COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-331

COMMONWEALTH

vs.

EDMANUEL ANDRICKSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant of assault and battery on a family or household member, G. L. c. 265, § 13M (a), and reckless endangerment of a child, G. L. c. 265, § 13L.[1] On appeal, the defendant argues that the judge abused her discretion in allowing the Commonwealth to introduce evidence of a prior restraining order. The defendant also argues that the evidence was insufficient to support the child endangerment conviction. We affirm.

1. Prior bad acts. The defendant argues that the judge erred in admitting evidence that the victim had previously obtained a c. 209A restraining order against the defendant and that, in connection with obtaining that order, the victim had

[1] The jury acquitted the defendant of strangulation or suffocation, G. L. c. 265, § 15D (b).

submitted an affidavit stating that the defendant had "headbutt[ed] [her] and threw a drink in [her] face and then pushed [her] to the ground." The Commonwealth elicited the evidence on cross-examination of the victim, who denied that the defendant assaulted her on the day in question and who also maintained that the defendant had not "put hands on [her] in the past." The victim's testimony was contradicted by her assertions in the affidavit she submitted in the earlier c. 209A proceeding.

Because the contradictory statements were contained in an affidavit, made under the pains and penalties of perjury, and submitted in a c. 209A proceeding, they were admissible for all purposes, and not merely as impeachment. See Mass. G. Evid. § 801(d)(1)(A) (2021);[2] Commonwealth v. Johnson, 49 Mass. App. Ct. 273, 278-279 (2000) (where prerequisites of evidentiary rule met, restraining order affidavit admissible as substantive evidence). Cf. Mass. G. Evid. § 613(a). Nonetheless, the judge limited its consideration to "the nature of the [parties'] relationship" and instructed the jury "not [to] use it to

[2] When a "declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . (i) is inconsistent with the declarant's testimony; (ii) was made . . . in an affidavit . . . under the penalty of perjury in a G. L. c. 209A proceeding; (iii) was not coerced; and (iv) is more than a mere confirmation or denial of an allegation by the interrogator," the statement is not hearsay. Mass. G. Evid. § 801(d)(1)(A).

conclude that if the defendant committed the other acts, he must also have committed the crimes charged in this case." This instruction was in line with our cases permitting introduction of "a defendant's prior acts of domestic violence . . . for the purpose of showing a 'defendant's motive and intent and to depict the existence of a hostile relationship between the defendant and the victim.'" Commonwealth v. Oberle, 476 Mass. 539, 550 (2017), quoting Commonwealth v. Linton, 456 Mass. 534, 551 (2010). The judge further obviated against any misuse of the evidence by instructing the jury that they could not consider the statements in the victim's affidavit for their truth. There was accordingly no error in admitting the evidence.

2. Sufficiency of evidence of child endangerment. The defendant argues that the Commonwealth failed to prove beyond a reasonable doubt that he engaged in conduct that created a substantial risk of serious injury as required to prove child endangerment. To prove child endangerment, the Commonwealth must show "(1) a child under age eighteen, (2) a substantial risk of serious bodily injury or sexual abuse, and (3) the defendant wantonly or recklessly (i) engaged in conduct that created the substantial risk, or (ii) failed to take reasonable steps to alleviate that risk where a duty to act exists." Commonwealth v. Coggeshall, 473 Mass. 665, 667-668 (2016).

"[T]he crime of reckless endangerment does not require proof of injury" (citation omitted), Commonwealth v. Santos, 94 Mass. App. Ct. 558, 564 (2018), but the risk must be "a good deal more than a possibility," Coggeshall, supra at 668, quoting Commonwealth v. Hendricks, 452 Mass. 97, 103 (2008). In reviewing the denial of a motion for a required finding, made at the close of the Commonwealth's case and renewed at the close of all the evidence, "we consider 'whether the evidence, in its light most favorable to the Commonwealth, . . . is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged.'" Commonwealth v. Semedo, 456 Mass. 1, 7 (2010), quoting Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

Taken in the light most favorable to the Commonwealth, see Latimore, 378 Mass. at 676-678, the evidence, together with the reasonable inferences to be drawn from it, showed the following. After an argument during which the victim (the defendant's girlfriend) screamed that the defendant had hit her, the victim stood on the porch to their home at the top of a small flight of stairs, and held her one year old infant in her arms as the defendant walked away. After exchanging words with a neighbor, the defendant quickly returned to the house, ascended the stairs, and punched the victim on the left side of her face.

We are not persuaded by the defendant's argument that, absent testimony as to the amount of force used, a punch alone is not enough to establish a substantial risk of serious bodily injury. In common usage, knowledge, and experience, the verb "punch" carries with it a connotation of force delivered by a closed fist. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/punch ("punch" means "to strike with a forward thrust especially of the fist" or "to drive or push forcibly by or as if by a punch"). Moreover, the defendant delivered the punch to the victim's face, a point of particular vulnerability. The jury could reasonably have inferred that a punch to the face could have startled the victim, causing her to lose her footing or to fall, or causing her to raise her hands or arms to protect her face. See Commonwealth v. Joyner, 467 Mass. 176, 179-180 (2014) (jury may draw reasonable and possible inferences from evidence). Any of these reasonable possibilities risked that the infant would be dropped, struck, or otherwise injured. See Commonwealth v. Figueroa, 83 Mass. App. Ct. 251, 260 (2013) ("[a] person of common intelligence would understand that a significant blow to an infant's head can cause serious bodily injury or even death"), overruled in part on other grounds Coggeshall, 473 Mass. at 670. These risks were magnified by the fact that the victim stood at the top of a short flight of stairs. In

addition, because the defendant was in a lower position relative to the victim, who was holding the baby in front of her, the defendant's fist necessarily had to pass by the baby to strike the victim's face, also increasing the risk to the child. See Commonwealth v. Lopez, 80 Mass. App. Ct. 390, 395-396 (2011) (discussing consequences of relative position on flight of stairs). Indeed, the neighbor testified that "if [the defendant] had missed, he would've hit the baby."

The concurring opinion in Commonwealth v. Rosa, 94 Mass. App. Ct. 458, 468-469 (2018) (Englander, J. concurring), upon which the defendant relies, is inapposite. The issue in Rosa was the defense of parental privilege to a charge of assault and battery, and in that context, the existence and severity of injury to the child factored into, among other things, whether the parent had used reasonable force. Here, by contrast, the child endangerment statute "does not require proof of injury," Santos, 94 Mass. App. Ct. at 564; rather, we look only at the

risk of injury.

Judgments affirmed.

By the Court (Green, C.J.,
Wolohojian & Shin, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: July 21, 2021.

[3] The panelists are listed in order of seniority.