TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00421-CV

Barrett Kitchen, Appellant

v.

Gregory Joseph Lutcavage, II, Appellee

FROM THE 250TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-FM-19-002879, THE HONORABLE TIM SULAK, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

Barrett Kitchen appeals from a now-expired protective order entered against him pursuant to Section 85.001(b) of the Family Code, which requires the issuance of a protective order if the trial court finds that the subject of the proposed order has committed acts of family violence and that family violence is likely to occur in the future. We will affirm.

BACKGROUND

Gregory Lutcavage and Theresa Gruca divorced in 2016. The couple have one child, a boy, and share conservatorship of their son. After the divorce, Lutcavage married Jamie Powers and Gruca married Barrett Kitchen. In April of 2019, Lutcavage sought a family-violence protective order against Kitchen in Travis County district court, where the matter was tried to the bench. After hearing testimony from Lutcavage, Kitchen, Powers, Gruca, and an officer with the Blanco Police Department, the district court found that Kitchen had

committed acts of family violence and that family violence was likely to recur. It then granted Lutcavage's petition and issued a six-month protective order requiring Kitchen to remain at least 50 feet from Lutcavage at certain school-related activities and while dropping off or picking up Lutcavage's and Gruca's son, and at least 200 yards from Lutcavage at all other times. Kitchen timely perfected this appeal. The order subsequently expired by its own terms.

DISCUSSION

Kitchen contends the evidence is legally and factually insufficient to support the trial court's family-violence findings. But as a predicate matter, he argues that his appeal was not mooted by the expiration of the protective order in November of 2019.

Mootness

Kitchen first argues that his arguments were not mooted by the expiration of the protective order, apparently anticipating that Lutcavage might raise a mootness challenge to this appeal. Lutcavage has not done so, but because mootness implicates jurisdiction, the question "cannot be waived." *Spears v. Falcon Pointe Cmty. Homeowners' Ass'n*, No. 03-16-00825-CV, 2017 WL 4766652, at *3 (Tex. App.—Austin Oct. 17, 2017, no pet.) (mem. op.) (citing *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012), and *Texas Quarter Horse Ass'n v. American Legion Dep't*, 496 S.W.3d 175, 180–81 (Tex. App.—Austin 2016, no pet.)); *see also Clements v. Haskovec*, 251 S.W.3d 79, 83 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.) ("Although the issue of mootness has not been raised or briefed by either party, we must address whether the expiration of the protective order has rendered this case moot before we examine the merits . . . ."). We will therefore address the issue.

"Ordinarily, the expiration of an order would render a case moot and thus unreviewable." *Burt v. Francis*, 528 S.W.3d 549, 552 (Tex. App.—Eastland 2016, no pet.) (citing *Camarena v. Texas Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988)). "However, Texas law recognizes a 'collateral consequences' exception to the mootness doctrine." *Id.* (citing *Federal Deposit Ins. Corp. v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994); *State ex rel. Cockerham v. Cockerham*, 218 S.W.3d 298, 302 (Tex. App.—Texarkana 2007, no pet.)). "The 'collateral consequences' exception is applied when prejudicial events have occurred and the effects continue 'to stigmatize individuals long after the judgment has ceased to operate.'" *Clements*, 251 S.W.3d at 84 (citation omitted). Our sister courts have consistently used this exception to allow review of expired family-violence protective orders. *See, e.g.*, *Nickelson v. State ex rel. Nickelson*, No. 04-17-00113-CV, 2018 WL 1831679, at *2 (Tex. App.—San Antonio Apr. 18, 2018, no pet.) (mem. op.); *Martin v. Martin*, 545 S.W.3d 162, 167 (Tex. App.—El Paso 2017, no pet.); *Burt*, 528 S.W.3d at 552; *Clements*, 251 S.W.3d at 84; *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815, 823 (Tex. App.—Fort Worth 2007, no pet.), *disapproved of on other grounds by Iliff v. Iliff*, 339 S.W.3d 74 (Tex. 2011); *Cockerham*, 218 S.W.3d at 302. As the Corpus Christi–Edinburg court explained:

> [A]lthough such orders may ultimately expire, the stigma attached to them generally does not. The effects of a family[-]violence protective order continue to stigmatize individuals long after the date of expiration. This stigma is not only a social burden; there are also attendant legal consequences to being the subject of such a protective order. The expiration of the protective order, therefore, does not render [an] appeal moot.

Clements, 251 S.W.3d at 84 (internal citations omitted). Thus, because the challenged order falls within the collateral-consequences exception to the mootness doctrine, we may proceed to the merits of Kitchen's argument.

Family Violence

Kitchen argues there is insufficient evidence to support the trial court's findings: (1) that he committed acts of family violence, and (2) that family violence is likely to recur. We review legal and factual sufficiency of the evidence supporting a protective order "using the same standards that we use in reviewing such issues following a jury verdict." *See B.C. v. Rhodes*, 116 S.W.3d 878, 883 (Tex. App.—Austin 2003, no pet.) (citing *K.C. Roofing Co. v. Abundis*, 940 S.W.2d 375, 377 (Tex. App.—San Antonio 1997, writ denied)). In evaluating legal sufficiency, we consider all the evidence in the light most favorable to the prevailing party, indulging every inference in that party's favor. *See id.* at 883–84. In reviewing factual sufficiency, we consider all of the evidence and uphold the finding unless the evidence is too weak to support it or the finding is so against the overwhelming weight of the evidence as to be manifestly unjust. *See id.* at 884. The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See id.* Evidence that is factually sufficient to support a finding is necessarily legally sufficient. *See In re M.V.G.*, 440 S.W.3d 54, 60 (Tex. App.—Waco 2010, no pet.).

Kitchen first argues there is no evidence to support the finding that he committed acts of family violence. As relevant here, "family violence" is a threat that, when made against a person with whom the perpetrator has a certain family or household relationship, "reasonably places the victim or applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault." *See* Tex. Fam. Code §§ 71.0021(a)(2), .004(3). Lutcavage, as the applicant, testified that Kitchen had committed alleged acts of family violence on four occasions from late 2016 through early 2019. First, Lutcavage testified that Kitchen had verbally assaulted Lutcavage when the two were at Lutcavage's son's elementary school and that Kitchen became so animated

that a teacher had to escort Kitchen away from Lutcavage. Second, Lutcavage testified that Kitchen again accosted him at the school, that Kitchen "loom[ed] over" Lutcavage until the two men's noses were "actually touching," and that the principal had to intervene and escort Kitchen into the school building. Third, Lutcavage testified that Kitchen verbally assaulted him and threatened to take his keys when Lutcavage parked in front of Kitchen's house to pick up Lutcavage's son. And fourth, Lutcavage testified that Kitchen "aggressively" confronted Lutcavage at a baseball game and threatened to "punch [him] in the mouth," "kick [his] ass," or "beat [his] ass."

Although he concedes that these incidents occurred, Kitchen contends they provide no evidence of family violence because Lutcavage was sometimes the instigator and was never reasonably "in fear of imminent physical harm." *See id.* § 71.0021(a)(2). Kitchen's wife corroborated Kitchen's characterization through her testimony at trial. This record, however, reflects sufficient evidence from which the factfinder could conclude that Lutcavage reasonably feared imminent physical harm. "Imminent" means "threatening to occur immediately" or "dangerously impending." *See Black's Law Dictionary* (11th ed. 2019). Lutcavage testified that Kitchen threatened to physically assault him multiple times and physically touched him in a threatening way at least once. Lutcavage further testified that during each incident, his heart would race and he would become "scared" for his own safety and that of his family. Powers testified that she was so concerned about the escalating incident at the baseball game that she wanted to record it with her phone to "defuse the situation." And both Lutcavage and Powers testified that they were so concerned about their safety that they each contacted the Blanco Police Department for assistance. An officer with that department also testified and confirmed the contact. The trial court, as the sole arbiter of the evidence, could have credited this testimony

and concluded that Kitchen's acts reasonably placed Lutcavage in fear of imminent physical harm. *See Burt*, 528 S.W.3d at 554 (holding that individual may reasonably fear imminent physical harm from "intimidating" acts); *Wilmeth v. State*, 808 S.W.2d 703, 706 (Tex. App.—Tyler 1991, no pet.) (holding "menacing" acts sufficient to cause reasonable fear of imminent physical harm).

In the alternative, Kitchen contends that there is no evidence that family violence will recur because he has no history of family violence. That contention, however, is predicated on the imminence argument that we have now rejected. Given its finding that Kitchen had committed acts of family violence, the trial court could reasonably infer that family violence would occur in the future, as well. *See, e.g.*, *Teer v. Neal*, No. 11-15-00061-CV, 2017 WL 730263, at *4 (Tex. App.—Eastland Feb. 16, 2017, no pet.) (mem. op.); *In re Cummings*, 13 S.W.3d 472, 477 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.). Accordingly, we conclude the district court's family-violence findings are neither contrary to the great weight of the evidence nor manifestly unjust. As a consequence, the evidence is both factually and legally sufficient to support those findings.

CONCLUSION

Having concluded that the record provides legally and factually sufficient evidence to support the finding of family violence, we overrule Kitchen's sole issue on appeal and affirm the trial court's protective order.

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Edward Smith, Justice

Before Chief Justice Rose, Justices Triana and Smith

Affirmed

Filed: June 24, 2020