COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1125

COMMONWEALTH

vs.

RICHARD R. PARKER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is an appeal by the defendant, Richard Parker, following a jury trial convicting him of kidnapping, in violation of G. L. c. 265, § 26; assault by means of a dangerous weapon, in violation of G. L. c. 265, § 15B (b); and witness intimidation, in violation of G. L. c. 268, § 13B. The defendant primarily argues that the evidence was insufficient to support any of the convictions. We affirm.

Background. We recite the facts as the jury could have found them, reserving additional facts for discussion below. In brief, on December 18, 2011, at approximately 5 A.M., the defendant's wife (victim) called the police, frantically asking for help because her "husband [was] trying to kill [her] with -- he's got knives going . . . ." She told the dispatcher that she had fled her house with her two dogs and hidden down the street,

stating that the defendant "has got knives all over the house he keeps throwing," and that "[t]his has been going on for about an hour. I just managed to run out." She fearfully relayed to the dispatcher that the defendant had been drinking, that she could see him standing on the front porch, and that she thought that he might be suicidal. Soon after, one of the two responding officers found the defendant lying on the ground approximately fifty feet behind the house in the brush of a wooded area. At trial, both officers testified to observing visible gouge marks and cuts in the master bedroom door and wall, several large knives on the bedroom floor, and other signs of destruction throughout the house, including spilled bleach, overturned furniture, and broken doors and glass.

Discussion. 1. Sufficiency of the evidence on kidnapping charge. We review the evidence in the light most favorable to the Commonwealth to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). To prove kidnapping under G. L. c. 265, § 26, the Commonwealth must establish that a person "without lawful authority, forcibly or secretly confine[d] or imprison[ed] another person within this commonwealth against his will . . . ." G. L. c. 265, § 26. "Confinement is broadly interpreted to mean any restraint of a

person's movement" (quotation and citation omitted). Commonwealth v. Boyd, 73 Mass. App. Ct. 190, 193 (2008). The required force "need not be physical force applied against the victim; if the victim is subdued by the display of potential force, [that] is sufficient" (quotation and citation omitted). Commonwealth v. Titus, 32 Mass. App. Ct. 216, 221 (1992). Here, the defendant testified at trial that his wife was in the bedroom when he picked up a large military style knife and began stabbing the wall and throwing it, ignoring her pleas to stop. In her distraught 911 call, which was played for the jury, the victim, who passed away prior to the trial, told the operator that the defendant was "trying to kill [her]," and that after enduring his behavior for an hour, she had "just managed to run out [of the house]." These facts, viewed in the light most favorable to the Commonwealth, provide sufficient evidence for a jury to reasonably infer that the defendant's destructive display of force of throwing weapons and breaking furniture throughout the house placed the victim in fear and, against her will, prevented her from leaving the house for at least an hour. See Titus, 32 Mass. App. Ct. at 221, citing Commonwealth v. Nelson, 370 Mass. 192, 203 (1976).

2. Sufficiency of the evidence on assault charge. "[A]n assault is defined as either an attempt to use physical force on another, or as a threat of use of physical force." Commonwealth

v. Gorassi, 432 Mass. 244, 248 (2000). Under the theory of threatened battery, the Commonwealth must show "that the defendant engaged in conduct that a reasonable person would recognize to be threatening, that the defendant intended to place the victim in fear of an imminent battery, and that the victim perceived the threat." Commonwealth v. Porro, 458 Mass. 526, 530-531 (2010). Such conduct includes that which is "objectively menacing" (citation omitted). Gorassi, 432 Mass. at 248. Here, the evidence was sufficient for the jury to reasonably infer that throwing large knives, stabbing walls, and destroying furniture is objectively menacing. The jury were further permitted to infer that such conduct was intended to place the victim, who, by the defendant's own admission, was in the room with him, in fear of an imminent battery, and that the victim perceived the threat, as evidenced in her frantic 911 call where she stated, "[The defendant] is trying to kill me with -- he's got knives going . . . ."

3. Sufficiency of the evidence on witness intimidation charge. To convict on a charge of witness intimidation, the Commonwealth must establish beyond a reasonable doubt that "(1) the target of the alleged intimidation was a witness in a stage of a criminal proceeding, (2) the defendant willfully endeavored or tried to influence the target, (3) the defendant did so by means of intimidation, force, or threats of force, and (4) the

defendant did so with the purpose of influencing the complainant as a witness" (citation omitted). Commonwealth v. Pagels, 69 Mass. App. Ct. 607, 612-613 (2007).[1] Essential elements of a crime may be established by circumstantial evidence, and any inferences drawn therefrom "need only be reasonable and possible" (citation omitted). Commonwealth v. Henault, 54 Mass. App. Ct. 8, 12 n.6 (2002), and cases cited. Finally, subsequent bad acts, although inadmissible to demonstrate bad character or propensity, may be admissible for other relevant purposes, including to show intent or motive. See Commonwealth v. Butler, 445 Mass. 568, 574 (2005).

Here, the direct and circumstantial evidence was sufficient for the jury to reasonably infer the requisite elements for witness intimidation. From the 911 call alone, the jury could reasonably infer that the victim believed that she was in danger of being harmed by the defendant and had to flee her house in the night with her dogs in order to call the police, that the defendant soon after emerged onto the front porch and wandered into the woods behind the house, that the defendant's use of force for at least the preceding hour had been partially

[1] Pagels construed an earlier version of the statute. The amendments to the statute in effect when the defendant was indicted, see St. 2010, c. 92, § 11; St. 2010, c. 256, § 120, expanded the statute's application.

directed at the victim, and that the defendant left his house to pursue her. At trial, the defendant testified that, at the time he was outside the house, he did not want the police there and he "figured [the victim] called 911." Although this evidence was sufficient to establish the required elements, additional evidence in the form of the defendant's subsequent phone calls from prison to the victim and to his ex-wife[2] further support a reasonable inference that the defendant's motive in seeking out his wife after she fled the house was to discourage her from communicating with police. In numerous calls to the victim, the defendant told her that she could testify that her memory was impacted by a brain injury, and that her failure to testify at trial would help his case. He also indicated to his ex-wife that he would "make some sort of deal to help [the victim] out [if she refused to testify]." Such evidence was probative of the defendant's continued goal of preventing the victim from communicating with the police or testifying against him, and outweighs any risk of unfair prejudice. See Commonwealth v. Barrett, 418 Mass. 788, 794-795 (1994).

4. Improper cross-examination and closing argument. The defendant also argues that the trial judge committed reversible

[2] While incarcerated, the defendant had a number of conversations with his former wife, which were recorded. She did not testify at trial.

error when, over the defendant's objection, the judge allowed the prosecutor to question the defendant about his knowledge of what the victim had accused him of and to refresh his memory with her written statement to police. "[T]he judge has broad discretion to determine the scope and extent of cross-examination." Commonwealth v. Johnson, 431 Mass. 535, 538 (2000). Where a defendant opens the door to a subject by testifying about it, as the judge here noted, it is within the judge's discretion to permit cross-examination on that subject. See Commonwealth v. Graham, 62 Mass. App. Ct. 642, 648 (2004). Further, where a witness demonstrates that his recollection on a subject is clearly exhausted, Commonwealth v. McGee, 469 Mass. 1, 15 (2014), an examiner may refresh the witness's recollection, often with a writing of some sort, but also "any other means." Commonwealth v. O'Brien, 419 Mass. 470, 478 (1995).

The jury had heard the victim's 911 call (in which she accused the defendant of trying to kill her, throwing weapons, and more) and portions of a phone conversation between the defendant and his ex-wife where, when asked whether the victim was "mak[ing] all that up," he did not deny knowing about the various offenses the victim was accusing him of. On cross-examination, the defendant denied knowing what other crimes the victim was accusing him of beyond that he "broke things and

things like that." After a sidebar conference, the judge permitted the prosecutor to refresh the defendant's recollection with the victim's two-page statement to police. The document detailed all the offenses, was not shown or described to the jury, and had been provided to both the Commonwealth and the defendant during discovery. It was proper for the prosecutor to refresh the defendant's recollection in this manner, well within the judge's discretion to permit it, and not clear error.[3] See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014); Commonwealth v. Gagnon, 408 Mass. 185, 192 (1990).[4]

Judgments affirmed.

By the Court (Agnes, Blake & Neyman, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: August 26, 2019.

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[3] We also discern no error or abuse of discretion in the judge's allowance of the prosecutor's reference during closing arguments to the defendant's knowledge of the accusations against him.

[4] Counsel for the defendant presented an additional appellate argument pursuant to Commonwealth v. Moffett, 383 Mass. 201, 216-217 (1981), and the defendant filed a separate Moffett brief, see id. at 208-209, claiming additional, related errors. The issues relate to the impartiality of a juror and how the judge handled a juror's mid-trial exclamation. Neither discussion rises to the level of appellate argument. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). In any case, we discern no error on the merits.

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