

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-641

COMMONWEALTH

vs.

JAIME NEVAREZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Jaime Nevarez, pleaded guilty in District Court to threatening to commit a crime, G. L. c. 275, § 2; malicious destruction of property, G. L. c. 266, § 127A; operation of a motor vehicle with a suspended license, G. L. c. 90, § 23; assault by means of a dangerous weapon, G. L. c. 265, § 15B (b); and wanton destruction of property, G. L. c. 266, § 127D, arising out of four separate criminal complaints. The plea judge imposed eighteen months of probation. The defendant now appeals from an order revoking his probation. Concluding that the hearsay evidence relied upon by the judge was substantially reliable and that there was adequate evidence to support a finding of a probation violation, we affirm.

1. Substantial reliability of hearsay. To determine whether hearsay evidence bears "substantial indicia of reliability," a judge may consider several nonexclusive factors "on the question of trustworthiness and reliability." Commonwealth v. Patton, 458 Mass. 119, 132-133 (2010), quoting Commonwealth v. Durling, 407 Mass. 108, 118 (1990). Those factors include "whether that evidence (1) is based on personal knowledge and/or direct observation, rather than on other hearsay; (2) involves observations recorded close in time to the events in question; (3) is factually detailed, rather than generalized and conclusory; (4) is internally consistent; (5) is corroborated by any evidence provided by the probationer; (6) was provided by a disinterested witness; or (7) was provided under circumstances that support the veracity of the source (e.g., was provided under pains and penalties of perjury or subject to criminal penalties for providing false information)." Rule 7(b) of the District/Municipal Courts Rules for Probation Violation Proceedings, Mass. Rules of Court, at 691 (Thomson Reuters 2020). See Commonwealth v. Hartfield, 474 Mass. 474, 484 (2016) (providing factors judge may rely on in determining whether hearsay evidence is substantially reliable); Patton, 458 Mass. at 132-134 (factors to consider in determining trustworthiness and reliability of hearsay evidence). We review

the hearing judge's assessment for an abuse of discretion. See Commonwealth v. Ogarro, 95 Mass. App. Ct. 662, 668 (2019).

Here, the judge acted within her discretion in finding that the hearsay evidence was substantially reliable. First, the victim's statements in the police report were supported by her personal knowledge and direct observation of the defendant's behavior outside of her residence. See Patton, 458 Mass. at 134 (statement based on victim's personal knowledge supported hearsay statement's reliability); Commonwealth v. Leopold L., 96 Mass. App. Ct. 796, 803-804 (2020) (victim's "out-of-court statements of identification were reliable because the victim knew the perpetrators based on previous interactions . . . and the victim relied on personal knowledge in making the identifications"). Second, the victim's statements were reported to police the day after the incident. See Patton, supra at 121-122, 134 (complaint promptly reported after incident supported victim's credibility in making hearsay statement); Commonwealth v. Nunez, 446 Mass. 54, 59 (2006) (victim's statements to police officer were substantially reliable because they were "made soon after the events at issue when the incident was still fresh in his mind"). Third, the victim's statements specifically recounted the factual details of the incident, including the approximate time of the incident, the defendant's location outside the victim's residence, and the

defendant's language at the time of the incident, as well as a description of the property damage to her car. See Patton, supra at 134 (statement "contain[ing] specific factual details," including physical location of victim in relation to probationer, supported finding of substantially reliable hearsay evidence). The victim's statements, documented in the police report, provided a detailed timeline of the events, which began with the defendant's yelling and screaming outside of the victim's residence and then admitting that he slashed the victim's car tires. See, e.g., Commonwealth v. Henderson, 82 Mass. App. Ct. 674, 679 (2012) ("factually detailed" affidavit supported reliability of hearsay evidence); Commonwealth v. Foster, 77 Mass. App. Ct. 444, 450 (2010), quoting Nunez, supra (police report containing victim's statement was substantially reliable hearsay because it was "factually detailed"). Fourth, the police officer corroborated the victim's statement that she had an active restraining order against the defendant. Fifth, the fact that the victim's statements were documented in a police report supports their underlying indicia of truthfulness because filing a false police report is a crime. See G. L. c. 269, § 13A; Commonwealth v. King, 71 Mass. App. Ct. 737, 741 n.7 (2008).

Furthermore, "the consistency of the hearsay incident with other, known behavior" of the defendant can support a finding

that hearsay evidence is substantially reliable. John Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 89 (2019), citing Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 638-639 (2011). Here, the victim's report was corroborated by its consistency with the defendant's earlier smashing of her vehicle windows when she refused to let him in, and another incident he which he let the air out of her car's tire. Accordingly, we discern no abuse of discretion in the hearing judge's conclusion that the hearsay was substantially reliable.<sup>1</sup>

2. Proof of probation violation. "A determination whether a violation of probation has occurred lies within the discretion of the hearing judge." Commonwealth v. Bukin, 467 Mass. 516, 519-520 (2014). The question is whether the defendant "more likely than not violated the conditions of his probation," Commonwealth v. Kelsey, 464 Mass. 315, 324 (2013), and it is "the exclusive province of the hearing judge to assess the weight of the evidence." Bukin, supra at 521.

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<sup>1</sup> Although the judge erred in not making the finding of substantial reliability in writing, see rule 7(a) of the District/Municipal Courts Rules for Probation Violation Proceedings, Mass. Rules of Court, at 691 (Thomson Reuters 2015), such an error "is not reversible error." King, 71 Mass. App. Ct. at 739 n.5. Here, where the only evidence presented was hearsay, the judge's conclusion that the hearsay was substantially reliable "is implicit in the fact that [she] made findings based on the hearsay evidence." Nunez, 446 Mass. at 59.

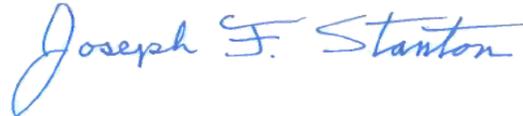
Because the Commonwealth failed to introduce the terms of the abuse prevention order, the judge could not assume that the order prohibited anything other than abuse of the victim. "Abuse," as defined by G. L. c. 209A, § 1, is "the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; (c) causing another to engage involuntarily in sexual relations by force, threat or duress." Even when the defendant does not physically touch the victim, and instead inflicts verbal abuse, the "defendant may violate the abuse prevention order." Commonwealth v. Torres, 468 Mass. 286, 290 (2014). By yelling and screaming outside of the victim's residence, and suggesting that he damaged the victim's tires because she would not see him, the defendant abused the victim within the meaning of G. L. c. 209A, § 1, by placing the victim "in fear of imminent serious physical harm." See Commonwealth v. Gordon, 407 Mass. 340, 349-350 (1990) (defendant's verbal outburst created reasonable fear of imminent serious physical harm); M.B. v. J.B., 86 Mass. App. Ct. 108, 117 (2014) (abuse where defendant escalated contact after history of anger and violence); Ginsberg v. Blacker, 67 Mass. App. Ct. 139, 143-144 (2006), quoting Gordon, supra at 350 (fear of imminent serious physical harm where defendant's "intimidating behavior . . . could be rationally interpreted by

the judge as 'creat[ing] a picture of a volatile situation in which the possibility of physical abuse was present').

Accordingly, the judge acted within her discretion in finding by a preponderance of the evidence that the defendant committed the crime of violating an abuse prevention order.

Order revoking probation  
affirmed.

By the Court (Lemire, Ditkoff  
& Grant, JJ.<sup>2</sup>),



Clerk

Entered: February 22, 2021.

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<sup>2</sup> The panelists are listed in order of seniority.