

THE FAMILY COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY



R----- B----, ) No.: 2411001992  
 )  
Appellant, )  
 )  
v. )  
 )  
 )  
STATE OF DELAWARE, )  
 )  
Appellee. )

**REVIEW OF COMMISSIONER'S ORDER**

Date Filed: March 4, 2026  
Response Received: March 25, 2026  
Date Decided: April 14, 2026

R----- B----, Appellant, *Sean Barney, Esq., Office of Defense Services.*  
State of Delaware, Appellee, *Matthew Casale, Esq., Department of Justice.*

**Hirst, J.**

## OPINION

Before the Court is a Request for Review of a Commissioner's Order ("ROCO") filed by Appellant R----- B---- ("Father"). The case arose from allegations that Father struck and injured A---- B--- ("Mother") while she was attempting to retrieve their infant son from his arms. On February 2, 2026, a Commissioner of the Family Court entered an order finding Father guilty of Assault in the Third Degree and Endangering the Welfare of a Child and sentencing him to two concurrent terms of one year of imprisonment, suspended for one year of probation.

Father now raises three objections to the Commissioner's Order. First, he claims that the Commissioner violated the rule against hearsay by allowing the State to present a recording of Mother's 911 call. Second, he argues that the Commissioner improperly found that he had a duty to retreat or surrender his son before retaliating against Mother. Third, he submits that, for several reasons, the Commissioner erred in her assessment of his credibility. For the reasons that follow, the Court finds that none of Father's claims merits relief and consequently **ACCEPTS** and **AFFIRMS** the Commissioner's order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

At 10:36 a.m. on November 5, 2024, Mother dialed 911 to report that Father had punched her in the face in the presence of their two-week-old son. Patrolwoman Katherine Kirlin of the Wilmington Police Department arrived at Mother's home within 20 minutes, by which time Father had left the scene. Patrolwoman Kirlin spoke with Mother, photographed her injuries, and then secured a warrant for Father's arrest. Father was

subsequently arrested in May 2025 and charged with Assault Third Degree<sup>1</sup> and Endangering the Welfare of a Child,<sup>2</sup> and his case came to trial on February 2, 2026.

At the start of the trial, the State and Defense Counsel informed the Commissioner that they had stipulated to the introduction of three exhibits: (1) a certified recording of Mother's 911 call, (2) a certified copy of a written report on that call and the subsequent police response, and (3) the picture of Mother's injuries taken by Patrolwoman Kirlin.<sup>3</sup> Defense counsel then informed the Commissioner that he had nothing to add, and the three exhibits were admitted into evidence.<sup>4</sup>

*Testimony of A---- B---*

Mother explained that she invited Father to her home on the morning of November 5, 2024, to "babysit" their one-month-old son during her appointment with a hairdresser in her home.<sup>5</sup> Father arrived and began cradling the baby in his arms. Soon, however, Mother and Father started to argue about Father's relationship and his children with another woman. Mother testified that, as the argument escalated, Father began "swinging my son around"—or, as she put it on cross-examination, "flinging him"—and causing his head to "go[] back and forth."<sup>6</sup> When she attempted to retrieve the baby, Father punched her in the face with a closed fist. He then "threw [her] on the

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<sup>1</sup> See 11 *Del. C.* § 611(1).

<sup>2</sup> See 11 *Del. C.* § 1102(a)(4).

<sup>3</sup> Trial Transcript at 4, Feb. 2, 2026.

<sup>4</sup> *Id.* at 4–5.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> *Id.* at 13, 26.

bed,” left the baby with her, and finally “fled the scene” after she said she was going to call the police.<sup>7</sup>

The State then asked for permission to “publish what’s been entered as State’s Exhibit 1 [the certified recording of Mother’s 911 call] . . . if there’s no objection.”<sup>8</sup> Father’s attorney offered no such objection in the approximately one minute that followed as the State prepared the technology to present the evidence, and the Commissioner eventually directed the State to proceed.<sup>9</sup> On the 911 call, Mother informed the dispatcher that “my baby daddy’s here putting his hands on me.” After a few moments, she noted that “he’s walking out now” and clarified that “he punched me in my face while I had my son in my hands.”<sup>10</sup>

After allowing the State to play more than a minute of the recording, Father’s attorney objected, arguing that, “the State need[ed] to lay the foundation” by “asking the witness whether she was truthful when she made her prior statement” and establishing that the statement was “voluntary.”<sup>11</sup> The State answered by describing the recording as “a certified 911 call.”<sup>12</sup> After defense counsel explained that he was referring to the requirements for admission under the 11 *Del. C.* § 3507 exception to the rule against hearsay, the State clarified that “[Mother] is not a turncoat witness [and] I’m not trying to

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<sup>7</sup> *Id.* at 14–15.

<sup>8</sup> *Id.* at 15; State’s Ex. 1.

<sup>9</sup> Trial at 10:24:02–10:25:05 a.m., Feb. 2, 2026 (audio).

<sup>10</sup> State’s Ex. 1.

<sup>11</sup> Trial Tr. at 15–16; Trial at 10:25:05–10:26:15 a.m., Feb. 2, 2026 (audio).

<sup>12</sup> *Id.* at 16.

get it in through 3507.”<sup>13</sup> The Commissioner then overruled Father’s objection,<sup>14</sup> and the State played the final three minutes of the recorded call.<sup>15</sup>

Mother’s direct examination concluded with a discussion of her injuries. The State presented a picture showing a bloody cut on her lip.<sup>16</sup> Mother explained that she was crying in pain and disbelief because she had “a busted lip” and “[h]e never put his hands on me before.”<sup>17</sup> For one to two weeks after the incident, she took over-the-counter pain medications.<sup>18</sup>

Defense Counsel’s cross-examination attacked Mother’s credibility. Although Mother testified on direct that Father held the child with his right arm and hit her with his left, she said the opposite on cross.<sup>19</sup> She admitted that the argument began when she expressed frustration that he was spending more time with another woman’s child than hers.<sup>20</sup> And she stated for the first time that Father hit her again “with a lot of force” around her right cheekbone after throwing her on the bed.<sup>21</sup>

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<sup>13</sup> *Id.* at 17; Trial at 10:27:44–10:27:47 a.m., Feb. 2, 2026 (audio). The official transcript prepared for this appeal reports that the word immediately before “witness” in this quote was inaudible, but the Court reviewed the audio recording and heard the word “turncoat”.

<sup>14</sup> At the end of Mother’s testimony, defense counsel renewed his objection and added that he was relying on *Wing v. State*, 326 A.3d 669, 679 (Del. 2024).

<sup>15</sup> State’s Ex. 1.

<sup>16</sup> See State’s Ex. 3.

<sup>17</sup> Trial Tr. at 18.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 14, 24.

<sup>20</sup> *Id.* at 27–28.

<sup>21</sup> *Id.* at 24–25.

*Testimony of Patrolwoman Katherine Kirlin*

Patrolwoman Kirlin, a Wilmington Police Officer, responded to Mother's home sometime before 10:54 a.m., less than twenty minutes after Mother's 911 call.<sup>22</sup> By the time she arrived, Father was gone. While inside, Patrolwoman Kirlin noticed and photographed "a little cut on the inside of [Mother's] lip with maybe some redness or bleeding around it"—an injury she described as consistent with Mother's statements on the scene and at trial.<sup>23</sup> Patrolwoman Kirlin saw no other blood on Mother or in her home, and she testified at trial that she did not recall any other injuries.<sup>24</sup>

*Testimony of R----- B----*

Father's testimony was largely consistent with Mother's. He testified that he felt Mother was excluding him from caring for his son. He accepted Mother's invitation because it was a rare opportunity for bonding.

They began arguing when, after several minutes, Mother complained that he was giving more attention to his daughters from another relationship than to her son. At first, her demeanor "wasn't really hostile" but rather "sassy."<sup>25</sup> But the argument escalated: Mother began insulting his other daughters and became increasingly infuriated as Father ignored her jibes. Mother screamed at him to "get the f--- out of my house," but he refused.<sup>26</sup> She attempted to take their son from his arms, but he turned away. She then started "throwing a bunch of wild swings" at his back, but "[h]er frails" didn't hurt

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<sup>22</sup> *Id.* at 41–42, 48; State's Ex. 2.

<sup>23</sup> Trial Tr. at 43, 45.

<sup>24</sup> *Id.* at 49.

<sup>25</sup> *Id.* at 57–58.

<sup>26</sup> *Id.* at 58.

him.<sup>27</sup> When one of those swings “accidentally hit [their] son’s foot,” however, he believed it was time to protect the baby.<sup>28</sup> He reached backward with his arm—the arm not holding their son—and “tapped her” on the lip.<sup>29</sup> Mother then fell back “dramatically” and said she would call the police.<sup>30</sup> Although at first he did not believe her, he soon heard the dispatcher on the line, at which point he gently placed their son on the bed and “calmly walked out” to avoid a dangerous encounter with police.<sup>31</sup>

Father conceded that he became frustrated when Mother insulted his other children.<sup>32</sup> He explained that he was confused by Mother’s explosive anger because he had never seen her act in that way before.<sup>33</sup> But he also claimed that, “when she first brought [her complaints] up, . . . [he] could tell it was going to get bad.”<sup>34</sup> He clarified on cross-examination that “bad” meant when he would lose an argument and then give up.<sup>35</sup> And he explained that he never called the police about Mother accidentally striking their son because “[e]verything happened so fast,” she called before he could, and he was afraid of being sent to jail.<sup>36</sup>

### *Judgment and Appeal*

In closing, the State highlighted the consistency of Mother’s account from the moment of the 911 call to trial, the corroboration offered by Patrolwoman Kirlin, and

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<sup>27</sup> *Id.* at 59, 63.

<sup>28</sup> *Id.* at 59–60, 63.

<sup>29</sup> *Id.* at 59–60.

<sup>30</sup> *Id.* at 60.

<sup>31</sup> *Id.* at 60–61.

<sup>32</sup> *Id.* at 64.

<sup>33</sup> *Id.* at 58–59, 65.

<sup>34</sup> *Id.* at 57–58.

<sup>35</sup> *Id.* at 65.

<sup>36</sup> *Id.* at 67–68.

Father's admissions about his actions while holding the baby that day. The defense, in turn, argued that Mother had provoked the argument and that the photographic evidence did not support Mother's description of multiple punches at "full force."<sup>37</sup> Instead, a minor injury to her lip was more consistent with Father's testimony that he attempted to push Mother away and inadvertently hit her on the lip in the process. In sum, the evidence showed that "[Father] acted instinctively . . . to protect his newborn," not endanger him.<sup>38</sup>

The Commissioner found Father guilty of both charges, explaining that "[t]he case really does come down to credibility" and, for several reasons, "the victim in this case is more credible."<sup>39</sup> First, Father's claim that he struck Mother to defend their baby was undermined by his failure to leave before hitting her, call the police himself, or stay afterward to ensure the child was okay. Second, Father's testimony that the parties had never fought was inconsistent with his claim that he knew the situation with Mother would escalate. Third, when he testified that he stayed and continued encouraging Mother to get her hair done even as she became angry, it was simply not convincing: "it sound[ed] more like he was refusing to give the child back."<sup>40</sup> Fourth, the Commissioner heard nothing on the recorded 911 call corroborating Father's claim that he overheard it. Finally, even if Mother made contact with the baby's foot, Father's response appeared to be disproportionate and unjustified.

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<sup>37</sup> *Id.* at 80.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 84.

<sup>40</sup> *Id.* at 85.

Now before the Court is Father's timely appeal of that conviction, in which he raises three points. First, Father argues that the Commissioner erred in admitting the recording of Mother's 911 call. Acknowledging that, in criminal cases, 11 *Del. C.* § 3507 broadly permits the presentation of prior voluntary statements by witnesses present in court for cross-examination, he nevertheless contends that the State failed to justify that statute's application here—and that no other exception to the general rule applies. Second, he objects that the Commissioner improperly suggested he had a duty to retreat before he could justify violence in defense of his child. Lastly, although it is not entirely clear from Father's brief, he raises what the Court construes as a claim that the Commissioner improperly found him guilty beyond a reasonable doubt based on a flawed assessment of the parties' relative credibility.

In its response, the State rejects all three of Father's arguments, asserting that (1) Defense Counsel's stipulation to the certified 911 call relieved the State of its normal obligation to establish a foundation; (2) the Commissioner was entitled to rely on Father's failure to retreat in assessing the credibility of the defense he presented; and (3) the Commissioner's credibility findings—and all other findings of fact—are entitled to deference on a ROCO appeal to Family Court.

### **STANDARD OF REVIEW**

The parties propose radically divergent standards of review for this case. They agree, of course, that this Court has appellate jurisdiction to review the Commissioner's final order under 10 *Del. C.* § 915(d)(1), which states:

Any party, except a party in default of appearance before a Commissioner, may appeal a final order of a Commissioner to a judge of the Court by filing and

serving written objections to such order, as provided by rules of the Court, within 30 days from the date of a Commissioner's order. A judge of the Court shall make a de novo determination of those portions of the Commissioner's order to which objection is made. A judge of the Court may accept, reject[,] or modify in whole or in part the order of the Commissioner. The judge may also receive further evidence or recommit the matter to the Commissioner with instruction.

Father contends that, because the ROCO statute expressly directs this Court to “make a de novo determination,” the Court owes minimal deference to the Commissioner’s findings of fact and none to her conclusions of law. And because the Commissioner based her credibility findings primarily on logical contradictions rather than observations of the witnesses’ courtroom demeanor, he somewhat tautologically suggests that this particular case is “amenable not only to de novo review but to non-deferential de novo review.”<sup>41</sup> The State, in contrast, argues that the Commissioner’s findings of fact must be upheld unless she has abused her discretion, or, alternatively, unless they are “clearly erroneous.”<sup>42</sup>

Notwithstanding some conflict in the case law on the standard of review and the level of deference owed to the Commissioner, the meaning of the statute is clear and controlling: because this case involves a Commissioner’s final order, the Court’s review must be de novo.<sup>43</sup> That means the Court must “review[] the evidence and law without

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<sup>41</sup> Def’s Request for ROCO at 22. An appeal de novo, by definition, is “[a]n appeal in which the appellate court uses the trial court’s record but reviews the evidence and law *without deference to the trial court’s rulings*.” *Appeal De Novo*, *Black’s Law Dictionary* (11th ed. 2019) (emphasis added).

<sup>42</sup> State’s Response to Request for ROCO at 8 (quoting *Kraft v. Mason*, No. 410, 2010, 2010 WL 5341918, at \*2 (Del. Dec. 20, 2010)).

<sup>43</sup> *State v. M.S.*, No. 0605008568, 2006 WL 4546614, at \*1 (Del. Fam. Ct. Sept. 8, 2006); *DFS v. J.C.*, No. 11–28019, 2012 WL 4861601, at \*2 (Del. Fam. Ct. May 23, 2012); see also *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001) (“Courts are not super-legislatures and it is not a proper judicial function to decide what is or is not wise legislative policy.”).

deference to the trial court's ruling"<sup>44</sup> and "decide[] anew" whether that ruling was correct.<sup>45</sup> The Court may to some extent "accord[] weight to the credibility findings of the Commissioner,"<sup>46</sup> who had "the opportunity to hear and assess witness testimony" in person at trial.<sup>47</sup> But "the Commissioner must explicitly identify the reasons why one witness is more credible than another," and the Court must "conduct a meaningful appellate review" of whether the Commissioner arrived at the correct conclusion.<sup>48</sup>

## ANALYSIS

The Court will address Father's arguments in the order he presented them.

### A. Admissibility of the 911 Call

Father contends that the State failed to establish an adequate foundation to justify admission of the recorded 911 call under 11 *Del. C.* § 3507. Enacted in 1970, Section 3507 created a general rule of admissibility for out-of-court statements. It provides that, "[i]n a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value."<sup>49</sup> It does not matter whether

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<sup>44</sup> *M.C. v. S.C.*, No. CN24-01763, CN24-01782, 2024 WL 4345511, at \*1 (Del. Fam. Ct. June 13, 2024) (Hirst, J.) (quoting *M.S.*, 2006 WL 4546614 at \*1).

<sup>45</sup> *Cf.* Del. Fam. Ct. Civ. R. 53.1(e).

<sup>46</sup> *Adams-Hall v. Adams*, No. 50, 2010, 2010 WL 3733922, at \*2 (Del. Sept. 8, 2010).

<sup>47</sup> *DFS v. J.C.*, No. 11-28019, 2012 WL 4861601, at \*3 (Del. Fam. Ct. May 23, 2012).

<sup>48</sup> *Id.* The Court may, of course, accept and affirm the correctness of a Commissioner's conclusions for reasons different than those articulated by the Commissioner. See *State v. Davis*, No. 1811002611, 2026 WL 226576, at \*2 n.21 (Del. Super. Ct. Jan. 28, 2026); see also 10 *Del. C.* § 915(d)(1) (permitting the Court to "receive further evidence" on appeal).

<sup>49</sup> 11 *Del. C.* § 3507(a). Delinquency matters, however, are civil, and Section 3507 does not apply. *Baker v. State*, 213 A.3d 1187, 1191 (Del. 2019) (citing *G.D. v. State*, 389 A.2d 764, 765 (Del. 1978)).

the prior statement is consistent or inconsistent with the witness's in-court testimony, or whether the party introducing the statement is surprised by that testimony.<sup>50</sup>

Before hearsay may be admitted under Section 3507, the prosecutor is required to establish certain “foundational elements to admissibility” to preserve trial fairness and defendants’ constitutional confrontation rights.<sup>51</sup> First, the prosecutor must show that a statement was voluntary, proving the issue “either during the direct examination of the witness or, if the witness denies that the statement was voluntary, on *voir dire*.”<sup>52</sup> That is, before the statement is presented to the factfinder, the prosecutor must ask the witness whether it was made voluntarily, and the judicial officer must explicitly find by a preponderance of the evidence that it was.<sup>53</sup> Second, the prosecutor must conduct a direct examination of the witness that “must encompass—or at least ‘touch on’—both the events perceived [or heard] and the out-of-court statement itself.”<sup>54</sup> Third, the witness must say whether or not the prior statement is true.<sup>55</sup> Indisputably, the State did not complete this technical recitation for admission under Section 3507.

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<sup>50</sup> 11 *Del. C.* § 3507(b).

<sup>51</sup> *Berry v. State*, 349 A.3d 1130, 1138 (Del. 2025).

<sup>52</sup> *Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010) (citing *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975)).

<sup>53</sup> *Barnes*, 858 A.2d at 944; *Smith v. State*, 669 A.2d 1, 7 (Del. 1995). It does not matter whether the judge or a jury sits as the finder of fact, *Turner v. State*, 5 A.3d 612, 617 (Del. 2010), and the standard to be applied is the same as for the voluntariness of confession under the Due Process Clause, *State v. Rooks*, 401 A.2d 943, 947–49 (Del. 1979).

<sup>54</sup> *Wing v. State*, 326 A.3d 669, 680 (Del. 2024) (alteration in original) (quoting *McCrary v. State*, 290 A.3d 442, 456, 459–60 (Del. 2023)); *Keys v. State*, 337 A.2d 18, 23 (Del. 1975) (per curiam). The requisite foundation is established whether or not the witness remembers anything about the statement or the underlying events, *McCrary*, 290 A.3d at 457, 460, but the prosecutor must nevertheless make “a good faith effort” during direct examination to “elicit the evidence contained in the witness’s [S]ection 3507 statement,” *Gomez v. State*, 25 A.3d 786, 797 (Del. 2011).

<sup>55</sup> *Wing*, 326 A.3d at 680. The statement is admissible whether the witness stands by the prior statement or disavows it, but the question must be asked, and the witness must take a position. *Blake v. State*, 3 A.3d 1077, 1082 (Del. 2010), *abrogated in part on other grounds by McCrary*, 290 A.3d at 459–60.

But Father misapprehends the role of the statute. It is just one of many exceptions to the rule against hearsay.<sup>56</sup> A statement that cannot come in under Section 3507 may nevertheless be admissible through another exception or for a non-hearsay purpose.<sup>57</sup> The State was under no particular obligation to comply with the requirements of Section 3507 and seek admission under that statute.

More significantly, Father waived his argument by stipulating to the admissibility of the certified 911 call. In contrast to forfeiture—that is, failure to raise a claim in a timely manner—waiver is final.<sup>58</sup> Because the consequences are harsh, courts handling criminal cases “indulge in every reasonable presumption against waiver.”<sup>59</sup> But a stipulation to admissibility is precisely the kind of affirmative agreement that clearly demonstrates waiver.<sup>60</sup> Once the stipulation is made, “the other party wishing to rely upon such evidence is relieved of its obligation to establish a foundation.”<sup>61</sup>

Before Father’s trial began, the State indicated on the record that the attorneys had stipulated to the admissibility of what became the State’s three exhibits. Father said nothing to the contrary, and the three exhibits were admitted in evidence. Father has

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<sup>56</sup> *McMullen v. State*, 253 A.3d 107, 114–15 (Del. 2021) *see also* D.R.E. 801(d)(1).

<sup>57</sup> A prior statement is hearsay only if it is offered “to prove the truth of the matter asserted in the statement.” D.R.E. 801(c)(2). It may therefore be admitted for a limited, non-substantive purpose like impeachment without reference to the requirements of Section 3507 (or any other exception to the hearsay rule). *See Robinson v. State*, 3 A.3d 257, 262 (Del. 2010) (citing D.R.E. 613(b)). And even when a statement is used for a hearsay purpose, it may nevertheless be excluded from the definition, *see, e.g.*, D.R.E. 801(d)(2) (statements by opposing parties), or excepted from the rule, *see, e.g.*, D.R.E. 803(1) (present sense impressions), 803(2) (excited utterances).

<sup>58</sup> *Purnell v. State*, 254 A.3d 1053, 1101 (Del. 2021). A forfeited claim, by contrast, can nonetheless justify reversal of a plainly erroneous trial court decision. *Id.*

<sup>59</sup> *Flamer v. State*, 490 A.2d 104, 113 (Del. 1983) (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

<sup>60</sup> *See Stevenson v. State*, 149 A.3d 505, 516 (Del. 2016) (“[T]here is an express and effective waiver as to any appellate presentation on an issue where defense counsel responds to queries by a trial judge, by stating that there are no objections to the admission of evidence.”).

<sup>61</sup> *Harris v. State*, No. 1402016580, 2018 WL 6309088, at \*2 (Del. Super. Ct. Dec. 3, 2018) (citing *Hunt v. State*, No. 66, 2013, 2013 WL 5745696, at \*2 (Del. Oct. 21, 2013)).

never argued—not at trial, and not now on this ROCO—that the State misrepresented their agreement or that it was for any reason invalid. By confirming that he had nothing (such as an objection) to add to the State’s summary of the stipulation, Father “express[ly] and effective[ly] waive[d]” any objection to the admission of the 911 call recording.<sup>62</sup> Therefore, his first claim fails.

## **B. Duty to Retreat or Surrender the Child**

Father argued at trial that striking Mother was a justifiable way to protect his son from danger. In finding him guilty, the Commissioner explained that his credibility was undermined by his failure to leave before retaliating and that “it sound[ed] more like he was refusing to give the child back.”<sup>63</sup> Under 11 *Del. C.* § 464(b), however, there is no general duty to retreat or surrender possession of a thing in dispute before using appropriate, non-deadly force in self-defense. Defense of another involves no greater duty to retreat. To the contrary, 11 *Del. C.* § 465 identifies situations where a person might need to retreat before acting in self-defense but need not do so before defending another.<sup>64</sup> Father correctly points out that, by rejecting his justification theory based in part on his failure to leave or hand over his son, the Commissioner implicitly—and incorrectly—held that Father had a duty to retreat before defending his child.

This Court, however, reviews criminal convictions *de novo*.<sup>65</sup> For the reasons given below, the Court concludes that the Commissioner correctly found Father guilty

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<sup>62</sup> *Stevenson*, 149 A.3d at 516.

<sup>63</sup> Trial Tr. at 85.

<sup>64</sup> See 11 *Del. C.* §§ 465(b), (c).

<sup>65</sup> 10 *Del. C.* § 915(d)(1); see *State v. T.D.*, No. 2312001822, 2025 WL 901273, at \*4–5 (Del. Fam. Ct. Feb. 3, 2025) (Newell, C.J.).

beyond a reasonable doubt of the two charges. Consequently, the Commissioner's error was harmless.<sup>66</sup>

### **C. Credibility and the Finding of Guilt**

The larger question is whether the evidence supports the Commissioner's assessment of Father's credibility and finding of guilt beyond a reasonable doubt. Father was convicted of two crimes: Assault in the Third Degree and Endangering the Welfare of a Child. Under 11 *Del. C.* § 1102(a)(4), a defendant is guilty of Endangering the Welfare of a Child if that defendant commits Assault Third Degree (or another specified crime), knowing that a child related to the defendant or the victim is bearing witness by sight or sound. There is no question that Father's infant son saw Father strike Mother, because Father was holding his son in his arms at the time. The only issue is whether Father was guilty of the predicate assault charge.

To prove Assault in the Third Degree, the State must establish that the defendant "intentionally or recklessly cause[d] physical injury to another person."<sup>67</sup> Physical injury is defined as "impairment of physical condition or substantial pain."<sup>68</sup> Father admitted at trial that he "tap[ped]" Mother on the lip, and he has never argued that he did so accidentally.<sup>69</sup> He points out that Mother testified inconsistently about the hand he used to strike her, but that inconsistency matters little in light of his admissions. Moreover, the State presented photographic evidence showing a bloody cut on Mother's lip.<sup>70</sup>

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<sup>66</sup> Del. Fam. Ct. Crim. R. 52(a).

<sup>67</sup> 11 *Del. C.* § 611(1).

<sup>68</sup> 11 *Del. C.* § 222(27).

<sup>69</sup> Trial Tr. at 59–60.

<sup>70</sup> See State's Ex. 3.

Patrolwoman Kirlin corroborated that evidence,<sup>71</sup> and Mother said she cried afterward and was in pain for days.<sup>72</sup> Father did not meaningfully contest the elements of assault, leaving only one remaining question: whether the Commissioner should have credited his justification defense.

Father argues that, when he struck Mother on the lip, he used only the force necessary to protect his son from harm. The defense-of-another justification is codified in 11 *Del. C.* § 465, which provides in relevant part:

- (a) The use of force upon or toward the person of another is justifiable to protect a third person when:
  - (1) The defendant would have been justified under [the self-defense statute] in using such force to protect the defendant against the injury the defendant reasonably believes to be threatened to the person whom the defendant seeks to protect; and
  - (2) Under the circumstances as the defendant reasonably believes them to be, the person whom the defendant seeks to protect would have been justified in using such protective force; and
  - (3) The defendant reasonably believes that intervention is necessary for the protection of the other person.

Self-defense, in turn, justifies the use of force when a person “reasonably believes” that it is “immediately necessary” for protection against an imminent unlawful attack.<sup>73</sup>

Whether a defendant’s belief was reasonable is determined objectively, “from the viewpoint of a reasonable person in the defendant’s situation under the circumstances.”<sup>74</sup> Importantly, justification is not an “affirmative defense”—meaning that

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<sup>71</sup> Trial Tr. at 43, 45.

<sup>72</sup> *Id.* at 18. See *Kulowiec v. State*, 74 A.3d 600, 602–05 (Del. 2013) (collecting cases)

<sup>73</sup> 11 *Del. C.* § 464(a). Self-defense alone does not help Father because, while he testified that he struck Mother after she began attacking him first verbally and then physically, he also conceded that he saw no need to protect himself against her “frails.” Trial Tr. at 63.

<sup>74</sup> 11 *Del. C.* § 471(e)(1). The justification statutes were amended in 2021 to require “reasonable belief” rather than mere “belief.” See 83 *Del. Laws*, c.73 (2021). But there is no need to decide how, if at all, that revision affected the imperfect justification principle codified in Section 470(a), for neither party addresses

a criminal defendant need only produce some “credible evidence” creating reasonable doubt of guilt.<sup>75</sup>

Even crediting Father’s characterization of Mother’s actions, his response was recklessly disproportionate and unnecessary. Mother and Father had a heated argument. After Mother asked Father to leave her home, he refused, and she started weakly hitting his back. He was standing between her and the baby, but one of her hands accidentally touched the child’s foot, and Father responded by smacking Mother in the face, splitting her lip, and knocking her backward onto the bed. Retaliating may have been consistent with parental “instinct,”<sup>76</sup> and Father may have believed, as he now contends, that it was immediately necessary to prevent her from accidentally hitting his son on the head and “caus[ing] extremely severe injury.”<sup>77</sup> But there was simply no immediate danger justifying Father’s sudden escalation. Given the evidence and circumstances surrounding the incident, his contrary belief defies logic, and the Court finds that acting on it was reckless and unreasonable.<sup>78</sup>

Father’s other arguments about the Commissioner’s credibility determination are without merit or show at most harmless error. It ultimately does not matter whether Father was present during the 911 call, whether he and Mother had fought before, whether he hit her again after knocking her on the bed, or whether his departure after

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the issue and the Court finds, in any event, that Father was reckless in believing that the force he used was necessary to protect his child.

<sup>75</sup> *Hamilton v. State*, 343 A.2d 594, 596 (Del. 1975) (citing 11 *Del. C.* § 461).

<sup>76</sup> See Trial Tr. at 63.

<sup>77</sup> Def’s Request for ROCO at 16.

<sup>78</sup> A person recklessly forms a belief in the necessity of protective force “if he recognizes the possibility that it may be unfounded but proceeds to operate on it without further checking.” Commentary on § 469 (now § 470), *Delaware Criminal Code with Commentary* 133 (1973).

the incident and failure to make his own 911 call undermine his claim that he honestly believed his actions were justifiable in defense of his son. Nor does it matter that Father did not in fact have a duty to retreat. Even if he believed that hitting Mother in the face was an appropriate and necessary response to her ineffectually hitting his back and then accidentally striking his son's foot, that belief was reckless. If Father felt that he needed to fight for the right to spend time with his infant son, as he contends in his appeal,<sup>79</sup> then filing a petition for custody or visitation would have been the appropriate avenue for relief. His violent actions were unjustifiable in light of the circumstances, and the Commissioner properly found him guilty of both Assault III and Endangering the Welfare of a Child beyond a reasonable doubt.

### CONCLUSION

For the reasons given above, after an independent review of the record, the Court **ACCEPTS** and **AFFIRMS** the Commissioner's Order dated October 30, 2025.

**IT IS SO ORDERED.**

4/14/2026  
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**Date Written Order Issued**

**/ Eliza M. Hirst /**  
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**ELIZA M. HIRST, JUDGE**

EMH

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<sup>79</sup> Def's Request for ROCO at 20, 26.