the Texas Family Code. Article 7B.003 provides that the trial court shall find whether there are reasonable grounds to believe that the applicant is the victim of sexual assault or abuse, indecent assault, stalking, or trafficking. *See* Tex. Code Crim. Proc. Ann. art. 7B.003(a). “If the court finds that there are reasonable grounds to believe that the applicant is the victim of sexual assault or abuse . . . the court shall issue a protective order that includes a statement of the required findings.” *Id.* at 7B.003(b).

At the time of the application for protective order, the Family Code provided that a trial court must render a protective order if it finds that family violence has occurred and is likely to occur in the future. Tex. Fam. Code Ann. §§ 81.001, 85.001.³ “Family violence” means 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

³Both Section 81.001 and Section 81.0015 were amended effective September 1, 2023 to delete the required finding that family violence is likely to occur in the future. Act of May 24, 2023, 88th Leg., R.S., ch. 688 §§ 1, 2 secs. 81.001, 81.0015, 2003 Tex. Sess. Law Serv. ____, ____ (to be codified at Tex. Fam. Code §§ 81.001, 81.0015).

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).

Article 7B.004 of the Texas Code of Criminal Procedure provides:

In a hearing on an application for a protective order under this subchapter, a statement that is made by a child younger than 14 years of age who is the victim of an offense under Section 21.02, 21.11, 22.011, 22.012, or 22.021, Penal Code, and that describes the offense committed against the child is admissible as evidence in the same manner that a child's statement regarding alleged abuse against the child is admissible under Section 104.006, Family Code, in a suit affecting the parent-child relationship.

Tex. Code Crim. Proc. Ann. art. 7B.004. Section 104.006 of the Texas Family Code applies to the hearsay statement of a child twelve years of age or younger describing alleged abuse. *See* Tex. Fam. Code Ann. § 104.006.

C. Testimony

L.S. was the only witness who testified at the hearing. She testified that after CYFD came to their home, Z.S. spoke to the children alone and kept her from going into the room. The trial court allowed L.S. to testify over a hearsay objection that A.S. told her that Z.S. instructed her that “she had better make this all go away.” L.S. further testified over a hearsay objection that her daughter, M.S., told her that on one occasion she woke up and heard A.S. crying. M.S. asked A.S. if she was ok, and Z.S. told M.S. to “shut up.” Z.S. then told M.S. to go to the bathroom, and when they were in the bathroom, he instructed her not to tell anyone what had happened. L.S. recalled that Z.S. had told her years before that he had been forced to commit acts of oral sex on

members of his own family, and there is an allegation Z.S. forced A.S. to perform oral sex on him. L.S. did not provide any other testimony that Z.S. committed family violence.

The trial court talked to A.S. in chambers. There is no record of the conversation between the trial court and A.S., but the trial court stated on the record that A.S. confirmed everything that is in L.S.'s affidavit.

D. Legal Sufficiency Analysis

We may sustain a legal-sufficiency challenge when the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact. *Gunn*, 554 S.W.3d at 658. Because the trial court's statement on the record concerning A.S.'s statement in chambers is necessary for a determination of the sufficiency of the evidence, we will address Z.S.'s issues challenging the legal sufficiency of the evidence and the trial court's decision to interview A.S. in chambers together.

Section 104.006 details the procedure for admitting statements of victims of child abuse for victims under the age of twelve. Article 7B.004 of the Texas Code Criminal Procedure allows the statement of a child younger than fourteen who is the victim of sexual abuse to be admissible in the same manner as allowed by Section 104.006 of the Texas Family Code. Tex. Code Crim. Proc. Ann. art. 7B.004. Because A.S. was fourteen at the time she made statements concerning sexual abuse to L.S., neither Section 104.006 nor Article 7B.004 authorized the trial court to interview A.S. in chambers. *Broadway Nat'l Bank v. Yates Energy Corp.*, 631 S.W.3d 16, 23 (Tex. 2021) (the court's

“objective in construing a statute is to effectuate the [l]egislature’s intent as we find it in the statute’s text”).

The State relies on Family Code Section 153.009(b) in support of the trial court’s decision to interview A.S. in chambers. Section 153.009 provides:

(b) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child or on the court’s own motion, the court may interview the child in chambers to determine the child’s wishes as to possession, access, or any other issue in the suit affecting the parent-child relationship.

Tex. Fam. Code Ann. § 153.009(b).

Subsection (b) is applicable to determine the child’s wishes as to “possession, access, or any other issue in the suit affecting the parent-child relationship,” commonly referred to as a SAPCR. Therefore, we must determine if the application for a protective order falls within this scope.

A SAPCR is filed as provided by Title 5 of the Family Code in which “the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested.” Tex. Fam. Code Ann. § 101.032(a). Protective order proceedings fall within Title 4, a separate title of the Family Code. *See* Tex. Fam. Code Ann. § 82.001; *see also In re Saldana*, 607 S.W.3d 448, 449 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding). An application for a protective order may be filed while a SAPCR is pending in a court other than the court where the SAPCR is pending. *See* Tex. Fam. Code Ann. § 85.062(a)(2). A protective order may be issued by a court other than the

court of continuing, exclusive jurisdiction. *See Saldana*, 607 S.W.3d. at 449. If a protective order was rendered before the filing of a suit for the dissolution of marriage or SAPCR or while the suit is pending, “the court that rendered the order may, on the motion of a party or on the court’s own motion, transfer the protective order to the court having jurisdiction of the suit.” Tex. Fam. Code Ann. § 85.064(a).

Because Title 4 allows an application for a protective order to be filed and issued by a court other than a court where the SAPCR is pending, it follows that the application for a protective order is not itself a SAPCR as provided by Title 5 of the Family Code. We conclude that the application for a protective order was not itself a SAPCR as provided by Title 5 of the Family Code. Therefore, Section 153.009(b) is not applicable to this proceeding and did not authorize the trial court to interview A.S. in chambers.

In addition, Section 104.006 of Title 5 of the Family Code details the procedure for admitting statements of victims of child abuse under the age of twelve. Section 104.006 from Title 5 is incorporated into Title 4. *See* Tex. Fam. Code Ann. § 84.006. However, Section 153.009 is not incorporated into Title 4 to allow the trial court to interview a child in chambers. There is nothing authorizing the trial court to conduct an interview of A.S. in chambers. We hold that the trial court erred by interviewing A.S. in chambers. *Cadena Com. USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 326 (Tex. 2017) (stating that it is the court’s responsibility to “consider the context and framework of the entire statute and meld its words into a cohesive reflection of legislative intent”). We sustain Z.S.’s second issue.

The rules of law and evidence prevent us from giving weight to the trial court's statement on the record that A.S. confirmed in chambers everything that was in L.S.'s affidavit. *See Gunn*, 554 S.W.3d at 658. Moreover, a trial judge is presumed to consider only the testimony and exhibits properly in evidence. *Barnard v. Barnard*, 133 S.W.3d 782, 788 (Tex. App.—Fort Worth 2004, pet. denied). The affidavit of L.S. was not admitted into evidence at the hearing. Documents not admitted into evidence are not considered by an appellate court. *Barnard*, 133 S.W.3d at 789. Because the trial court's statement provided the only evidence that family violence had occurred, we hold that the evidence is legally insufficient. We sustain Z.S.'s first issue. Because of our disposition of the first and second issues, we need not address the third, fourth, and fifth. Tex. R. App. P. 47.1.

III. CONCLUSION

We reverse the trial court's final order of protection and render judgment denying application for protective order. We note that nothing in this opinion prevents L.S. from seeking a new protective order.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: September 7, 2023