COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1108

COMMONWEALTH

vs.

VIRGINIO GOMES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury-waived trial, the defendant was convicted of violating an abuse prevention order, in violation of G. L. c. 209A, § 7. Shortly before trial, a charge of rape of a child, in violation of G. L. c. 265, § 23, was dismissed without prejudice.[1] On appeal, the defendant argues that the motion judge erred in denying his motion to suppress evidence obtained during a warrantless search of his home. We affirm.

Motion to suppress. In reviewing a ruling on a motion to suppress, the appellate court accepts the motion judge's subsidiary findings of fact absent clear error, and we independently review the judge's ultimate findings and conclusions of law. Commonwealth v. Tyree, 455 Mass. 676, 682

[1] At the request of the Commonwealth, a charge of malicious injury to property, in violation of G. L. c. 266, § 127, also was dismissed.

(2010). "[O]ur duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

The motion judge found the following facts. On December 23, 2014, the police were called at about 4:00 A.M. to an address in Brockton to investigate a report of a missing person. Upon arrival, Officer Daniel MacIntosh and his partner met and spoke to the caller, who reported that her fifteen-year-old daughter had left their home through an open window in the company of the defendant, who was twenty-four or twenty-five years old. She said she looked out the second-floor bedroom window and saw the defendant, whom she knew, and her daughter entering 117 Menlo Street, where the defendant lived. The mother said that she had an abuse prevention order against the defendant on behalf of her daughter. The police confirmed that an abuse prevention order was in effect against the defendant.

The officers went to 117 Menlo Street and proceeded to the third-floor apartment where the mother said the defendant lived. The officers found the apartment door unlocked and entered. They did not see anyone, but heard music coming from inside a bedroom, the door to which was closed and locked. The police banged on the door several times, identified themselves, and called the defendant's name, asking the occupant to open the

door. The music was then turned off, but there was no other response. Officer MacIntosh could hear people inside the bedroom. The police warned that if the occupants did not open the door, the police would kick the door open. After receiving no response, the police kicked open the door and found the defendant and the minor girl inside. After speaking with the girl, the officers returned her to her mother.

"A warrantless government search of a home is presumptively unreasonable under the Fourth Amendment to the United States Constitution." Commonwealth v. Entwistle, 463 Mass. 205, 213 (2012). The emergency aid doctrine establishes one "narrow exception to the warrant requirement." Commonwealth v. Duncan, 467 Mass. 746, 754 (2014). The Commonwealth must show two things: first, that at the time of entry, the police have an objectively reasonable basis to believe that an emergency exists, and, second, that the officer's conduct inside the home is reasonable under the circumstances. Commonwealth v. Arias, 481 Mass. 604, 610 (2019). To "determ[ine] whether entry is justified under the emergency aid exception, we look solely to the objective circumstances known to the police at the time of entry." Entwistle, supra at 214.

Given the totality of the circumstances, we agree with the motion judge's decision that the police had an objectively reasonable basis to believe that an emergency of the required

nature existed that justified their warrantless entry into the defendant's apartment and, when nobody responded to their knock, the police entry into the defendant's bedroom. The defendant argues that the police had no basis to assume that the girl was in any danger because there was no violence reported and they did not know whether the restraining order had been issued as an "abuse prevention order" under G. L. c. 209A or a "harassment prevention order," pursuant to G. L. c. 258E. Accordingly, the defendant argues that "the mere existence of facts suggesting a restraining order is being violated is insufficient to satisfy the emergency aid exception." We reject the premise of the defendant's argument. The objective concern was that the defendant and the minor girl might engage in sexual relations and we agree that rape of a child poses a threat of "serious injury" to the child.

The defendant's reliance on Commonwealth v. Gordon, 87 Mass. App. Ct. 322, 334-335 (2015), for the proposition that where an individual has been the victim of domestic violence, has exhibited signs of distress, and may be in the home, the police must announce their presence "and receive no response, [before] the conditions exist for a warrantless entry under the emergency aid exception," is unavailing. First, the court in Gordon did not require the police to knock and announce their presence before entry. Rather, we concluded that possible

domestic violence, coupled with the fact that the police in that case did knock and announce their presence and received no response, established the applicability of the emergency aid exception. Second, here, the officers entered the apartment through an unlocked door. The evidence the defendant seeks to suppress was found in the bedroom only. There is no dispute that the police knocked and announced their presence repeatedly, could hear people inside, and asked the occupants to come out, before kicking open the bedroom door. After the police found the defendant and the girl, their actions were limited to arresting the defendant and returning the minor girl to her mother. The defendant does not challenge the reasonableness of this conduct.

Judgment affirmed.

By the Court (Henry, Desmond & Hand, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: May 15, 2020.

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