SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 4, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED FEBRUARY 4, 2022

_____	849	CA 21 00329	JOSEPH SINDONI V BOARD OF EDUCATION OF SKANEATELES
_____	940	KA 19 02144	PEOPLE V VIRGIL JOHNSON
_____	941	KA 17 01864	PEOPLE V LAQUAN TAYLOR
_____	947	CA 20 01520	DANIEL J. BECK V CITY OF NIAGARA FALLS
_____	949	CA 20 01388	ANTOINETTE C. V COUNTY OF ERIE
_____	981	KA 18 01952	PEOPLE V GREGORY M. NOONAN
_____	983	KA 18 00565	PEOPLE V HERBERT D. JOHNSON
_____	986	CA 21 00315	TDA, LLC V GEORGE LACEY
_____	991	CA 20 01486	PRESTON V. CLIFTON V THOMAS P. COLLINS
_____	1022	CA 20 01495	TOWN OF AMHERST In the Matter of Arbitration Betw CSEA LOCAL 1000 AFSCME
_____	1036	KA 17 01081	PEOPLE V JOSE M. RIVERA
_____	1081	KA 20 00245	PEOPLE V JONATHON WHITE
_____	1099	KA 17 01724	PEOPLE V JAMES GRAHAM
_____	1102	KA 19 00295	PEOPLE V MARSHALL D. JACKSON
_____	1103	KA 18 01623	PEOPLE V DANIEL A. HALL
_____	1106	KA 18 01554	PEOPLE V TERRELL R. CRITTLETON
_____	1108	CA 21 00229	TODD PUCCIO V GREATER NIAGARA FRONTIER COUNCIL OF
_____	1118	TP 20 01235	JOSEPHINE HALL V HOWARD A. ZUCKER
_____	1125	KA 20 00955	PEOPLE V TOREY D. SMITH
_____	1126	KA 17 01410	PEOPLE V MAJIER ABERGUT
_____	1127	KA 21 00328	PEOPLE V MAJIER ABERGUT
_____	1132	CAF 20 01613	TEELA PARATORE V MICHAEL PARATORE
_____	1136	CA 21 00546	GEORGE H. HUNDLEY In the Matter of LOUIS J. COLELLA

_____	1137	CA 20 00284	TIMOTHY BROWN V JASON E. ASKEW
_____	1138	CA 20 00285	JASON E. ASKEW V WELL TIMED TRANSPORT, INC.
_____	1139	CA 20 01354	MARI TUCKER V KALOS HEALTH,INC.
_____	1141	CA 20 01216	TECHNOLOGY INSURANCE COMPANY, INC. V MAIN STREET AMERICA INSURANCE COMPA
_____	1145	KA 19 00698	PEOPLE V ELUID MANSO
_____	1151	KA 19 01736	PEOPLE V TYRIK STYLES
_____	29	KA 16 02194	PEOPLE V TONY L. YOUNGBLOOD, JR.
_____	30	KA 19 01656	PEOPLE V CHRISTOPHER E. MCCREA
_____	31	KAH 20 01014	BENJAMIN WELIKSON, ESQ. V SUPERINTENDENT GROVELAND
_____	32	KA 18 01099	PEOPLE V STEPHEN FRANCOIS, JR.
_____	33	KA 17 00966	PEOPLE V TONY JENNINGS
_____	36	CAF 20 00712	Mtr of ARIANA F. F.
_____	37	CAF 20 00713	Mtr of ARIANA F.
_____	37.1	CAF 20 00817	Mtr of ARIANA F.
_____	38	CAF 20 00715	Mtr of ARIANA F.
_____	44	CA 21 00402	BERNICE CURRY-MALCOLM V NEW YORK STATE TEACHERS' R
_____	45	CA 21 00771	BERNICE CURRY-MALCOLM V NEW YORK STATE TEACHERS' R
_____	53	KA 20 00294	PEOPLE V DEZIRAE J. MARTIN
_____	64	CA 20 00763	LANCASTER MANOR LLC V COMPREHENSIVE AT LANCASTER,
_____	65	CA 20 01221	STATE OF NEW YORK V JACK D.
_____	86	KA 19 01964	PEOPLE V CHARLES R. JACKSON, JR.
_____	87	KA 16 00386	PEOPLE V JERROD L. HUNTER
_____	93	KA 21 00341	PEOPLE V JAMES HUMPHREY
_____	111	KA 19 00544	PEOPLE V ROBERT A. ADORNO DAVILLA
_____	117	KA 18 01569	PEOPLE V RICHARD L. GILMORE
_____	118	CAF 20 00943	Mtr of LARAE L.
_____	119	CAF 20 01598	JEFFERSON COUNTY DEPARTMENT OF SOCI V AYDEN D.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

849

CA 21-00329

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND DEJOSEPH, JJ.

JOSEPH SINDONI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF SKANEATELES CENTRAL SCHOOL DISTRICT AND SKANEATELES CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 16, 2021. The judgment, among other things, granted plaintiff's motion insofar as it sought a preliminary injunction.

It is hereby ORDERED that the judgment so appealed from is modified on the law by denying the motion in part and vacating the first decretal paragraph, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendants, Board of Education of Skaneateles Central School District (Board) and Skaneateles Central School District (District), seeking, inter alia, declaratory and injunctive relief arising from alleged violations of the Open Meetings Law (Public Officers Law art 7) and of plaintiff's civil rights pursuant to 42 USC § 1983. Plaintiff, who had previously been appointed by the Board as the District's varsity high school football coach, was notified shortly after a closed session meeting of the Board on January 5, 2021, that his appointment to that position would not be renewed. Plaintiff moved by order to show cause seeking, in effect, summary judgment on the first cause of action declaring that the executive session conducted by the Board was illegal and that the action taken during that session was void and also seeking, inter alia, a preliminary injunction with respect to the second and third causes of action enjoining defendants from terminating plaintiff until a constitutionally sufficient notice of charges was provided along with an opportunity to be heard. Supreme Court granted the motion in part by, inter alia, granting partial summary judgment declaring that the executive session violated the Public Officers Law and that the action taken during that session was void (first decretal paragraph),

and by granting the preliminary injunction (second decretal paragraph). Defendants appeal.

While the appeal was pending, plaintiff resigned from his coaching position and moved in this Court to dismiss defendants' appeal as moot in light of his resignation. We granted plaintiff's motion to dismiss the appeal insofar as it sought to dismiss the portion of the appeal relating to the second decretal paragraph, but otherwise denied that motion.

We agree with defendants that the court erred in granting the relief in the first decretal paragraph, which effectively granted plaintiff's request for summary judgment as to his first cause of action. Even assuming, arguendo, that such relief was available at this stage of the proceedings (*cf. Pitts v City of Buffalo*, 298 AD2d 1003, 1004 [4th Dept 2002]), we agree with defendants that plaintiff failed to establish that he is entitled to relief under Public Officers Law § 107.

It is well settled that "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with [section 105]" (Public Officers Law § 103 [a]; *see Matter of Zehner v Board of Educ. of Jordan-Elbridge Cent. School Dist.*, 91 AD3d 1349, 1349-1350 [4th Dept 2012]). While an executive session may be called to discuss, inter alia, "matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person" (§ 105 [1] [f]), the public body may do so only upon a majority vote of its membership and after "identifying the general area or areas of the subject or subjects to be considered" (§ 105 [1]). However, section 108 (3) clarifies that "[n]othing contained in [the Open Meetings Law] shall be construed as extending the provisions hereof to . . . any matter made confidential by federal or state law." Because "communications made pursuant to an attorney-client relationship are considered confidential under the [CPLR] . . . , communications between a . . . board . . . and its counsel, in which counsel advises the board of the legal issues involved in [a] determination . . . , are exempt from the provisions of the Open Meetings Law" (*Matter of Brown v Feehan*, 125 AD3d 1499, 1501 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Young v Board of Appeals of Inc. Vil. of Garden City*, 194 AD2d 796, 798 [2d Dept 1993]; *see generally* CPLR 4503 [a] [1]). "When an exemption [under section 108] applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by § 105 (1) that relates to entry into an executive session" (*Brown*, 125 AD3d at 1501 [internal quotation marks omitted]).

There is no dispute that, during the closed session on January 5, 2021, the Board and the District superintendent met with the District's counsel seeking legal advice "regarding the [p]laintiff's legal employment status, employment rights, [and] the process for appointing school employees." We thus agree with defendants that the

attorney-client exemption applies and that the court erred in determining that there was a violation of the Open Meetings Law (*see id.*; *Young*, 194 AD2d at 798). Moreover, even assuming, arguendo, that there was a technical violation of the Open Meetings Law, we conclude that the court erred in determining that the violation required annulment of the Board's action during the closed session inasmuch as plaintiff failed meet his "burden to show good cause warranting judicial relief" (*Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15, 30 [4th Dept 1996], *appeal dismissed* 89 NY2d 860 [1996], *lv denied* 89 NY2d 811 [1997]; *see* Public Officers Law § 107 [1]; *Matter of New York Univ. v Whalen*, 46 NY2d 734, 735 [1978]). We therefore modify the judgment by denying the motion in part and vacating the first decretal paragraph.

All concur except DeJoseph, J., who is not participating.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

940

KA 19-02144

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VIRGIL JOHNSON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated June 11, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court, despite a misstatement of facts in its written decision, issued "an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (§ 168-n [3]; *see People v Smith*, 11 NY3d 797, 798 [2008]; *People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013]; *cf. People v Flax*, 71 AD3d 1451, 1452 [4th Dept 2010]). Moreover, even if we were to conclude that "the court failed to set forth its findings of fact and conclusions of law, remittal is unnecessary where, as here, the record is sufficient to enable us to make our own findings of fact and conclusions of law" (*Young*, 108 AD3d at 1233; *see People v Gilbert*, 78 AD3d 1584, 1584 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]).

We also reject defendant's further contention that the court abused or improvidently exercised its discretion in granting the People's request for an upward departure to risk level two. The People established by clear and convincing evidence the existence of an aggravating factor that, " 'as a matter of law, . . . tend[s] to establish a higher likelihood of reoffense or danger to the community' " (*People v Moore*, 130 AD3d 1498, 1498 [4th Dept 2015]) and is "of a kind, or to a degree, not otherwise adequately taken into

account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007] [internal quotation marks omitted]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Specifically, defendant was assessed five points for sexual contact over clothing. While we agree with defendant that there was no evidence of actual penetration of the victim, the case summary and evidence at the hearing established that defendant intended to and came close to penetrating the victim. During the course of his sexual assault of the 14-year-old female victim, he placed a condom on his penis and twice tried to penetrate her even though she was still wearing her shorts and underwear. We thus conclude that the five points assessed in the category of sexual contact did not adequately take into account the severity of the assault, the risk of reoffense or defendant's danger to the community (*see People v Headwell*, 156 AD3d 1263, 1264 [3d Dept 2017], *lv denied* 31 NY3d 902 [2018]; *People v DeDona*, 102 AD3d 58, 68 [2d Dept 2012]).

"[A]n objective risk assessment instrument, 'no matter how well designed, will not fully capture the nuances of every case' " (*DeDona*, 102 AD3d at 68, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [Guidelines]), and the Board of Examiners of Sex Offenders has specifically acknowledged the possibility of an upward departure where the court concludes that the lack of points, or in this case the actual point assessment, "results in an under-assessment of the offender's actual risk to public safety" (Guidelines at 9).

Based on our determination that the upward departure was warranted on that ground, we do not address defendant's contentions regarding other factors that were cited by the court as a basis for an upward departure.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

941

KA 17-01864

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAQUAN TAYLOR, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered February 17, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, robbery in the first degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [4]), arising from two separate incidents. We affirm.

Contrary to defendant's contention, County Court did not err in granting the People's motion to amend the indictment to conform to the proof. Such a motion may be granted "provided the amendment does not change the theory of the prosecution or otherwise serve[] to prejudice the defendant on the merits" (*People v Spann*, 56 NY2d 469, 473 [1982]; *see* CPL 200.70 [1]). Here, the indictment charged defendant with respect to the second incident with having "fired two shots from a handgun at close range, striking the victim twice and causing his death." As amended and charged to the jury, the indictment alleged with respect to the second incident that defendant "fired three shots from a handgun, at close range, striking the victim, and causing his death." We conclude that the amendment neither changed the theory of the prosecution, nor caused any prejudice to defendant (*see Spann*, 56 NY2d at 473-474; *People v Davis*, 167 AD2d 862, 863 [4th Dept 1990], *lv denied* 77 NY2d 876 [1991]; *People v Johnson*, 115 AD2d 794, 795 [3d Dept 1985]).

Defendant further contends that his *Antommarchi* rights were

violated because he was not present at the sidebar conference wherein the People initially moved to amend the indictment. We reject that contention. Here, the court "essentially replicated de novo in defendant['s] . . . presence the sidebar conference," and "the record supports the conclusion . . . that defendant . . . was given a full and fair opportunity to give meaningful input regarding the [motion]" (*People v Starks*, 88 NY2d 18, 29 [1996]; *cf. People v Marzug*, 270 AD2d 945, 946 [4th Dept 2000]).

Defendant's contention regarding the legal sufficiency of the evidence is preserved only in part (*see People v Gray*, 86 NY2d 10, 19 [1995]) and, in any event, is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant contends that the testimony of certain witnesses was incredible as a matter of law, we note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021] [internal quotation marks omitted]), and we see no reason to disturb the jury's resolution of those issues.

Because defendant failed to seek a ruling on that part of his omnibus motion seeking to sever the counts of the indictment relating to the separate incidents, we conclude that defendant has abandoned his contention regarding that part of the omnibus motion (*see People v Mulligan*, 118 AD3d 1372, 1376 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]; *People v Nix*, 78 AD3d 1698, 1699 [4th Dept 2010], *lv denied* 16 NY3d 799 [2011], *cert denied* 565 US 843 [2011]).

Defendant also contends that the court deprived him of his constitutional right to a fair and impartial jury by seating a juror who did not unequivocally assure the court of his impartiality. " 'By failing to raise that challenge in the trial court, however, defendant failed to preserve it for our review' " (*People v Irvin*, 111 AD3d 1294, 1295 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014], *reconsideration denied* 26 NY3d 930 [2015]). Defendant also failed to preserve for our review his related contention that the court improperly failed to discharge the sworn juror as "grossly unqualified" (CPL 270.35 [1]; *see People v Black*, 137 AD3d 1679, 1679 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]; *People v Blackshear*, 125 AD3d 1384, 1386 [4th Dept 2015], *lv denied* 25 NY3d 987 [2015]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). To the extent that defendant contends that reversal is required based on the juror's contact with the court after the verdict and before sentencing, we conclude that defendant's contention is not properly before us inasmuch as he did not move to set aside the verdict on that ground (*see* CPL 330.30; *see generally People v Brown*, 265 AD2d 893, 894 [4th Dept 1999], *lv denied* 94 NY2d 820 [1999]; *People v Santos-Sosa*, 233

AD2d 833, 833 [4th Dept 1996], *lv denied* 89 NY2d 988 [1997]). In any event, the juror did not assert any cognizable type of jury misconduct, and his "complaints regarding the tenor and dynamics of the deliberative process, essentially amounting to belated misgivings or second thoughts, are insufficient to overturn the verdict" (*People v Redd*, 164 AD2d 34, 38 [1st Dept 1990]; *see People v Brunson*, 66 AD3d 594, 596 [1st Dept 2009], *lv denied* 13 NY3d 937 [2010]; *People v Karen*, 17 AD3d 865, 867 [3d Dept 2005], *lv denied* 5 NY3d 764 [2005]).

Defendant's sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

947

CA 20-01520

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

DANIEL J. BECK AND DEBRA BECK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
AND NIAGARA FALLS WATER BOARD, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 10, 2020. The order denied the motion of defendant Niagara Falls Water Board for summary judgment dismissing the complaint and cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and all cross claims against defendant Niagara Falls Water Board are dismissed.

Memorandum: This premises liability action stems from injuries sustained by Daniel J. Beck (plaintiff) while he was working as an employee of a welding and fabrication company with a facility located at the intersection of 56th Street and Simmons Avenue in the City of Niagara Falls. At the time of the incident, plaintiff was assisting a coworker in using a forklift and a clamp to transport a steel beam on Simmons Avenue when the forklift struck one or more potholes and the beam fell, causing an injury to plaintiff's foot. Plaintiffs allege, inter alia, that the Niagara Falls Water Board (defendant) was negligent in its maintenance and repair of its sewer system, and that such negligence caused or contributed to the dangerous condition that led to plaintiff's accident. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint and all cross claims against it. We reverse.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[L]iability for a dangerous condition on property is predicated upon

occupancy, ownership, control or a special use of [the] premises" (*Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1444 [4th Dept 2012] [internal quotation marks omitted]). Where none of those elements is present, "a party cannot be held liable for injury caused by the defective or dangerous condition on the property" (*id.* [internal quotation marks omitted]). Defendant met its initial burden on its motion "by establishing that [it] neither owned nor made special use of [Simmons Avenue], and that [it] had no connection to the condition" that caused the accident (*Belvedere v AFC Constr. Corp.*, 21 AD3d 390, 391 [2d Dept 2005]). In opposition, plaintiffs failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

949

CA 20-01388

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF APPLICATION OF ANTOINETTE C.
AND ROBERT C., AS PARENTS AND NATURAL GUARDIANS
OF ROBERT C., JR., CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (THOMAS J. NAVARRO, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (JESSE A. DRUMM OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 6, 2020. The order, insofar as appealed from, granted that part of the application of claimants for leave to serve a late notice of claim against respondent County of Erie.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the application is denied in its entirety.

Memorandum: In mid-November 2018, claimants' son, who was then eight years old, was a passenger in a vehicle operated by a family member when the driver lost control on a road maintained by respondent County of Erie (County) and crashed into a tree. The son sustained physical and psychological injuries as a result of the accident. In early September 2020, claimants sought leave, pursuant to General Municipal Law § 50-e (5), to serve a late notice of claim alleging, inter alia, that the accident and the son's injuries were caused by the County's negligence in failing to properly maintain and treat the road, which resulted in a dangerous accumulation of snow and ice. The County appeals from that part of an order that granted claimants' application for leave to serve a late notice of claim on the County. We agree with the County that Supreme Court abused its discretion in granting that part of the application (*see generally Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013]). We therefore reverse the order insofar as appealed from and deny the application in its entirety.

"Pursuant to General Municipal Law § 50-e (1) (a), a party

seeking to sue a public corporation . . . must serve a notice of claim on the prospective [respondent] 'within ninety days after the claim arises' " (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "General Municipal Law § 50-e (5) permits a court, in its discretion, to [grant leave] extend[ing] the time for a [claimant] to serve a notice of claim" (*id.* at 460-461; *see Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020]). "The decision whether to grant such leave 'compels consideration of all relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5)" (*Dalton*, 107 AD3d at 1518, quoting *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [public corporation] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [public corporation] in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). " '[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative' . . . , and '[t]he court is vested with broad discretion to grant or deny the application' " (*Dalton*, 107 AD3d at 1518). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*id.* [internal quotation marks omitted]).

Initially, we agree with the County that, contrary to claimants' assertion, " '[i]t is well settled that an extension of the statutory period within which to serve a notice of claim will not automatically be granted merely because the claimant is an infant' " (*Matter of Mahan v Board of Educ. of Syracuse City School Dist.*, 269 AD2d 834, 834 [4th Dept 2000]; *see generally Harris v City of New York*, 297 AD2d 473, 475 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]; *Matter of Meredithe C. v Carmel Cent. School Dist.*, 192 AD2d 952, 953 [3d Dept 1993]). Rather, in determining whether to grant an extension, the court must consider the claimant's infancy as a factor (*see* General Municipal Law § 50-e [5]; *Williams*, 6 NY3d at 537-538; *Mahan*, 269 AD2d at 834). In that regard, although the absence of a causal nexus between a claimant's infancy and the delay in serving a notice of claim is not fatal to an application for an extension, "[a] delay of service caused by infancy would make a more compelling argument to justify an extension," whereas "the lack of a causative nexus may make the delay less excusable" (*Williams*, 6 NY3d at 538).

Here, claimants did not demonstrate any nexus between the son's infancy and the delay in service of a notice of claim (*see id.* at 537-538; *Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601, 1602 [4th Dept 2016]; *Rose v Rochester Hous. Auth.*, 52 AD3d 1268, 1269 [4th Dept 2008]). The record demonstrates that, despite the son's infancy, claimants were immediately aware of the accident and were aware of the son's injuries, both physical and psychological, within 90 days after

the accident and certainly well before they sought leave to serve a late notice of claim. There is no evidence in the record that the lengthy delay in serving a notice of claim was attributable to any difficulty in discovering or diagnosing the son's injuries due to his infancy (*see Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 979-980 [4th Dept 2020]; *Matter of Lamprecht v Eastport-South Manor Cent. Sch. Dist.*, 129 AD3d 1084, 1085 [2d Dept 2015]; *Matter of Scala v Westchester County Med. Ctr.*, 233 AD2d 514, 514 [2d Dept 1996]).

We further agree with the County that, as the court properly determined, claimants' other offered justifications for the delay do not constitute reasonable excuses. First, "where, as here, a parent alleges that he or she was consumed with the infant's medical care and unable to serve a timely notice of claim, it does not constitute a reasonable excuse unless it is supported by evidence demonstrating that the delay was directly attributable to the infant's medical condition" (*Matter of Ramos v Board of Educ. of the City of N.Y.*, 148 AD3d 909, 911 [2d Dept 2017]; *see Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 [1st Dept 2006]; *Matter of Drozdzal v Rensselaer City School Dist.*, 277 AD2d 645, 646 [3d Dept 2000]; *see generally Matter of Kliment v City of Syracuse*, 294 AD2d 944, 945 [4th Dept 2002]). In this case, claimants' submissions, including the son's medical records, failed to substantiate their assertion that the son required such extraordinary care that they were unable to serve a timely notice of claim (*see Ramos*, 148 AD3d at 912; *Nieves*, 34 AD3d at 337; *Drozdzal*, 277 AD2d at 646; *cf. Matter of Quick v New York City Health & Hosps. Corp.*, 106 AD3d 493, 494 [1st Dept 2013]). Second, it is well settled that ignorance of the notice of claim requirement does not provide a sufficient excuse for the failure to serve a timely notice of claim, and we thus conclude that claimants' further assertion that they were "unaware of the notice of claim requirement . . . did not establish a reasonable excuse for their delay" (*Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]; *see Matter of Borrelli v County of Erie*, 196 AD3d 1059, 1060 [4th Dept 2021]; *Ficek*, 144 AD3d at 1602).

We also agree with the County that claimants failed to demonstrate that the County acquired actual knowledge of the essential facts constituting the claim within the 90-day period following the accident or within a reasonable time thereafter. We note that "[i]t is well settled that actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim" (*Ficek*, 144 AD3d at 1603; *see Turlington*, 143 AD3d at 1248). Moreover, " '[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)' . . . , and the claimant has the burden of demonstrating that the respondent had actual timely knowledge" (*Turlington*, 143 AD3d at 1248).

Here, claimants repeatedly conceded before the court that the

County did not receive timely actual knowledge. By conceding that factor, claimants waived any contention that the County acquired timely actual knowledge (*see generally Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246 [4th Dept 2012]; *Matter of Allstate Ins. Co. v Ramirez*, 208 AD2d 828, 830 [2d Dept 1994]), and thus their assertion on appeal that a deputy sheriff's accident report provided the County with actual knowledge is not properly before us (*see generally Leonard v Motor Veh. Acc. Indem. Corp.*, 175 AD3d 1795, 1796 [4th Dept 2019]; *Matter of Polanco v New York City Hous. Auth.*, 39 AD3d 320, 321 [1st Dept 2007]; *Santiago v City of New York*, 294 AD2d 483, 484 [2d Dept 2002]).

In any event, we agree with the County that the accident report did not provide it with the requisite actual knowledge. Preliminarily, the fact that the County Sheriff's Office " 'had knowledge of this incident, without more,' " does not constitute actual knowledge of the claim against the County (*Brown*, 100 AD3d at 1441; *see generally Caselli v City of New York*, 105 AD2d 251, 255-256 [2d Dept 1984]; *Williams v Town of Irondequoit*, 59 AD2d 1049, 1050 [4th Dept 1977]). Moreover, even if the deputy sheriff's knowledge was imputed to the County itself, " 'for a [police] report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation' " (*Brown*, 100 AD3d at 1440; *see Caselli*, 105 AD2d at 257-258), and here the accident report "made no connection between the accident and any alleged negligence on the part of [the County]" (*Kliment*, 294 AD2d at 945; *see Brown*, 100 AD3d at 1440-1441; *Matter of Taylor v County of Suffolk*, 90 AD3d 769, 770 [2d Dept 2011]; *cf. Innes v County of Genesee*, 99 AD2d 642, 643 [4th Dept 1984], *affd* 62 NY2d 779 [1984]).

Contrary to the County's further contention, however, we conclude that claimants met their initial burden of making a showing, albeit not an extensive one, that late notice will not substantially prejudice the County (*see generally Newcomb*, 28 NY3d at 466). In particular, claimants "presented a *plausible argument* that the late notice will not substantially prejudice the [County] because the alleged [snowy and] icy condition was highly transitory such that the [County] would have been in the same position regarding any investigation even if the notice of claim had been timely served" (*Matter of Shumway v Town of Hempstead*, 187 AD3d 758, 759 [2d Dept 2020] [emphasis added]; *cf. Matter of Miskin v City of New York*, 175 AD3d 684, 685-686 [2d Dept 2019]; *Matter of Smiley v Metropolitan Transp. Auth.*, 168 AD3d 631, 631 [1st Dept 2019]; *Matter of Moroz v City of New York*, 165 AD3d 799, 800 [2d Dept 2018]). We further conclude that the County failed to "respond with a particularized evidentiary showing that [it would] be substantially prejudiced if the late notice [was] allowed" (*Newcomb*, 28 NY3d at 467). Indeed, "[t]he speculative assertions of [the County's] counsel, unsupported by any record evidence, failed to satisfy [the County's] burden to establish that late notice [would] substantially prejudice[] its ability to defend against [claimants'] claim" (*Sherb v Monticello Cent. Sch. Dist.*, 163 AD3d 1130, 1134 [3d Dept 2018]; *see Newcomb*, 28 NY3d at

465-468; *Matter of Kranick v Niskayuna Cent. Sch. Dist.*, 151 AD3d 1262, 1263-1264 [3d Dept 2017]).

Based on the foregoing, of all the relevant circumstances evaluated—infancy, reasonable excuse, actual knowledge, and substantial prejudice—only one, lack of substantial prejudice, favored granting claimants' application. Despite the well-settled principle that "actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim" (*Ficek*, 144 AD3d at 1603), the court here failed to give the appropriate weight to that factor (*see Zarrello v City of New York*, 93 AD2d 886, 886 [2d Dept 1983], *affd* 61 NY2d 628 [1983]) and instead "weigh[ed] heavily" the lack of substantial prejudice, even though claimants' showing in that regard, while adequate, was not particularly strong. Under these circumstances—which include the nearly 22-month period between the accident and claimants' application for leave to serve a late notice of claim, the improper weighing of the substantial prejudice factor at the expense of the actual knowledge factor, and claimants' failure to demonstrate a nexus between the son's infancy and the delay or to otherwise proffer a reasonable excuse for the delay—we conclude that the court abused its discretion in granting that part of the application seeking leave to serve a late notice of claim on the County (*see generally Matter of Nunez v Village of Rockville Ctr.*, 176 AD3d 1211, 1214-1216 [2d Dept 2019]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

981

KA 18-01952

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY M. NOONAN, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 27, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the second degree, aggravated criminal contempt, criminal contempt in the first degree and assault in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [1]). Defendant failed to preserve for our review his challenge to County Court's *Sandoval* ruling (*see People v Brown*, 159 AD3d 1415, 1416 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the court erred in submitting to the jury an annotated verdict sheet. The record reveals, however, that defendant, after having the opportunity to review the annotated verdict sheet, failed to object and thereby consented to its submission to the jury (*see People v Johnson*, 96 AD3d 1586, 1587-1588 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction of murder in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "It is well established that a defendant's [i]ntent to kill may be inferred from [his] conduct as well as the circumstances surrounding the crime . . . , and that a jury is entitled to infer

that a defendant intended the natural and probable consequences of his acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks omitted]). Here, the People presented evidence that defendant and the victim were alone in the apartment bedroom and arguing at the time of the victim's death. The medical examiner's testimony established that the victim sustained hemorrhages on her skull caused by separate blows to the head or by pounding her head against a hard surface. The victim also sustained hemorrhages in her larynx and around her trachea which, according to the medical examiner, could have resulted only from external compression. Moreover, the medical examiner testified that the victim also sustained fatal damage to her liver as a result of blunt force trauma to her abdomen. Consequently, we conclude that the evidence is legally sufficient to establish defendant's intent to kill the victim (*see generally id.*). Similarly, to the extent that defendant contends that his conviction of assault in the second degree is based on insufficient evidence because the People failed to establish his intent to cause serious physical injury (*see* Penal Law § 120.05 [1]), we reject that contention (*see People v Massey*, 140 AD3d 1736, 1737 [4th Dept 2016], *lv denied* 28 NY3d 972 [2016]). In addition, viewing the evidence in light of the elements of the crimes of murder in the second degree and assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that the court abused its discretion in permitting a witness to testify to a prior statement made by defendant in which defendant admitted that he had previously punched the victim in the stomach because doing so does not leave marks. As an initial matter, we conclude that defendant preserved his contention for our review (*see People v Sheehan*, 105 AD3d 873, 874 [2d Dept 2013], *lv denied* 21 NY3d 1020 [2013]; *cf. People v Cayea*, 163 AD3d 1279, 1280 [3d Dept 2018], *lv denied* 32 NY3d 1109 [2018]). We nonetheless conclude that the court did not err in allowing that testimony because the statement was relevant to establish defendant's intent and motive (*see People v Dixon*, 171 AD3d 1470, 1471 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]; *see generally People v Leonard*, 29 NY3d 1, 7 [2017]; *People v Westerling*, 48 AD3d 965, 966-968 [3d Dept 2008]), and the probative value of that evidence outweighed the potential for prejudice (*see generally People v Allweiss*, 48 NY2d 40, 46-47 [1979]).

Defendant's sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

983

KA 18-00565

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERBERT D. JOHNSON, DEFENDANT-APPELLANT.

HEGGE & CONFUSIONE, LLC, MULLICA HILL (MICHAEL CONFUSIONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 13, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) and criminal use of a firearm in the first degree (§ 265.09 [1] [a]). He was acquitted of three separate counts related to a second alleged robbery. Contrary to defendant's contention, Supreme Court did not err in refusing to suppress identification evidence related to the crimes of which he was convicted. "[T]he showup procedure, which was conducted within two hours of the [robbery], was ' "reasonable under the circumstances" ' " (*People v Norman*, 183 AD3d 1240, 1240 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020], quoting *People v Cedeno*, 27 NY3d 110, 123 [2016], *cert denied* — US —, 137 S Ct 205 [2016]; *see People v Howard*, 22 NY3d 388, 402 [2013]; *People v Johnson*, 167 AD3d 1512, 1513 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]). That procedure "was 'part of a continuous, ongoing police investigation' . . . , and was conducted 'as soon as practicable following defendant's apprehension' . . . Moreover, the showup procedure was not rendered unduly suggestive by the fact that defendant was handcuffed" (*Norman*, 183 AD3d at 1240-1241; *see People v Crittenden*, 179 AD3d 1543, 1544 [4th Dept 2020], *lv denied* 35 NY3d 969 [2020]).

Defendant further contends that the court erred in denying two

applications in which he sought funding for a DNA expert and related investigation services. Specifically, several months after the court granted defendant's initial application for $1,000 for investigative services, defendant filed a written application seeking an additional $1,000 for "further investigative services," contending that such funds were necessary to investigate, inter alia, other potential suspects, and to speak with potential alibi witnesses. Although defendant also mentioned "a potential need for a cell phone expert," there is no mention of a need for a DNA expert in that written application. In his posttrial motion to set aside the verdict pursuant to CPL 330.30, however, defendant contended that the court had erred in denying an ex parte application seeking $500 to retain a specific DNA expert.

As a preliminary matter, the present record does not include an ex parte application for $500 for a DNA expert and defendant, as the appellant, must bear the consequences of an insufficient record (*see People v Larrabee*, 201 AD2d 924, 924 [4th Dept 1994], *lv denied* 83 NY2d 855 [1994]; *see also People v Dye*, 78 AD3d 1607, 1608 [4th Dept 2010], *lv denied* 16 NY3d 743 [2011]). We thus conclude that defendant's challenge to the denial of the application for funds for a DNA expert should be raised in a CPL 440.10 motion (*see Dye*, 78 AD3d at 1608).

With respect to the written application for $1,000 for "further investigative services," we conclude that the court did not abuse its discretion in denying that application. County Law § 722-c provides in pertinent part, that, in order to be entitled to funds for expert services, a defendant must establish that the services sought "are necessary" and that the defendant "is financially unable to obtain them." "[U]pon a finding of necessity, a court shall authorize expert services on behalf of a defendant, and only in extraordinary circumstances may a court provide for compensation in excess of $1,000 per expert" (*People v Micolo*, 171 AD3d 1484, 1485-1486 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]; *see* County Law § 722-c). Contrary to his contention, "defendant did not make the requisite showing of necessity" to justify his request for additional investigatory funds (*Micolo*, 171 AD3d at 1486; *see People v Walker*, 167 AD3d 1502, 1503 [4th Dept 2018], *lv denied* 33 NY3d 955 [2019]).

Defendant also contends that the evidence is not legally sufficient to support the conviction. That contention is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not specifically directed at the alleged deficiencies identified on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]), and he also failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

In his CPL 330.30 motion, defendant sought to set aside the verdict on the grounds of, inter alia, newly discovered evidence. We reject defendant's contention that he was entitled to a new trial on that particular ground. The alleged newly discovered evidence

addressed in the CPL 330.30 motion related to witnesses who claimed that defendant was with them during and after the crimes in question and provided him with an innocent explanation for being in the area where he was arrested. Such evidence constitutes alibi evidence, and "alibi evidence cannot ordinarily form the basis for a new trial on the grounds of newly discovered evidence" (*People v Ramos*, 166 Misc 2d 515, 519 [Sup Ct, Kings County 1995], *affd* 232 AD2d 583 [2d Dept 1996]; *see People v Giordano*, 144 Misc 108, 110 [Bronx County Ct 1932]). That is because defendants would generally know all of the particulars of their alibi before trial, especially where, as here, the defendant is arrested the night of the crime and the purported alibi witnesses are people known to the defendant (*cf. Ramos*, 166 Misc 2d at 519-520). Generally, when evidence is known to a defendant at the time of trial, it cannot be considered newly discovered evidence (*see e.g. People v Lostumbo*, 182 AD3d 1007, 1010 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *People v Backus*, 129 AD3d 1621, 1624 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]). "A defendant who chooses to withhold evidence should not be given a new trial on the basis of the evidence thus withheld" (*Backus*, 129 AD3d at 1624 [internal quotation marks omitted]).

Contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

986

CA 21-00315

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

TDA, LLC, DOING BUSINESS AS LACEY HEAVY EQUIPMENT AND TRUCK CENTER,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE LACEY AND LACEY HEAVY EQUIPMENT REPAIR, INC., DEFENDANTS-APPELLANTS.

GROSS SHUMAN, P.C., BUFFALO (CHRISTOPHER D. GALASSO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 31, 2020. The order, among other things, granted that part of plaintiff's motion for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the third subparagraph of the first ordering paragraph the language "or removing the Rental Equipment from plaintiff's premises" and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff and defendants, among others, entered into an Asset Purchase Agreement (APA) whereby plaintiff and its nonparty affiliates purchased defendants' land, certain assets and the goodwill of defendants' business of maintaining, repairing and renting heavy construction equipment. The APA included a noncompete provision. Defendant Lacey Heavy Equipment Repair, Inc. (LHER) and plaintiff also entered into an Equipment Rental Agreement for certain heavy construction equipment not purchased under the APA. The Equipment Rental Agreement permitted defendants to store the heavy equipment on plaintiff's property and allowed plaintiff to rent the equipment to its customers in return for LHER's receipt of a percentage of the rental fee. Plaintiff commenced this action alleging, inter alia, that defendants breached the noncompete provision of the APA and breached the Equipment Rental Agreement by impeding plaintiff's access to the rental equipment. By order to show cause, plaintiff moved for, inter alia, a preliminary injunction enjoining defendants from soliciting plaintiff's customers, competing with plaintiff's business, interfering with plaintiff's rental of

heavy equipment, and removing the rental equipment from plaintiff's property. Defendants appeal from an order that, among other things, granted that part of plaintiff's motion seeking a preliminary injunction. We modify.

"[T]o prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of the equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]; *see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Whether a party is entitled to a preliminary injunction is a determination entrusted to the sound discretion of the motion court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009]).

Here, we conclude that Supreme Court properly granted that part of plaintiff's motion seeking a preliminary injunction. Contrary to defendants' contention, plaintiff established the requisite likelihood of success on the merits of at least some of its claims, irreparable injury, and a balancing of the equities in its favor (*see generally Olean Med. Group LLP v Leckband*, 32 AD3d 1214, 1215 [4th Dept 2006]). We note in particular that plaintiff established irreparable injury in the form of "loss of goodwill and damage to customer relationships" (*Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1697 [4th Dept 2011]), and plaintiff established a balancing of the equities in its favor by demonstrating that the preliminary injunction essentially maintains the status quo under the terms of the agreements, to which defendants agreed (*see generally Destiny USA Holdings, LLC*, 69 AD3d at 223).

We agree with defendants, however, that the relief granted by the court precluding the removal of the heavy equipment from plaintiff's property goes beyond what is appropriate in this case (*see generally id.*; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d 403, 406 [2d Dept 2006]; *Healthworld Corp. v Gottlieb*, 12 AD3d 278, 279 [1st Dept 2004]). Pursuant to the terms of the Equipment Rental Agreement, defendants were entitled to remove the heavy equipment stored on plaintiff's property so long as they informed plaintiff. We therefore modify the order by striking from the third subparagraph of the first ordering paragraph the language "or removing the Rental Equipment from plaintiff's premises."

We further agree with defendants that the court erred in granting the preliminary injunction without providing for an undertaking. With certain exceptions that are not applicable here, prior to the court granting a preliminary injunction, a plaintiff must post an undertaking in an amount fixed by the court (*see* CPLR 6312 [b]; *Destiny USA Holdings, LLC*, 69 AD3d at 224), and that requirement may not be waived (*see Rourke Devs. v Cottrell-Hajeck, Inc.*, 285 AD2d 805, 806 [3d Dept 2001]). Thus, an undertaking should have been required, and we remit the matter to Supreme Court for further proceedings to fix the amount of an appropriate undertaking (*see Cangemi v Yeager*, 185 AD3d 1397, 1397 [4th Dept 2020]; *Matter of Rockwood Pigments NA,*

Inc. v Elementis Chromium LP, 124 AD3d 509, 511 [1st Dept 2015]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

991

CA 20-01486

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

PRESTON V. CLIFTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS P. COLLINS, DEFENDANT,
AND KURT KILIAN, INDIVIDUALLY AND DOING
BUSINESS AS KILIAN CONSTRUCTION,
DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 6, 2020. The order, insofar as appealed from, denied those parts of the motion of defendant Kurt Kilian, individually and doing business as Kilian Construction, seeking summary judgment dismissing the Labor Law §§ 200, 240 (1) and 241 (6) claims against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Kurt Kilian, individually and doing business as Kilian Construction, seeking summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims against him and the Labor Law § 200 claim against him insofar as it is premised on the method and manner of the work performed, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell down a stairwell while installing cable outlets during a home construction. Defendant Thomas P. Collins was the owner of the home and defendant Kurt Kilian, individually and doing business as Kilian Construction, was a contractor on the project. Kilian moved for summary judgment dismissing the complaint and all cross claims against him, and he now appeals from those parts of an order that denied those parts of his motion seeking summary judgment dismissing plaintiff's claims against him under Labor Law §§ 200, 240, and 241.

We agree with Kilian that, because he was a prime contractor, not a general contractor, Supreme Court erred in denying those parts of his motion seeking to dismiss the claims against him premised on

violations of Labor Law §§ 240 (1) and 241 (6). "There is a distinction between a general contractor and a prime contractor for general construction" (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]). "A general contractor will be held liable under [Labor Law §§ 240 (1) and 241 (6)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*id.*; *see Relyea v Bushneck*, 208 AD2d 1077, 1078-1079 [3d Dept 1994]). Here, Collins, not Kilian, hired plaintiff's employer to perform work on the project, and Kilian established through the documentary evidence and deposition testimony that he exercised no control or supervision over plaintiff's work and had no authority to enforce safety standards against plaintiff (*see Walsh v Sweet Assoc.*, 172 AD2d 111, 113-114 [3d Dept 1991], *lv denied* 79 NY2d 755 [1991]). Thus, Kilian established as a matter of law that he was not a general contractor subject to liability pursuant to Labor Law §§ 240 (1) or 241 (6), and plaintiff failed to raise a triable issue of fact (*see Knab v Robertson*, 155 AD3d 1565, 1566 [4th Dept 2017]; *Kulaszewski*, 272 AD2d at 856). We therefore modify the order accordingly.

We likewise conclude that Kilian established on his motion that he is entitled to dismissal of the Labor Law § 200 claim against him to the extent that claim is premised on the theory that he controlled the method and manner of plaintiff's work, and plaintiff failed to raise a triable issue of fact (*see Jones v County of Erie*, 121 AD3d 1562, 1563 [4th Dept 2014]). We therefore further modify the order accordingly. However, to the extent that the section 200 claim against Kilian is based on the theory that he was negligent with respect to the dangerous condition of the stairwell, we conclude that Kilian failed to establish as a matter of law that he did not have control over the work site or that he lacked actual or constructive notice of the dangerous condition, i.e., the unguarded, open stairwell (*see Knab*, 155 AD3d at 1567; *Nicholas v Wal-Mart Stores, Inc.*, 137 AD3d 1733, 1734 [4th Dept 2016]). In his deposition testimony, Kilian acknowledged that it was his obligation to put up a safety railing around the open stairwell to protect anyone that may be on the site, and he further testified that there were no safety railings around the stairwell. Inasmuch as Kilian failed to meet his burden in that regard, we do not consider the adequacy of plaintiff's opposing submissions (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Schultz v Alamo Group Inc.*, 192 AD3d 1630, 1631-1632 [4th Dept 2021]).

We do not address Kilian's contention that the court erred in denying that part of his motion seeking dismissal of the common-law premises liability claim against him. Kilian's notice of appeal states that he appeals from only those parts of the order denying his motion with respect to the Labor Law §§ 200, 240 and 241 claims against him, and thus any contention regarding any other part of the order is not properly before us (*see Casey v Niagara Mohawk Power Corp.*, 269 AD2d 775, 777 [4th Dept 2000]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1022

CA 20-01495

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
TOWN OF AMHERST,
PETITIONER-RESPONDENT-RESPONDENT,

AND MEMORANDUM AND ORDER

CSEA LOCAL 1000 AFSCME, AFL-CIO, CSEA,
LOCAL 1000, AFSCME, AFL-CIO, TOWN OF
AMHERST LOCAL UNIT OF 815, AMHERST
UNIT #6768 AND ADAM FISCHER,
RESPONDENTS-PETITIONERS-APPELLANTS.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (LESLIE C. PERRIN OF COUNSEL), FOR RESPONDENTS-PETITIONERS-APPELLANTS.

STANLEY J. SLIWA, TOWN ATTORNEY, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 13, 2020 in a proceeding pursuant to CPLR article 75. The order and judgment granted the amended petition for a stay of arbitration and denied the cross petition to compel arbitration.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on law without costs, the amended petition is denied and the cross petition is granted.

Memorandum: Respondent-petitioner Adam Fischer had been employed by petitioner-respondent, the Town of Amherst (petitioner), pursuant to a collective bargaining agreement (CBA) but was terminated. Respondent-petitioner CSEA, Local 1000, AFSCME, AFL-CIO (CSEA) filed a grievance on behalf of Fischer, alleging that his employment had been terminated in violation of article 30 of the CBA. CSEA thereafter sent petitioner a notice of intent to arbitrate the grievance. In response, petitioner commenced this proceeding seeking a stay of arbitration pursuant to CPLR 7503, and CSEA cross-petitioned to compel arbitration of the grievance. Supreme Court granted the amended petition and denied the cross petition after determining that the CBA was between petitioner and respondent-petitioner CSEA, Local 1000, AFSCME, AFL-CIO, Town of Amherst Local Unit of 815, Amherst Unit #6768 (Local Unit) and thus, that no binding agreement to arbitrate existed between petitioner and CSEA. The court further determined that, even if CSEA was a party to the CBA, it failed to satisfy a condition

precedent to arbitration, i.e., the timing requirements of article 30 of the CBA. We reverse.

"The Court of Appeals recognizes a two-step process for a court to determine when a particular public sector grievance is subject to arbitration" (*Matter of Jefferson County [Jefferson County Local of the Civ. Serv. Empls. Assn., Inc.]*, 175 AD3d 997, 997 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020] [*Jefferson*]; *see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 137-138 [1999]). With respect to the first step, neither party "dispute[s] that there is no statutory, constitutional or public policy impediment to arbitration" (*Jefferson*, 175 AD3d at 998). Our analysis is therefore limited to the second step, i.e., whether "the parties have agreed to arbitrate the dispute at issue" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [2002]; *see Jefferson*, 175 AD3d at 997-998).

We conclude that the court erred in granting the amended petition and denying the cross petition on the ground that CSEA did not have an agreement to arbitrate with petitioner and thus that CSEA's notice of intent to arbitrate was a nullity. Although, generally, "only a party to an arbitration agreement is bound by or may enforce the agreement" (*Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 152 AD3d 567, 569 [2d Dept 2017] [internal quotation marks omitted]; *see Matter of Soto [Goldman]*, 7 NY2d 397, 400 [1960]), the language of the CBA here establishes that CSEA was a party to that agreement.

We further conclude that the court erred in granting the amended petition and denying the cross petition on the alternative basis that CSEA failed to comply with a condition precedent to arbitration by neglecting to timely file a grievance in accordance with article 30 of the CBA. Article 30 provides that where an employee is "disciplined" by means of a suspension or termination, "[s]uch discipline may be made the subject of a grievance under the grievance procedure of this agreement, *but only if* such grievance is filed within five (5) days from the date of discipline" (emphasis added). Where, as here, "an agreement contains a broad arbitration clause," such a time requirement is not a condition precedent, but instead establishes the period in which to commence the grievance process generally (*Matter of Kachris [Sterling]*, 239 AD2d 887, 887 [4th Dept 1997]). Thus, here the issue whether the grievance was timely filed "is deemed a 'condition in arbitration' " that must first be submitted to the arbitrator (*id.*; *see also Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d 358, 363-364 [1978]; *Matter of Town of Greece [Civil Serv. Empls. Assn., Inc., Local 828, AFSCME, AFL-CIO]*, 153 AD3d 1626, 1627 [4th Dept 2017], *lv denied* 31 NY3d 905 [2018]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1036

KA 17-01081

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE M. RIVERA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 2, 2017. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously affirmed.

Memorandum: In 2011, defendant was convicted upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), and sentenced as a second felony offender based upon a 2007 juvenile offender adjudication. In 2016, that juvenile offender adjudication was vacated, and in 2017 Supreme Court granted defendant's motion pursuant to CPL 440.20 (1) to vacate the sentence imposed in this case on the ground that defendant was not a second felony offender, and directed that defendant be resentenced. During the subsequent resentencing, the court denied defendant's request to be adjudicated a youthful offender, concluding that defendant was convicted of an armed felony and that there were no mitigating circumstances bearing directly on the manner in which the crime was committed. Defendant now appeals from the resentence.

We reject defendant's contention that the court abused its discretion in denying his request for an updated presentence investigation. Although six years had passed since the original presentence report was prepared, the court had before it all the information necessary regarding the manner in which the crime was committed to determine whether defendant was eligible to be adjudicated a youthful offender (*see People v Wilson*, 181 AD3d 1318, 1319 [4th Dept 2020], *lv denied* 35 NY3d 1116 [2020]; *cf. People v Jarvis*, 170 AD3d 1622, 1623 [4th Dept 2019]).

Contrary to defendant's further contention, the court did not err in concluding that defendant was not eligible to be adjudicated a youthful offender. Where, as here, a defendant is convicted of an armed felony (*see* CPL 1.20 [41]), he or she may be adjudicated a youthful offender only where he or she was not the sole participant in the crime and his or her participation was relatively minor (*see* CPL 720.10 [3] [ii]), or where there exist "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]), i.e., circumstances that "bear directly on defendant's personal conduct in committing the crime" (*People v Garcia*, 84 NY2d 336, 342 [1994]; *see People v Middlebrooks*, 25 NY3d 516, 519 [2015]).

Here, the record establishes that defendant was the only person who possessed the handgun at issue. Furthermore, although "lack of injury to others and nondisplay of a weapon [constitute] qualifying mitigating circumstances" (*Garcia*, 84 NY2d at 342; *see People v Lindsey*, 166 AD3d 1565, 1565 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]), the record establishes that, during an argument, defendant procured the weapon from a hidden location in a vehicle, purposely displayed it, and activated the slide on the weapon to chamber a round into the gun. Thus, although there were no injuries, we perceive no basis to disturb the court's determination that defendant is not an eligible youth because, based on defendant's display of the weapon and his implicit threat to use it, there are insufficient mitigating circumstances to support such an adjudication (*see People v D.M.*, 168 AD3d 879, 880 [2d Dept 2019], *lv denied* 33 NY3d 947 [2019]; *People v Stewart*, 140 AD3d 1654, 1655 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]; *People v Henry*, 76 AD3d 1031, 1031 [2d Dept 2010]).

Finally, the resentence is not unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1081

KA 20-00245

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHON WHITE, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Mark A. Montour, J.), rendered January 3, 2020. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]) in connection with an incident during which defendant poured gasoline onto the head of his ex-girlfriend and proceeded to light her on fire. Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant had the requisite intent for each count (*see People v Gorton*, 195 AD3d 1428, 1428 [4th Dept 2021]*, lv denied* 37 NY3d 1027 [2021]).

We likewise reject defendant's contention that Supreme Court erred in denying the requests he made for substitution of counsel in August 2019 and September 2019. Assuming, arguendo, that defendant made "specific factual allegations of serious complaints about counsel," we conclude that the court conducted a sufficient "minimal inquiry" into whether there was "good cause" for substitution (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; *see People v Sides*, 75 NY2d 822, 824 [1990]) and thereafter reasonably concluded that defendant's complaints had no merit (*see generally People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]; *People v Jaramillo*, 97 AD3d 1146, 1147 [4th Dept

2012], *lv denied* 19 NY3d 1026 [2012]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1099

KA 17-01724

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES GRAHAM, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 20, 2017. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Preliminarily, we note that defendant's "waiver of his right to appeal was invalid . . . and, in any event, [would] not bar his contention that [County] Court failed to properly consider youthful offender treatment" (*People v Dhillon*, 143 AD3d 734, 735 [2d Dept 2016]). On the merits, as the People correctly concede, we agree with defendant that the court erred in determining that he was ineligible for youthful offender status. Contrary to the court's determination, manslaughter in the first degree is not an "armed felony" for purposes of CPL 720.10 (2) (a) (ii) (*see Dhillon*, 143 AD3d at 735; *People v Wilson*, 240 AD2d 603, 603 [2d Dept 1997]; *see generally* CPL 1.20 [41]). Thus, defendant's eligibility for youthful offender status did not turn, as the court held, on the existence of a statutory mitigating factor enumerated in CPL 720.10 (3) (*see People v Jarvis*, 186 AD3d 1086, 1086-1087 [4th Dept 2020]; *Dhillon*, 143 AD3d at 735). Inasmuch as defendant is otherwise eligible for youthful offender status on this conviction (*see* CPL 720.10 [1], [2]), the court was obligated to make a discretionary youthful offender determination before imposing sentence (*see* CPL 720.20 [1]; *People v Rudolph*, 21 NY3d 497, 501 [2013]). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see Jarvis*, 186 AD3d at 1087; *People v Willis*, 161 AD3d 1584,

1584 [4th Dept 2018]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1102

KA 19-00295

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARSHALL D. JACKSON, DEFENDANT-APPELLANT.

LELAND D. MCCORMAC, III, INTERIM PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), dated August 24, 2018. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the judgment of conviction is vacated, and a new trial is granted.

Memorandum: Defendant was convicted by a jury of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), and criminal possession of stolen property in the fourth degree (§ 165.45 [4]). The conviction arises out of an incident in which defendant, while using a gun that he had stolen, shot and killed a stranger. The proof at trial included two video recordings of the incident in which defendant could be identified as the perpetrator. Defendant and his girlfriend testified for the defense. Defendant testified that he had served nine years in the military, that his service included three tours of active duty in Iraq, and that he was receiving Social Security disability benefits due to a diagnosis of posttraumatic stress disorder (PTSD) following his discharge from the military. He further testified that, when he saw what he believed to be a gun handle in the victim's waistband, his "combat mode really kicked in," and he shot the victim. However, no medical evidence or expert testimony was introduced at trial supporting defendant's PTSD diagnosis or a psychiatric defense, and County Court therefore denied defense counsel's request for a jury charge on the affirmative defense of extreme emotional disturbance (EED).

On his direct appeal from the judgment of conviction, defendant contended that his trial attorney was ineffective in failing to proffer evidence in support of an EED defense. Although we affirmed the judgment, we stated that defendant's contention regarding ineffective assistance of counsel was "based upon matters outside the record . . . and must be pursued by way of a motion pursuant to CPL article 440" (*People v Jackson*, 153 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). Thereafter, defendant moved pursuant to CPL 440.10 to vacate the judgment, alleging that defense counsel was ineffective because she failed to obtain defendant's Social Security disability benefit records or have him evaluated by an independent psychiatrist in preparation of an EED defense. After a hearing, the court denied the motion, and a Justice of this Court granted defendant leave to appeal.

"To prevail on his claim that he was denied effective assistance of counsel, defendant must demonstrate that his attorney failed to provide meaningful representation" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]). A defendant claiming ineffective representation "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019] [internal quotation marks omitted]), and it is well settled that the failure to investigate may amount to ineffective assistance (*see People v Oliveras*, 21 NY3d 339, 348 [2013]).

Defense counsel testified at the CPL article 440 hearing that, in preparing for trial, she requested and received defendant's military records, which indicated that defendant had been diagnosed with PTSD, but she did not request or review records relating to defendant's Social Security disability benefits, even though defendant informed her that he received such benefits. She also accompanied defendant to an interview conducted by the People's expert, who concluded that defendant was not "suffering from active PTSD symptoms during the shooting," but she did not seek an independent expert opinion. Rather than introducing expert or medical evidence, defense counsel attempted to establish an EED defense through the testimony of defendant and his girlfriend. Although defense counsel did not clearly recall the details of the case, and her file had been destroyed, she thought that she might have opted not to introduce defendant's military records at trial because she was uncertain how to lay a foundation for their admissibility.

We conclude on this record that defendant met his burden of establishing that he received less than meaningful representation. Pursuing an EED defense was the best trial strategy for defendant, and defendant demonstrated the absence of any strategic or other legitimate explanation for defense counsel's failure to obtain certain records, her failure to introduce other records in evidence, and her failure to secure an expert to support an EED defense (*see generally Oliveras*, 21 NY3d at 348). We therefore reverse the order, grant the

motion to vacate the judgment of conviction, and grant defendant a new trial.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1103

KA 18-01623

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL HALL, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered June 19, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of marihuana in the second degree and conspiracy in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of marihuana in the second degree (Penal Law former § 221.25) and conspiracy in the fifth degree (§ 105.05 [1]). Defendant's conviction stems from his possession of approximately 25 ounces of marihuana that was recovered after the police stopped a truck in which defendant was a passenger and found marihuana plants in the bed of the truck. Defendant contends that we should modify the judgment pursuant to the newly enacted Marihuana Regulation and Taxation Act (Act). We reject that contention. Effective March 31, 2021, the Act legalized for persons 21 and older, inter alia, the possession of cannabis up to and including three ounces (§ 222.05 [1] [a]); it repealed Penal Law article 221 and enacted Penal Law article 222. As noted, defendant was convicted of criminal possession of marihuana in the second degree, a class D felony, under Penal Law former § 221.25, which provided that a person was guilty of that offense "when he [or she] knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than [16] ounces." Under the current law, defendant would have been guilty of criminal possession of cannabis in the third degree, a class A misdemeanor (*see* § 222.30). "A person is guilty of criminal possession of cannabis in the third degree when he or she knowingly and unlawfully possesses: cannabis . . . [that] weighs more than [16] ounces"

(§ 222.30 [1]).

The Act also added CPL 440.46-a. Pursuant to subdivision (2) (a) (ii), when a person such as defendant has completed serving a sentence for a conviction under Penal Law former article 221, and "such person would have been guilty of a lesser or potentially less onerous offense under . . . article [222] than such former article [221] of the penal law; then such person may petition the court of conviction pursuant to this article for vacatur of such conviction." Upon such motion, "the court, after affording the parties an opportunity to be heard and present evidence, may substitute, unless it is not in the interests of justice to do so, a conviction for an appropriate lesser offense under article [222] of the penal law" (CPL 440.46-a [2] [b] [ii]). Thus, defendant's contention is not properly before us inasmuch as defendant must first "petition the court of conviction" for any relief (CPL 440.46-a [2] [a]), which is not automatic. This Court may review the court's decision on any CPL 440.46-a motion on an appeal therefrom (*see generally People v Soodoo*, 73 Misc 3d 16, 20 [App Term, 2d Dept, 9th & 10th Jud Dists 2021]).

Next, we reject defendant's contention that the marihuana should have been suppressed on the ground of an unlawful stop and search. With respect to the stop of the truck, it is well settled that, "where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*People v Robinson*, 97 NY2d 341, 349 [2001]; *see Whren v United States*, 517 US 806, 812-813 [1996]; *People v Hinshaw*, 35 NY3d 427, 430-431 [2020]; *People v Brunson*, 145 AD3d 1476, 1477 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]). The evidence at the suppression hearing established that the officer followed the truck because of suspicious activities observed by surveillance aircraft, and he stopped the truck after observing brake light failure and the driver's failure to use a turn signal. The stop was lawful inasmuch as, among other things, the officer had probable cause to believe that the driver committed traffic violations (*see People v Nikiteas*, 167 AD3d 1556, 1558 [4th Dept 2018], *lv denied* 33 NY3d 952 [2019]; *People v Booth*, 158 AD3d 1253, 1254 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]). Once the truck was stopped, officers observed the marihuana in plain view in the truck bed, giving them probable cause to search the vehicle (*see People v Simpson*, 176 AD3d 1113, 1113 [2d Dept 2019], *lv denied* 34 NY3d 1162 [2020]; *People v Mills*, 93 AD3d 1198, 1199 [4th Dept 2012], *lv denied* 19 NY3d 964 [2012]).

We reject defendant's contention that County Court erred in allowing evidence of his flight from the police after the police stopped the truck. The evidence of defendant's flight "was relevant inasmuch as it was indicative of his consciousness of guilt" (*People v Turner*, 197 AD3d 997, 998 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]; *see People v Yazum*, 13 NY2d 302, 304 [1963], *rearg denied* 15 NY2d 679 [1964]), and the probative value of that evidence outweighed

the potential prejudice to defendant (*see People v Fitzgerald*, 84 AD3d 1397, 1397 [2d Dept 2011], *lv denied* 17 NY3d 816 [2011]; *see also Turner*, 197 AD3d at 998-999; *see generally People v Frumusa*, 29 NY3d 364, 372 [2017], *rearg denied* 29 NY3d 1110 [2017]). Defendant waived his challenge to the consciousness of guilt instruction, inasmuch as defense counsel consented to that charge (*see People v Gant*, 189 AD3d 2160, 2161 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]). In any event, the court gave an appropriate limiting instruction "that evidence of flight is of slight value and that flight may have an innocent explanation" (*People v Martinez*, 298 AD2d 897, 899 [4th Dept 2002], *lv denied* 98 NY2d 769 [2002], *cert denied* 538 US 963 [2003], *reh denied* 539 US 911 [2003]; *see Fitzgerald*, 84 AD3d at 1397).

Defendant contends that the evidence is legally insufficient because the accomplice testimony was not sufficiently corroborated. We reject that contention. Accomplice testimony must be corroborated by evidence "tending to connect the defendant with the commission of [the] offense" (CPL 60.22 [1]). Here, witness testimony and surveillance video " 'tend[ed] to connect . . . defendant with the commission of the crime[s] in such a way as may reasonably [have] satisf[ied] the jury that the accomplice[s] [were] telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see People v Baska*, 191 AD3d 1432, 1433 [4th Dept 2021]; *People v Lipford*, 129 AD3d 1528, 1529 [4th Dept 2015], *lv denied* 26 NY3d 1041 [2015]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1106

KA 18-01554

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL R. CRITTLETON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 26, 2018. The judgment convicted defendant, upon a plea of guilty, of burglary in the second degree (two counts), criminal obstruction of breathing or blood circulation (two counts), and attempted grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, upon his *Alford* plea, of, inter alia, two counts of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in accepting his plea because it was not knowingly and voluntarily entered. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Dixon*, 147 AD3d 1518, 1518-1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]; *People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). Furthermore, this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1108

CA 21-00229

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

TODD PUCCIO AND SUSAN PUCCIO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BOY SCOUTS OF AMERICA, GREATER NIAGARA FRONTIER COUNCIL OF THE BOY SCOUTS OF AMERICA, CUB SCOUT PACK 601, BOWMANSVILLE FIRE CO., INC., MICHAEL FRYS, THOMAS DOERING, DON GRANDE, JOSEPH T., BENJAMIN C. AND CONNOR C., DEFENDANTS-RESPONDENTS.

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (BRYAN DANIELS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

STILLWELL MIDGLEY VISCO, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BOY SCOUTS OF AMERICA, GREATER NIAGARA FRONTIER COUNCIL OF THE BOY SCOUTS OF AMERICA, CUB SCOUT PACK 601, BOWMANSVILLE FIRE CO., INC., MICHAEL FRYS, THOMAS DOERING, AND DON GRANDE.

PENINO & MOYNIHAN, LLP, WHITE PLAINS (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANT-RESPONDENT JOSEPH T.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BENJAMIN C. AND CONNOR C.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 29, 2019. The order granted the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Todd Puccio (plaintiff) while sledding at an event organized by a Cub Scout Pack (Pack) for its members and their families. Plaintiff, a den leader for the Pack, attended the event with his son, who was a member of the Pack at the time. Approximately one hour into the event, plaintiff sledded down a hill to retrieve a sled left at the bottom of the hill by his son and, when his sled came to a stop and he attempted to get off of it, he was struck in the face by a boot of a minor participant who was sledding down the hill. All defendants except defendant Cub Scout Pack 601, which was alleged not to be a legal entity (moving defendants) moved for summary judgment seeking, inter alia, dismissal of the complaint against them, and

Supreme Court granted the motions. We affirm.

It is well settled that, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *see Savage v Brown*, 128 AD3d 1343, 1343 [4th Dept 2015]). "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte v Fell*, 68 NY2d 432, 439 [1986]). Thus, "primary assumption of the risk applies when a consenting participant in a qualified activity 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]). "[A]wareness of risk is not to be determined in a vacuum [but] . . . is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]; *see Turcotte*, 68 NY2d at 440).

Plaintiff testified that he had sledded prior to the event, he had observed the sledding activity for an hour prior to the accident and had instructed his son to watch out for sleds coming down the hill as he walked back up the hill, and he knew he must go to an area where people could be sledding down the hill, in order to retrieve his son's sled. The court here properly determined that plaintiff assumed the risk of being struck by another participant while sledding (*see Savage*, 128 AD3d at 1344).

Plaintiffs contend that defendants unreasonably increased the risks of injury by failing to follow certain safety protocols, such as supervising the sledding activity. The doctrine of primary assumption of the risk "does not . . . shield defendants from liability for exposing participants to unreasonably increased risks of injury" (*id.* at 1343; *see Morgan*, 90 NY2d at 485; *Jurgensen v Webster Cent. Sch. Dist.*, 126 AD3d 1423, 1424 [4th Dept 2015]). We conclude, however, that the moving defendants met their initial burden, and plaintiffs failed to raise a triable issue whether plaintiff was subjected to unreasonably increased risks (*see Conrad v Holiday Val., Inc.*, 187 AD3d 1520, 1521-1522 [4th Dept 2020]; *Swan v Town of Grand Is.*, 234 AD2d 934, 935 [4th Dept 1996]; *cf. Ulin v Hobart & William Smith Colls.*, 158 AD3d 1298, 1298-1299 [4th Dept 2018]). Plaintiff was an individual in the same role and with the same supervisory responsibilities as those defendants who he claims failed to provide proper supervision. He testified that he did not instruct the participants regarding any sledding safety rules. He was well aware that there were no official supervisors instructing the children on safe sledding techniques, and he decided to sled down the hill regardless (*see generally Jurgensen*, 126 AD3d at 1424). Inasmuch as "the risks of the activity [were] fully comprehended or perfectly obvious, plaintiff has consented to them and defendant[s] [have]

performed [their] duty" (*Turcotte*, 68 NY2d at 439; *see Morgan*, 90 NY2d at 484).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1118

TP 20-01235

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

IN THE MATTER OF CALVIN A. HALL, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF JOSEPHINE HALL, DECEASED, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, SAMUEL D. ROBERTS, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE AND STACY ALVORD, COMMISSIONER, OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

YANG-PATYI LAW FIRM, PLLC, SYRACUSE (JOSEPHINE YANG-PATYI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS HOWARD A. ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND SAMUEL D. ROBERTS, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO, FOR RESPONDENT STACY ALVORD, COMMISSIONER, OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oswego County [Norman W. Seiter, Jr., J.], entered April 17, 2018) to annul an amended determination of respondents. The amended determination denied applications of petitioner's decedent for Medicaid benefits.

It is hereby ORDERED that the amended determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner, as voluntary administrator of the estate of Josephine Hall (decedent), commenced this CPLR article 78 proceeding seeking to annul the amended determination of the New York State Department of Health (respondent) denying, after a fair hearing, an application for Medicaid benefits on behalf of decedent. Petitioner challenges respondent's conclusion that decedent did not qualify for a hardship waiver of the determination that she was ineligible for medical assistance (MA) because her husband transferred assets for less than fair market value within the 60-month look-back period. We conclude that respondent's "resolution [is] supported by

substantial evidence upon the whole record" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]), and we therefore confirm the amended determination.

"In determining the MA eligibility of an institutionalized individual, any transfer of assets for less than fair market value made by the individual or the individual's spouse within or after the look-back period will render the individual ineligible for nursing facility services" (18 NYCRR 360-4.4 [c] [2] [ii]). An exception applies where it is determined that the denial of eligibility will result in an undue hardship which, as relevant here, requires a demonstration that "the institutionalized individual is unable to obtain appropriate medical care without the provision of MA . . . [and that,] despite his or her best efforts, the institutionalized individual or the individual's spouse is unable to have the transferred asset returned or to receive fair market value for the asset. Best efforts include cooperating, as deemed appropriate by the commissioner of the social services district, in efforts to seek the return of the asset" (18 NYCRR 360-4.4 [c] [2] [iii] [e] [2]-[3]).

Here, substantial evidence supports respondent's conclusion that there was no indication that decedent would be unable to obtain appropriate medical care if she did not receive MA (*see Matter of Weiss v Suffolk County Dept. of Social Servs.*, 121 AD3d 703, 705 [2d Dept 2014]; *Matter of Conners v Berlin*, 105 AD3d 1208, 1210-1211 [3d Dept 2013]; *see also Matter of Delaware Operations Assoc. LLC v New York State Dept. of Health*, 187 AD3d 1560, 1562 [4th Dept 2020]). With respect to decedent's alleged inability to have the transferred assets returned, respondent concluded that the evidence presented in support of that claim was not credible, and " '[i]ssues of witness credibility are . . . for the administrative agency to resolve in the exercise of its exclusive fact-finding authority' " (*Matter of Hall v Shah*, 100 AD3d 1357, 1360 [4th Dept 2012]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1125

KA 20-00955

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOREY SMITH, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered May 30, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Wayne County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that County Court erred in refusing to suppress physical evidence discovered in a vehicle by parole officers because the evidence was the fruit of an unlawful search by a police investigator. We agree.

According to the suppression hearing testimony, a police investigator who was conducting a separate criminal investigation contacted defendant's parole officer for assistance in locating defendant so that the police investigator could interview him. Defendant's parole officer knew that defendant would be attending treatment at a health facility on a particular date and at a certain time, and he arranged to meet the police investigator and two other parole officers there. After defendant exited the health facility building, the parole officers stopped defendant and informed him that the police investigator wanted to speak with him. The police investigator then conducted a pat frisk of defendant, purportedly for the purpose of officer safety, and discovered no weapons but did find a set of car keys. Defendant's parole officer requested the keys from the police investigator and, upon pressing the key fob, discovered

that the keys activated the lights of a vehicle in the parking lot.

After interviewing defendant in the back of a patrol vehicle, the police investigator left. The parole officers, however, questioned defendant about the vehicle in the parking lot because, under the terms of his parole, defendant was not permitted to drive. Defendant claimed that the vehicle belonged to someone else who was still in the building and said he was waiting for that person to come outside. The parole officers waited with defendant for an hour, but no one came outside to claim the vehicle. During that period, one of the parole officers obtained surveillance video showing that defendant had, in fact, driven the vehicle to the health facility that day. The parole officers thereafter searched the vehicle and found cocaine, among other things, in the closed center console.

In his pretrial omnibus motion, defendant sought suppression of the physical evidence obtained as a result of the search of the vehicle. In its decision following the suppression hearing, the court determined that the police investigator's frisk of defendant was unlawful and rejected the People's argument that the parole officers would have inevitably discovered that defendant had been driving the vehicle. The court nonetheless concluded that the unlawful search of defendant's person and the seizure of the keys did not taint the parole officers' discovery of the vehicle and search thereof because a lawful justification for the search of the vehicle arose from the parole officers' own independent investigation.

"[A] parolee does 'not surrender his [or her] constitutional rights against unreasonable searches and seizures' merely by virtue of being on parole" (*People v McMillan*, 29 NY3d 145, 148 [2017], quoting *People v Huntley*, 43 NY2d 175, 181 [1977]; *see People ex rel. Piccarillo v New York State Bd. of Parole*, 48 NY2d 76, 82 [1979]). However, given "the dual nature of a parole officer's duties and a parolee's reduced expectation of privacy[,] . . . a parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when a parole officer conducts a warrantless search that is rationally and reasonably related to the performance of the parole officer's duties" (*McMillan*, 29 NY3d at 148). Courts recognize a distinction between parole officers and police officers when evaluating searches of parolees, however, and "searches that may be reasonably justified if undertaken by a parole officer are not necessarily constitutional if undertaken by a police officer" (*id.*; *see People v Santiago*, 176 AD3d 744, 746 [2d Dept 2019], *lv denied* 34 NY3d 1081 [2019]). Concomitantly, though, " 'in any evaluation of the reasonableness of a particular search or seizure,' whether undertaken by parole or police officers, 'the fact of defendant's status as a parolee is always relevant and may be critical' " (*McMillan*, 29 NY3d at 148-149, quoting *Huntley*, 43 NY2d at 181).

With respect to the consequences of an unreasonable search or seizure, "[u]nder well-established exclusionary rule principles, where police have engaged in unlawful activity[,] . . . evidence which is a result of the exploitation of that illegality is subject to suppression as the fruit of the poisonous tree unless one of the

recognized exceptions to the exclusionary rule is applicable" (*People v Small*, 110 AD3d 1138, 1140 [3d Dept 2013] [internal quotation marks omitted]; *see People v Jones*, 2 NY3d 235, 242 [2004]; *People v Gethers*, 86 NY2d 159, 161-162 [1995]). The commonly advanced exceptions to the exclusionary rule include, as relevant here, inevitable discovery and independent source (*see People v Turriago*, 90 NY2d 77, 85 [1997], *rearg denied* 90 NY2d 936 [1997]; *Gethers*, 86 NY2d at 162). The Court of Appeals has recognized that the deterrent purpose of the exclusionary rule is broader as a matter of state constitutional law than it is as a matter of federal constitutional law because, while "[t]he exclusionary rule 'was originally created to deter police unlawfulness by removing the incentive' to disregard the law, [it] also 'serves to insure that the State itself, and not just its police officers, respect the constitutional rights of the accused' " (*Jones*, 2 NY3d at 241, quoting *People v Payton*, 51 NY2d 169, 175 [1980]; *see People v Lloyd*, 174 AD3d 1389, 1390 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]).

Initially, the People request that we affirm on the ground that the frisk by the police investigator was lawful. We have no authority to do so. CPL 470.15 (1) constitutes "a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see People v Nicholson*, 26 NY3d 813, 825 [2016]; *People v Concepcion*, 17 NY3d 192, 195 [2011]). The statute thus "bars [the Appellate Division] from affirming a judgment, sentence or order on a ground not decided *adversely* to the appellant by the trial court" (*Concepcion*, 17 NY3d at 195; *see Nicholson*, 26 NY3d at 825). Here, inasmuch as the court decided in defendant's favor that the police investigator's frisk was unlawful, we are precluded from reviewing that issue on appeal (*see Concepcion*, 17 NY3d at 196; *see also Nicholson*, 26 NY3d at 826).

Similarly, we cannot, as the People urge, affirm on the ground that the inevitable discovery exception to the exclusionary rule applies. Contrary to the People's assertion and as defendant correctly contends, the court expressly rejected the People's invocation of that exception on the merits inasmuch as the court determined, with an accompanying citation to authority, that there was no testimony or evidence in the record that would allow it, beyond its own surmise, to find that the parole officers would have inevitably discovered that defendant was driving the vehicle (*see People v Walker*, 198 AD2d 785, 787-788 [4th Dept 1993]). Relatedly, the People also assert that the inevitable discovery exception is reviewable notwithstanding *LaFontaine/Concepcion* because the evaluation of that exception is part of a single multipronged legal ruling (*see People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]). We conclude that the People's assertion lacks merit because, unlike the evaluation of the multiple prongs of a single *Brady* or *Molineux* ruling, the exceptions to the exclusionary rule are "separate and analytically distinct" grounds (*id.*; *accord Turriago*, 90 NY2d at 85; *People v Coles*, 105 AD3d 1360, 1363 [4th Dept 2013]).

With respect to the exception at issue on appeal, "where the evidence sought to be suppressed is the product of an independent source entirely free and distinct from proscribed police activity, it should be admissible and not subject to a per se rule of exclusion based solely on the unlawful conduct" (*People v Arnau*, 58 NY2d 27, 35 [1982], *cert denied* 468 US 1217 [1984]). "[T]he independent source rule is applicable[where] there is no causal connection, direct or indirect, proximate or attenuated, between the illegality and the subsequent seizure" (*id.* at 34). "In cases where this causal nexus is lacking, the exclusionary rule simply does not apply" (*id.*).

Here, the record establishes that the discovery of the contraband in the vehicle was the direct result of, and not entirely free and distinct from, the police investigator's unlawful search of defendant and seizure of the keys, and the court thus erred in refusing to suppress that evidence (*see People v Rosa*, 30 AD3d 905, 908 [3d Dept 2006], *lv denied* 7 NY3d 851 [2006]). Defendant's parole officer testified that he went to the health facility exclusively at the request of the police investigator and not for any independent parole investigation inasmuch as defendant, at that time, was not under suspicion for any parole violations. Another parole officer confirmed that, when they arrived at the scene, the parole officers were not investigating defendant for any reason and had no suspicion that defendant was doing anything other than attending treatment at the health facility that day (*see People v Mackie*, 77 AD2d 778, 779 [4th Dept 1980]). At that point, the parole officers had no knowledge or reason to suspect that defendant had violated his parole conditions by driving, let alone that he might have done so by operating a particular vehicle. Thus, as defendant correctly contends, the record establishes that, when the parole officers first arrived at the health facility, they were not " 'pursuing parole-related objectives' " but were instead facilitating the police investigator's contact with defendant as part of a separate criminal investigation (*People v Taylor*, 97 AD3d 1139, 1140 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012]; *see People v Marcial*, 109 AD3d 937, 938 [2d Dept 2013], *lv denied* 22 NY3d 1200 [2014]).

The testimony further establishes that the parole officers' suspicion of a parole violation and their investigation thereof arose only after defendant's parole officer requested that the police investigator hand over the fruit of the unlawful search and seizure, i.e., the keys, and the police investigator left the scene. The parole officers began their investigation—pressing the fob, questioning defendant, waiting for the purported owner of the vehicle to emerge from the building, and viewing surveillance footage—as a direct result of the unlawful seizure of the keys from defendant's person. Indeed, defendant's parole officer did not learn of defendant's possible connection to the vehicle until he pressed the fob, which activated the lights of the vehicle. Inasmuch as the investigation by the parole officers was precipitated by the police investigator's unlawful seizure of the keys from defendant, the subsequent discovery of the contraband in the vehicle was not "based solely on information obtained prior to and independent of the illegal [search and seizure]" (*Arnau*, 58 NY2d at 33). Thus, the court's

determination that the parole officers' investigation was independent of the unlawful seizure of the keys is not supported by the record.

The People nonetheless insist that the discovery of the contraband was entirely free and distinct from the proscribed police activity because, even before the discovery of the keys, the parole officers observed defendant leaving the health facility alone and walking toward a vehicle in the parking lot and thus had an independent basis to investigate whether defendant had been driving. Even assuming, arguendo, that the People's contention does not improperly rely on principles of inevitable discovery, we conclude that it lacks merit. Initially, as defendant contends, the testimony of defendant's parole officer that he could tell that defendant was walking precisely toward the vehicle in the parking lot is of questionable credibility, if not incredible as a matter of law, given the testimonial and photographic evidence that defendant's parole officer stopped defendant just off the sidewalk, approximately 100 feet from the vehicle in question, which was parked on the opposite side of the parking lot in a row of other cars. In any event, there is no evidence that the parole officers actually investigated whether defendant operated any vehicle, let alone the particular vehicle at issue, on the basis of defendant's presence in the parking lot and prior to the unlawful seizure of the keys. Moreover, even if defendant's parole officer had, as he testified, somehow anticipated that the key fob might open the vehicle, his testimony indisputably establishes that he confirmed any such suspicion by pressing the fob that had been illegally seized by the police investigator and thereafter commenced an investigation into defendant's possible parole violation. In sum, there is no basis in the record on which to conclude that the contraband discovered in the vehicle was "the product of an independent source *entirely free and distinct* from proscribed police activity" (*Arnau*, 58 NY2d at 35 [emphasis added]).

Based on the foregoing, we conclude that the court erred in refusing to suppress the physical evidence obtained from the vehicle. Inasmuch as our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see People v Lopez*, 149 AD3d 1545, 1548 [4th Dept 2017]; *People v Freeman*, 144 AD3d 1650, 1651 [4th Dept 2016]). We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress physical evidence, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45. In light of our decision, we do not address defendant's remaining contentions.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1126

KA 17-01410

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAJIER ABERGUT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BRADLEY E. KEEM, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered March 6, 2017. The judgment convicted defendant, upon a nonjury verdict, of assault in the first degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count two of the indictment, and as modified the judgment is affirmed and the matter is remitted to Onondaga County Court for resentencing on that count.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, after a nonjury trial, of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), arising from an incident during which he stabbed another man. In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL 440.10 to vacate the judgment in appeal No. 1.

We reject defendant's contention in appeal No. 1 that County Court (Hafner, A.J.) erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30 [1] [a]). Although defendant met his initial burden "of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]), we conclude that the People met their burden of demonstrating "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]). Contrary to defendant's contention, the court properly declined to charge the People with any period of time between the suppression hearing on April 11, 2016, and the People's temporary withdrawal of their statement of readiness on August 3, 2016, inasmuch as the People's withdrawal of their statement of readiness in this case did not render their original statement

illusory (*see People v Camillo*, 279 AD2d 326, 326 [1st Dept 2001]; *see generally People v Pratt*, 186 AD3d 1055, 1056 [4th Dept 2020], *lv denied* 36 NY3d 975 [2020]). We likewise reject defendant's challenge to the period between September 9, 2016, when the People re-announced their readiness, and October 31, 2016, the court's proposed trial date. The period between September 9, 2016, and September 26, 2016, is not chargeable to the People because the court was entertaining defendant's speedy trial motion during that time (*see People v Lacey*, 260 AD2d 309, 311 [1st Dept 1999], *lv denied* 93 NY2d 1003 [1999]; *see generally* CPL 30.30 [4] [a]). Further, the record reflects that the delay during the period challenged by defendant was also the result of the court's schedule, and "postreadiness delay attributable to the court is not charged to the People" (*People v Brown*, 28 NY3d 392, 404 [2016] [internal quotation marks omitted]; *see People v Brothers*, 50 NY2d 413, 417 [1980]). Defendant failed to preserve for our review his contentions that the People are responsible for a delay in providing the grand jury minutes and for a delay from October 31, 2016, the court's first proposed trial date, to January 9, 2017, the date the trial ultimately began (*see People v Edmead*, 197 AD3d 937, 939-940 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although an acquittal would not have been unreasonable, upon "weigh[ing] conflicting testimony, review[ing] any rational inferences that may be drawn from the evidence and evaluat[ing] the strength of such conclusions" (*People v Courteau*, 154 AD3d 1317, 1318 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018] [internal quotation marks omitted]), we cannot conclude that the court failed to give the evidence the weight it should be accorded (*see People v O'Neill*, 169 AD3d 1515, 1515 [4th Dept 2019]).

Contrary to defendant's contention in appeal No. 1, his sentence on the count of assault in the first degree is not unduly harsh and severe. As the People correctly concede, however, the sentence originally imposed on the count of criminal possession of a weapon in the third degree was illegal and the court erred in attempting to correct it without formally resentencing defendant at a proceeding at which he was present or securing defendant's waiver of the right to be present at such a proceeding (*see generally People v Estremera*, 30 NY3d 268, 274 [2017]; *People v Perkins*, 162 AD3d 1641, 1642 [4th Dept 2018]). We therefore modify the judgment by vacating the sentence imposed on count two of the indictment, and we remit the matter to County Court for resentencing on that count, at which time defendant must be permitted to appear.

Insofar as it is reviewable on direct appeal, we have considered the claim of ineffective assistance of counsel set forth by defendant in appeal No. 1 and, viewing the evidence, the law, and the circumstances in totality and as of the time of representation, we conclude that he received meaningful representation (*see generally*

People v Baldi, 54 NY2d 137, 147 [1981]).

In appeal No. 2, we reject defendant's contention that County Court (Doran, J.) erred in denying his motion pursuant to CPL 440.10 without a hearing (*see generally People v Witkop*, 114 AD3d 1242, 1243 [4th Dept 2014], *lv denied* 23 NY3d 1069 [2014]). Inasmuch as a plea offer involving only misdemeanors was not authorized under the circumstances of this case (*see generally* CPL 220.10 [5] [d] [ii]; *People v Wheeler*, 159 AD3d 1425, 1425 [4th Dept 2018], *lv denied* 31 NY3d 1123 [2018]), defendant's contention that counsel was ineffective either in failing to secure for defendant a plea to misdemeanors that would not render him subject to mandatory deportation or in overstating the deportation consequences of a misdemeanor plea purportedly offered by the People is without merit (*see Wheeler*, 159 AD3d at 1425).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1127

KA 21-00328

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAJIER ABERGUT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BRADLEY E. KEEM, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Matthew J. Doran, J.), dated February 22, 2021. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Same memorandum as in *People v Abergut* ([appeal No. 1] — AD3d — [Feb. 4, 2022] [4th Dept 2022]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1132

CAF 20-01613

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

IN THE MATTER OF TEELA PARATORE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL PARATORE, MARLENE FOLEY AND
WALTER FOLEY, RESPONDENTS-RESPONDENTS.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-RESPONDENT MICHAEL PARATORE.

STEPHANIE R. DIGIORGIO, UTICA, FOR RESPONDENT-RESPONDENT MARLENE FOLEY.

DIANE MARTIN-GRANDE, ROME, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered November 19, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, determined a visitation schedule for petitioner to visit with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner mother appeals from an order that, inter alia, modified a prior order of custody and visitation, entered on consent of the parties, by setting a specific schedule for the mother's parenting time.

Contrary to the mother's sole contention on appeal, we conclude that Family Court's determination regarding her parenting time was supported by a sound and substantial basis in the record (*see generally Matter of Verne v Hamilton*, 191 AD3d 1433, 1434 [4th Dept 2021]; *Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). Although the mother contends that the parenting time schedule set by the court was too restrictive, the record establishes that the court's determination resulted from a "careful weighing of [the] appropriate factors" as applied to the circumstances of this case (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018] [internal quotation marks omitted]), and

the court explicitly provided that the mother's consistent exercise of the established parenting time would constitute a change in circumstances allowing her to seek modification of the order in the near future.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1136

CA 21-00546

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

IN THE MATTER OF THE ESTATE OF LEWIS DERRING, DECEASED.

---------- MEMORANDUM AND ORDER

GEORGE H. HUNDLEY, PETITIONER-RESPONDENT,

LOUIS J. COLELLA, RESPONDENT-APPELLANT.

LOUIS J. COLELLA, DANSVILLE, RESPONDENT-APPELLANT PRO SE.

KIRWAN LAW FIRM, P.C., SYRACUSE (ROBERT A. FEINBERG OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree (denominated order) of the Surrogate's Court, Seneca County (Barry L. Porsch, S.), entered February 25, 2021. The decree adjudged that the Last Will and Testament of Lewis Derring, dated November 6, 2014, be admitted to probate.

It is hereby ORDERED that the decree so appealed from is unanimously affirmed without costs.

Memorandum: We affirm for reasons stated at Surrogate's Court in the bench decision during the trial and by the Surrogate in his decree. We write only to note that, regardless of any inconsistent statements in the decree, the Surrogate concluded, as stated in the bench decision at trial, that petitioner met his burden of establishing due execution and testamentary capacity based on the will and the self-proving affidavit of the two attesting witnesses (*see Matter of Coughlin v Coughlin*, 147 AD3d 1485, 1485 [4th Dept 2017]; *Austin Harvard LLC v City of Canandaigua*, 141 AD3d 1158, 1159 [4th Dept 2016]; *Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546 [4th Dept 2014], *lv dismissed* 24 NY3d 998 [2014]). Thus, contrary to respondent's contention, the Surrogate did not rely on testimony from the SCPA 1404 hearing in reaching his determination.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1137

CA 20-00284

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

TIMOTHY BROWN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. ASKEW, DEFENDANT-RESPONDENT,
AND WELL TIMED TRANSPORT, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BARTH SULLIVAN BEHR, BUFFALO (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO LAW LLP, BUFFALO (JEANNA M. CELLINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICE OF JENNIFER S. ADAMS, WILLIAMSVILLE (REBECCA POSTEK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 22, 2019. The order denied the motion of defendant Well Timed Transport, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: Plaintiff Timothy Brown commenced a negligence action against defendant-plaintiff Jason E. Askew and defendant Well Timed Transport, Inc. (Well Timed), and Askew commenced a separate negligence action against Well Timed, each seeking to recover damages for injuries that he sustained in a multivehicle accident. The accident occurred in the afternoon on a section of Interstate 90 (I-90) westbound consisting of four driving lanes and an on-ramp/merging lane. After the on-ramp/merging lane expires, the rightmost lane of the four driving lanes becomes an off-ramp from I-90 headed toward another highway, thereby requiring any driver seeking to remain on I-90 to merge left before I-90 reduces to three through lanes. The speed limit on the subject portion of I-90 is 55 miles per hour. Askew drove down the on-ramp, merged into the rightmost lane, and then intended to merge left again into the right through lane in order to continue on I-90. Meanwhile, Brown, who was driving a tractor-trailer, was in the left-center lane, and a taxi for Well Timed was in the right-center through lane that would continue on I-90. It is undisputed that Askew began an attempt to merge into the right-center through lane but, ultimately, Askew's vehicle and the

Well Timed taxi collided. The Well Timed taxi then hit Brown's tractor-trailer, which in turn hit the center barrier of I-90. The Well Timed taxi also struck the barrier and came to rest against it. Brown and Askew allegedly sustained serious injuries, and the driver of the Well Timed taxi died.

In appeal No. 1, Well Timed appeals from an order that denied its motion for summary judgment dismissing Brown's complaint and Askew's cross claim against it. In appeal No. 2, Well Timed appeals from an order that denied its motion for summary judgment dismissing Askew's complaint. We affirm in each appeal.

Well Timed contends that Supreme Court erred in denying its motions because it established as a matter of law that it was not negligent and that Askew was the sole proximate cause of the accident. On its motions, Well Timed "had the initial burden of establishing as a matter of law either that [it] was not negligent or that any negligence on [its] part was not a proximate cause of the accident" (*Gilkerson v Buck*, 174 AD3d 1282, 1283 [4th Dept 2019]; *see Galletta v Delsorbo*, 188 AD3d 1641, 1642 [4th Dept 2020]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Viewing the evidence in the light most favorable to Brown and Askew and affording them the benefit of every reasonable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude in both appeals that Well Timed failed to meet that burden (*see Gilkerson*, 174 AD3d at 1283; *see generally Zuckerman*, 49 NY2d at 562).

Here, Well Timed submitted an accident reconstruction report and a police report that, along with the nonparty witness statements contained therein, support the conclusion that the Well Timed taxi was proceeding straight on I-90 in a nonnegligent manner when Askew negligently failed to observe the Well Timed taxi and then made an overcorrection and unsafe movements, thereby causing the accident. Well Timed's submissions, however, also contained differing versions of the accident that raise triable issues of fact regarding Well Timed's negligence (*see Fayson v Rent-A-Center E., Inc.*, 166 AD3d 1569, 1570 [4th Dept 2018]; *Bermejo v Khaydarov*, 155 AD3d 597, 598 [2d Dept 2017]). In particular, the excerpts of Brown's deposition testimony raise triable issues of fact whether Well Timed's driver drove in a negligent manner by unsafely passing Brown on the right (*see* Vehicle and Traffic Law § 1123 [b]; *Karash v Adetunji*, 56 AD3d 726, 726-727 [2d Dept 2008]) at a speed in excess of the limit and imprudent for the conditions in the area of the merging lanes (*see* Vehicle and Traffic Law § 1180 [a], [b]) and by then, in a failure to exercise reasonable care, deliberately blocking Askew from merging into the right through lane (*see Kadashev v Medina*, 134 AD3d 767, 768 [2d Dept 2015]).

Well Timed nonetheless contends that those portions of Brown's testimony—which it submitted in support of its own motions—are unreliable and speculative and thus insufficient to raise a triable issue of fact. That contention lacks merit. Initially, to the extent that Well Timed suggests that we should disregard Brown's version of

the accident as not credible, we reject that suggestion inasmuch as "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]; *see Rawls v Simon*, 157 AD3d 418, 419 [1st Dept 2018]). In any event, Brown's testimony was based on his personal observations of the accident, not speculation (*see Fayson*, 166 AD3d at 1570).

With respect to Brown's testimony regarding the speed of the Well Timed taxi, "a 'lay witness will ordinarily be permitted to testify as to the estimated speed of an automobile, based upon the prevalence of automobiles in our society, the frequency with which most people view them at various speeds and an adequate foundation that the witness has estimated the speed of automobiles on prior occasions' " (*Guthrie v Overmyer*, 19 AD3d 1169, 1170 [4th Dept 2005]). Here, the deposition transcript establishes that Brown's testimony that his tractor-trailer was traveling 55 miles per hour or lower, and that the Well Timed taxi was passing on the right at 5 to 6 mph faster than the tractor-trailer, was based on his years of experience. Even if we were to disregard Brown's numerical estimate of the Well Timed taxi's speed, we conclude that other evidence submitted by Well Timed, including the pre-crash data in the accident reconstruction report indicating that Brown's tractor-trailer was traveling 56.5 miles per hour immediately before braking and the unrefuted evidence that the Well Timed taxi was passing the tractor-trailer, raises a question of fact whether the Well Timed taxi was speeding past Brown as it approached the merge lanes in which the accident occurred.

In addition, contrary to Well Timed's assertion, the evidence that the Well Timed taxi may have deliberately prevented Askew from merging does, in fact, have a "factual or evidentiary basis" in the form of Brown's personal observations as recounted in his deposition testimony. Brown observed that Askew's vehicle and the Well Timed taxi were driving "neck and neck" for a couple of seconds and that Askew's vehicle was trying to merge left, but the Well Timed taxi "was not letting [Askew] in" and was "imped[ing Askew] from coming over," even though the Well Timed taxi could have slowed down and allowed Askew to merge. Based on those observations and his experience, Brown anticipated that an accident was imminent. We thus conclude that Brown's testimony raises an issue of fact whether Well Timed's driver was operating the taxi with reasonable care to avoid any collision (*see Kadashev*, 134 AD3d at 768).

We also note that Well Timed's submissions contain yet another version of the accident as conveyed by Askew. In particular, Askew maintained at his deposition that an unidentified red car cut him off, which caused him to swerve to avoid contact with that car, thereby leading his vehicle onto the shoulder and then into a spin, before the Well Timed taxi made contact with his vehicle. Although Askew's version of the accident is largely contrary to the accounts of the other witnesses, "[s]uch conflicting versions of how the accident occurred raise credibility issues, and[, again,] '[i]t is not the court's function on a motion for summary judgment to assess credibility' " (*Rawls*, 157 AD3d at 419). Under Askew's version of the

accident, there is a triable issue of fact "whether [the Well Timed driver] failed to see what was there to be seen and exercised reasonable care to avoid the collision" (*Bermejo*, 155 AD3d at 598).

Contrary to Well Timed's further contention, we conclude that Well Timed failed to meet its initial burden on its motions of establishing as a matter of law that Askew's negligence was the sole proximate cause of the accident (*see Luttrell v Vega*, 162 AD3d 1637, 1637 [4th Dept 2018]). Although Well Timed may have established that Askew's unsafe movements were, in the words of the accident reconstruction report, "*[a]* [p]rimary contributing factor in this collision" (emphasis added), "[t]he fact that [Askew] may have also been negligent does not absolve [Well Timed] of liability inasmuch as an accident may have more than one proximate cause" (*Zbock v Gietz*, 145 AD3d 1521, 1522-1523 [4th Dept 2016]; *see Dunkle v Vakoulich*, 173 AD3d 1662, 1663 [4th Dept 2019]). Here, for the reasons previously discussed, we conclude that there are triable issues of fact whether negligence on the part of Well Timed's driver was a proximate cause of the accident.

Based on the foregoing, we conclude that the court properly denied Well Timed's motions for summary judgment because it failed to make a prima facie showing of entitlement to judgment as a matter of law, thereby requiring denial of the motions "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1138

CA 20-00285

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

JASON E. ASKEW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WELL TIMED TRANSPORT, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BARTH SULLIVAN BEHR, BUFFALO (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JENNIFER S. ADAMS, WILLIAMSVILLE (REBECCA POSTEK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 22, 2019. The order denied the motion of defendant Well Timed Transport, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Same memorandum as in *Brown v Askew* ([appeal No. 1] — AD3d — [Feb. 4, 2022] [4th Dept 2022]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1139

CA 20-01354

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

MARI TUCKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KALOS HEALTH, INC., DOING BUSINESS AS KALOS HEALTH, AND KELLY TUCKER, DEFENDANTS-RESPONDENTS.

JACKSON & BALKIN, LOCKPORT (NICHOLAS D. D'ANGELO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (ANDREW S. HOLLAND OF COUNSEL), FOR DEFENDANT-RESPONDENT KALOS HEALTH, INC., DOING BUSINESS AS KALOS HEALTH.

MUSCATO, DI MILLO & VONA, L.L.P., LOCKPORT (GEORGE V.C. MUSCATO OF COUNSEL), FOR DEFENDANT-RESPONDENT KELLY TUCKER.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 8, 2020. The order and judgment, among other things, granted the motions of defendants to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages arising from the alleged disclosure by defendant Kelly Tucker (Tucker) of plaintiff's personal medical information, which was under the control of Tucker's employer, defendant Kalos Health, Inc., doing business as Kalos Health (Kalos). Plaintiff appeals from an order and judgment that, inter alia, granted defendants' respective motions pursuant to CPLR 3211 (a) (7) to dismiss the complaint against them. We affirm.

Contrary to plaintiff's contention, Supreme Court properly granted Kalos's motion insofar it sought dismissal of the second cause of action, for breach of fiduciary duty, against it (*see Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 482 [2014]).

We likewise reject plaintiff's contention that the court erred in granting Kalos's motion insofar as it sought dismissal of the third cause of action, for negligent retention and supervision. "A necessary element of a cause of action to recover damages for

negligent hiring, retention, or supervision is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury," and here the complaint failed to allege that Kalos knew or should have known of a propensity on the part of Tucker to commit the wrongful acts alleged in the complaint (*Shu Yuan Huang v St. John's Evangelical Lutheran Church*, 129 AD3d 1053, 1054 [2d Dept 2015] [internal quotation marks omitted]; *see generally White v Diocese of Buffalo, N.Y.*, 138 AD3d 1470, 1471 [4th Dept 2016]). Instead, the complaint alleges that Tucker's conduct was specifically directed at plaintiff for personal reasons.

We reject plaintiff's contention that defendants' motions should have been denied as premature in light of the need for further discovery inasmuch as plaintiff made no showing that "additional discovery would disclose facts essential to justify opposition to defendants' motion[s]" (*Spring v County of Monroe*, 151 AD3d 1694, 1696 [4th Dept 2017] [internal quotation marks omitted]).

By failing to raise a contention opposing the dismissal of any other aspect of her complaint, plaintiff has abandoned any further challenge to the court's order and judgment (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1141

CA 20-01216

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

TECHNOLOGY INSURANCE COMPANY, INC., AS REINSURER AND SUCCESSOR TO TOWER NATIONAL INSURANCE COMPANY, AND ROGER S. AUMICK, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MAIN STREET AMERICA ASSURANCE COMPANY, DEFENDANT-APPELLANT, DARRIUS OUTLING, DOING BUSINESS AS KRISPIE KUTS, DEFENDANT, ET AL., DEFENDANTS.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (JOSEPH M. SCHNITTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (BRIAN D. BARNAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 2, 2020. The judgment granted the motion of plaintiffs for summary judgment, denied the cross motion of defendant-appellant for summary judgment, declared that defendant-appellant is obligated to defend and indemnify plaintiff Roger S. Aumick in an underlying action, declared that plaintiff Technology Insurance Company, Inc., as reinsurer and successor to Tower National Insurance Company, is entitled to attorney's fees and declared that the coverage provided by defendant-appellant is primary and non-contributory.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Technology Insurance Company, Inc., as reinsurer and successor to Tower National Insurance Company (plaintiff), issued an insurance policy to plaintiff Roger S. Aumick covering certain property Aumick owns. Main Street America Assurance Company (defendant) issued a policy to Aumick's tenant, defendant Darrius Outling, doing business as Krispie Kuts, who operated a barbershop on the premises. The policy named Aumick as an additional insured.

In February 2014, a patron of Outling's barbershop tripped on a snow-covered hole in the driveway while walking from the shop to his vehicle. The patron commenced a personal injury action against

Outling and Aumick (underlying action), and plaintiffs thereafter commenced this action seeking, inter alia, declarations that defendant is required to defend and indemnify Aumick in the underlying action and that defendant's policy provides coverage for Aumick on a primary and non-contributory basis. Plaintiffs moved for summary judgment on the complaint, and defendant cross-moved for summary judgment declaring that its policy does not afford coverage to Aumick. Supreme Court granted plaintiffs' motion, denied defendant's cross motion, and declared, as relevant here, that defendant is obligated to defend and indemnify Aumick in the underlying action, that its policy provided coverage to Aumick on a primary and non-contributory basis, and that plaintiff's policy provides excess coverage to Aumick with respect to the patron's claim. Defendant appeals, and we now affirm.

We reject defendant's contention that the court erred in granting that part of plaintiffs' motion seeking a declaration that defendant was obligated to defend and indemnify Aumick. In disputes over insurance coverage, we must look to the language of the policy (*see Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005], *rearg denied* 5 NY3d 825 [2005]). Here, the additional insured endorsement in the policy that defendant issued to Outling provided coverage to Aumick as an additional insured "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [Outling]." The policy further provided that defendant would indemnify the insureds in actions regarding covered incidents, including suits arising from bodily injury. The term " 'arising out of' " means " 'originating from, incident to, or having connection with' " (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]). It "requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Maroney*, 5 NY3d at 472).

In support of their motion, plaintiffs submitted the lease agreement between Aumick and Outling, pursuant to which Outling was responsible for the removal of snow and ice from the driveway. Plaintiff further submitted the injured patron's deposition testimony that he did not see the hole partly because it was covered with snow. Moreover, based on the record before us, the lease agreement provided Outling with the ability to use the driveway. Indeed, the driveway "was necessarily used for access in and out of [the barbershop] and was thus, by implication, 'part of the . . . premises' that [Outling] was licensed to use under the parties' [lease]" (*ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990, 991 [1997]; *see Tower Ins. Co. of N.Y. v Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510, 510 [1st Dept 2015]). Thus, plaintiffs established from the lease agreement that the use of the driveway was included in the scope of the leased premises (*see generally Pixley Dev. Corp. v Erie Ins. Co.*, 174 AD3d 1415, 1417 [4th Dept 2019]; *Tower Ins. Co. of N.Y.*, 134 AD3d at 510). Because plaintiffs established that there was a causal relationship between the injury and the risk for which coverage was provided, Aumick is entitled to a defense and indemnification as an additional insured. We further conclude that defendant failed to raise an issue of fact

with respect to the applicability of its policy on the ground that the injury was caused by a structural defect in the condition of the driveway inasmuch as the focus of the inquiry here "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*Regal Constr. Corp.*, 15 NY3d at 38 [internal quotation marks omitted]).

We further conclude that the court did not err in granting that part of the motion seeking a declaration that defendant's coverage of Aumick in the underlying personal injury action is primary and non-contributory. In determining whether defendant's policy provides primary or excess coverage, we must examine the "other insurance" clauses in the policies issued by defendant and plaintiff (*see generally Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]; *Public Serv. Mut. Ins. Co. v Nova Cas. Co.*, 177 AD3d 472, 473 [1st Dept 2019]). Here, each policy provided that its coverage was excess over "[a]ny other insurance that insures for direct physical loss or damage; or . . . [a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

Construing defendant's policy as a whole (*see generally New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567 [4th Dept 2010]), we conclude, contrary to defendant's contention, that the first section of the relevant "other insurance" provision does not apply here inasmuch as the phrase "[a]ny other insurance that insures for direct physical loss or damage" refers to property damage, not liability coverage for bodily injury (*see Jones Mem. Hosp. v Main St. Am. Assur. Co.*, 200 AD3d 1636, 1639 [4th Dept 2021]). With respect to the second part of the provision, we conclude that the patron's damages arose out of the premises for which Aumick was a named additional insured, and thus defendant's policy provides primary coverage to Aumick, and plaintiff's coverage was excess (*see Jones Mem. Hosp.*, 200 AD3d at 1639-1640; *see also Tower Ins. Co. of N.Y.*, 134 AD3d at 510-511).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1145

KA 19-00698

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELUID MANSO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered January 29, 2019. The judgment convicted defendant upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]), defendant contends that he did not validly waive his right to appeal and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Hemphill*, 192 AD3d 1479, 1480 [4th Dept 2021]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1151

KA 19-01736

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRIK STYLES, DEFENDANT-APPELLANT.

IRA M. PESSERILO, SYRACUSE, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 23, 2019. The judgment convicted defendant upon a plea of guilty of attempted promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]), defendant contends that defense counsel was ineffective for failing to communicate with him and for failing to consider a possible psychiatric defense. We affirm.

Initially, we note that the documents submitted in support of defendant's CPL 440.10 motion are not properly part of the record before us because defendant did not obtain leave to appeal from the denial of that motion (*see People v Rodriguez*, 115 AD3d 580, 581 [1st Dept 2014], *lv denied* 23 NY3d 967 [2014]; *cf. People v Fuller*, 124 AD3d 1394, 1395 [4th Dept 2015], *lv denied* 25 NY3d 989 [2015]).

Defendant's contention that he "was denied effective assistance of counsel survives his plea 'only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[']s allegedly poor performance' " (*People v Rivera*, 195 AD3d 1591, 1591 [4th Dept 2021], *lv denied* 37 NY3d 995 [2021]; *see People v Molski*, 179 AD3d 1540, 1540-1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]). Here, the plea transcript demonstrates that, although defendant was dissatisfied with the limited communication between himself and defense counsel, he was firm in his decision to accept the plea offer—which was favorable—and he did not desire any further communication with defense counsel. Moreover, although there were

brief and unspecific references to defendant's mental health issues prior to the plea proceeding, defendant stated that he was "fully alert" at the time of the plea and that he understood the proceedings against him.

Finally, to the extent that defendant's contention is based upon off-the-record communications between defendant and defense counsel, it is properly the subject of a CPL article 440 motion (*see People v Jones*, 147 AD3d 1521, 1521-1522 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]; *People v Rausch*, 126 AD3d 1535, 1536 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

29

KA 16-02194

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY L. YOUNGBLOOD, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

TONY L. YOUNGBLOOD, JR., DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 3, 2015. The judgment convicted defendant upon a jury verdict of attempted aggravated murder (three counts) and unlawful imprisonment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences imposed for attempted aggravated murder under counts one through three of the indictment shall run concurrently with respect to each other, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]; [b]) and one count of unlawful imprisonment in the first degree (§ 135.10). Defendant's conviction stems from his conduct in firing a shotgun at police officers while inside his girlfriend's home and not allowing the girlfriend's daughter to leave the home. We reject defendant's contention in his pro se supplemental brief that the evidence is legally insufficient. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant, with the intent to cause the deaths of police officers engaged in the course of performing their official duties, engaged in conduct that tended to effect the commission of those crimes, and that defendant knew or reasonably should have known that they were police officers (*see* §§ 110.00, 125.26 [1] [a] [i]; *see generally People v Badger*, 90 AD3d 1531, 1532-1533 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]). The testimony of the three officers and

other evidence established that the officers announced their presence before entering the home, whereupon defendant fired a shotgun in the direction of one officer who was inside the house and then fired the shotgun from upstairs at two officers who were standing outside. Defendant's intent to kill the police officers can be reasonably inferred from his conduct (*see People v Rouse*, 34 NY3d 269, 274-275 [2019]; *People v Milbank*, 187 AD2d 459, 460 [2d Dept 1992]). In addition, the evidence is also legally sufficient to establish that the girlfriend's daughter was unlawfully imprisoned. Contrary to defendant's contention in his main brief, viewing the evidence in light of the elements of the crime of attempted aggravated murder as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention in his main brief that he was denied effective assistance of counsel. Defendant failed to establish the absence of a strategic or other legitimate explanation for defense counsel's failure to request a lesser included offense (*see People v Spencer*, 183 AD3d 1258, 1259-1260 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *see generally People v Rivera*, 71 NY2d 705, 709 [1988]) and failure to request a missing witness instruction with respect to defendant's girlfriend (*see People v Shepard*, 171 AD3d 951, 952 [2d Dept 2019]; *People v Myers*, 87 AD3d 826, 828 [4th Dept 2011], *lv denied* 17 NY3d 954 [2011]).

We agree with defendant's contention in his main brief that the sentence is unduly harsh and severe. Although defendant's crimes were undoubtedly serious and could easily have resulted in death or injury to the officers, no one was injured or killed during the shootout. We conclude that the de facto life sentence without parole is not warranted here. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences on the counts of attempted aggravated murder shall run concurrently with each other (*see generally* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

30

KA 19-01656

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER E. MCCREA, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 11, 2019. The judgment convicted defendant upon a jury verdict of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the evidence is legally insufficient to support the conviction inasmuch as the People failed to establish that he intended to prevent a police officer from performing a lawful duty. Defendant failed to preserve his contention for our review because his motion for a trial order of dismissal was not specifically directed at the ground advanced on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Townsley*, 50 AD3d 1610, 1611 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]). In any event, we conclude that the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The sentence is not unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

31

KAH 20-01014

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. BENJAMIN WELIKSON, ESQ., ON BEHALF OF DAWSON SHARPE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

S. CRONIN, SUPERINTENDENT GROVELAND CORRECTIONAL FACILITY, AND ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

PATRICIA PAZNER, NEW YORK CITY (BENJAMIN WELIKSON OF COUNSEL)), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an amended judgment (denominated amended order) of the Supreme Court, Livingston County (Thomas E. Moran, J.), entered June 23, 2020 in a habeas corpus proceeding. The amended judgment dismissed the petition.

It is hereby ORDERED that the amended judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this habeas corpus proceeding seeking the immediate release of Dawson Sharpe from the custody of the New York State Department of Corrections and Community Supervision (DOCCS) on the ground, inter alia, that he was being unlawfully held beyond the date of his conditional release upon a request from United States Immigration and Customs Enforcement (ICE) officials. Before the return date of the writ, Sharpe was released from DOCCS's custody to ICE's custody. Supreme Court dismissed the petition as moot. Contrary to petitioner's contention, the court did not improvidently exercise its discretion in declining to invoke the exception to the mootness doctrine (*see Matter of Kirkland v Annucci*, 150 AD3d 736, 738 [2d Dept 2017], *lv denied* 29 NY3d 918 [2017]). The exception to the mootness doctrine applies where the issue to be decided "(1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see City of New York v Maul*, 14 NY3d 499, 507 [2010]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). While we agree with petitioner that the issue raised here will typically evade review in the courts,

the issue raised is not novel. Indeed, the Second Department addressed this precise issue and concluded that "New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violations" (*People ex rel. Wells v DeMarco*, 168 AD3d 31, 34 [2d Dept 2018]), and that it is unlawful to retain a prisoner, who would otherwise be released, pursuant to an ICE detainer (*see id.* at 53). In addition, the issue is not likely to recur given respondents' concession on appeal that "DOCCS now acknowledges that, under . . . [*Wells*], it may not detain an individual solely to facilitate a transfer to federal immigration officials seeking to effectuate a final order of removal."

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

32

KA 18-01099

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN FRANCOIS, JR., DEFENDANT-APPELLANT.

LELAND D. MCCORMAC, III, INTERIM PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered December 18, 2017. The judgment convicted defendant, upon a plea of guilty, of attempted murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Defendant's challenges to the voluntariness of his guilty plea are without merit (*see People v Ashley*, 71 AD3d 1286, 1287 [3d Dept 2010], *affd* 16 NY3d 725 [2011]; *People v Miller*, 126 AD3d 1233, 1234-1235 [3d Dept 2015], *lv denied* 25 NY3d 1168 [2015]; *People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]). Moreover, although the People correctly concede that defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

33

KA 17-00966

PRESENT: WHALEN, P.J., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY JENNINGS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

TONY JENNINGS, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 8, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). The conviction arises from a police encounter during which officers approached a parked vehicle in which defendant, one of the two occupants, was sitting in the driver’s seat. The encounter resulted in the recovery of, inter alia, cocaine and cash from defendant’s person, as well as a digital scale with drug residue from inside his vehicle.

Defendant contends in his main and pro se supplemental briefs that the police lacked reasonable suspicion to justify the seizure of the vehicle, and therefore County Court erred in refusing to suppress both the physical property seized from defendant and the vehicle, as well as inculpatory statements made by defendant during booking following his arrest. We agree. Initially, we conclude that the police officers effectively seized defendant’s vehicle when they

parked their patrol vehicle in such a manner that, for all practical purposes, prevented defendant from driving his vehicle away (*see People v Jennings*, 45 NY2d 998, 999 [1978]; *People v Suttles*, 171 AD3d 1454, 1455 [4th Dept 2019]; *People v Layou*, 71 AD3d 1382, 1383 [4th Dept 2010]). Furthermore, we conclude that the People did not have "reasonable suspicion that defendant had committed, was committing, or was about to commit a crime" to justify their seizure of the vehicle inasmuch as the seizure was based only on defendant's presence in a vehicle parked in a high crime area, and on the police officers' observation of furtive movements inside the vehicle (*Layou*, 71 AD3d at 1383; *see People v Williams*, 191 AD3d 1495, 1498 [4th Dept 2021]; *People v Morrison*, 161 AD2d 608, 609 [2d Dept 1990]).

In light of the foregoing, we conclude that the seizure of defendant and his vehicle was unlawful and that, as a result, the physical evidence seized by the police and the statements made by defendant to the police following the unlawful seizure should have been suppressed. Consequently, the judgment must be reversed and, "because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed" (*Suttles*, 171 AD3d at 1455 [internal quotation marks omitted]; *see People v Lopez*, 149 AD3d 1545, 1548 [4th Dept 2017]; *People v Lee*, 110 AD3d 1482, 1484 [4th Dept 2013]).

In light of our determination, we do not address the remaining contentions in defendant's main and pro se supplemental briefs.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

36

CAF 20-00712

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARIANA F.F. AND SERENITY R.F.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ROBERT E.F., SR., AND TARA M.L.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT ROBERT E.F., SR.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT TARA M.L.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeals from an amended order of the Family Court, Livingston County (Barry L. Porsch, A.J.), entered December 5, 2019 in a proceeding pursuant to Family Court Act article 10. The amended order adjudged that respondents had severely abused, abused, and neglected the subject children.

It is hereby ORDERED that said appeals are unanimously dismissed without costs.

Memorandum: In appeal No. 1, respondent father and respondent mother appeal from an amended order of fact-finding entered pursuant to Family Court Act article 10 determining that Ariana F.F. is a severely abused, abused, and neglected child and determining that Serenity R.F. is a derivatively severely abused, derivatively abused, and neglected child. In appeal No. 2, the father appeals from an order granting the motion of petitioner, Livingston County Department of Social Services (DSS), that reasonable efforts are not required to reunify respondents with the subject children. In appeal No. 3, the mother appeals from the dispositional order in the article 10 proceeding that, inter alia, continued placement of the children in the custody of DSS. In appeal No. 4, respondents appeal from an order pursuant to Social Services Law § 384-b that, inter alia, terminated their parental rights and freed the subject children for adoption.

As a preliminary matter, respondents' right of direct appeal from

the amended order of fact-finding in appeal No. 1 and the father's right of direct appeal from the order in appeal No. 2 terminated with the entry of the order of disposition in appeal No. 3, and we therefore dismiss appeal Nos. 1 and 2 (*see Matter of Anthony W. [Anthony W.]*, 200 AD3d 1596, 1596 [4th Dept 2021]). The mother's appeal from the dispositional order in appeal No. 3 brings up for review the propriety of the amended order in appeal No. 1 (*see Matter of Bryleigh E.N. [Derek G.]*, 187 AD3d 1685, 1685 [4th Dept 2020]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]). The father, however, did not appeal from the dispositional order. We exercise our discretion to treat the father's notice of appeal from the amended fact-finding order in appeal No. 1 as a valid notice of appeal from the dispositional order in appeal No. 3 (*see* CPLR 5520 [c]; *Matter of Hunter K. [Robin K.]*, 142 AD3d 1307, 1308 [4th Dept 2016]). The dispositional order also brings up for review the intermediate order in appeal No. 2 (*see generally Matter of Alaysha M. [Agustin M.]*, 89 AD3d 1467, 1467 [4th Dept 2011]).

With respect to appeal No. 3, we reject respondents' contentions that Family Court erred in determining that they severely abused Ariana and derivatively severely abused Serenity. The abuse allegations came to light after the mother, angry with the father regarding his interaction with other women, left the home and went to a police station, where she reported that the father physically abused her and had sexually abused Ariana for several years. Regarding one incident, the mother told the police that she bathed Ariana pursuant to the father's direction before she had Ariana lie naked next to the father in his bed. She then watched as the father "dry humped" the child. The mother also said that she had seen the two lying naked next to each other. The mother said that the father admitted that he had sex with Ariana. The mother also reported an incident from the previous evening where respondents and the subject children were in bed together, and she believed that the father had sex with Ariana because she felt the bed rocking. Petitioner also presented the testimony of a medical examiner that Ariana had findings on her examination that were consistent with a child who had been sexually abused. In addition, a forensic interviewer testified that Ariana disclosed that the father touched his penis to her vagina while they were both naked. Respondents failed to testify, and the court properly drew the strongest possible negative inferences against them based on that failure (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]; *Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644 [4th Dept 2019]; *Matter of Chelsey B. [Michael W.]*, 89 AD3d 1499, 1500 [4th Dept 2011], *lv denied* 18 NY3d 807 [2012]).

We conclude that DSS established by clear and convincing evidence that the father committed the felony sex crime of sexual abuse in the first degree (Penal Law § 130.65 [3]) and thereby established that Ariana was severely abused by him (*see* Family Ct Act §§ 1012 [e] [iii] [A]; 1046 [b] [ii]; 1051 [e]; Social Services Law § 384-b [8] [a] [ii]; *Bryleigh E.N.*, 187 AD3d at 1685-1686; *Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]). Further, DSS established by clear and convincing evidence that the mother

"knowingly allowed" to be committed the felony sex crime of sexual abuse in the first degree and thereby established that Ariana was severely abused by the mother (Social Services Law § 384-b [8] [a] [ii]; *see* Family Ct Act § 1012 [e] [iii] [A]; *Matter of Ronan L. [Jeana K.]*, 195 AD3d 1072, 1075-1076 [3d Dept 2021]; *Matter of Destiny C. [Goliath C.]*, 127 AD3d 1510, 1512-1513 [3d Dept 2015], *lv denied* 25 NY3d 911 [2015]). The " 'determination of Family Court is entitled to great weight and should not be disturbed unless clearly unsupported by the record' " (*Chelsey B.*, 89 AD3d at 1500), and that is not the case here. The court also properly found that respondents derivatively severely abused Serenity (*see id.*; *see generally Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]).

We reject respondents' further contentions in appeal No. 3 that the court erred in failing to require reasonable efforts to reunite the children with them. "Pursuant to Family Court Act § 1039-b, the Family Court may relieve an agency of its obligation to make diligent efforts to reunite a parent and child where the parent has subjected the child to [severe abuse or] derivative severe abuse" (*Matter of Aliah J. [Candice J.]*, 174 AD3d 898, 900 [2d Dept 2019], *lv dismissed in part and denied in part* 35 NY3d 1104 [2020]; *see* §§ 1012 [j]; 1039-b [b] [1]), "and the parent fails to demonstrate that, despite the severe abuse, 'reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future' " (*Aliah J.*, 174 AD3d at 900, quoting § 1039-b [b]; *see Marino S.*, 100 NY2d at 369-370, 372; *Ronan L.*, 195 AD3d at 1076). Here, as noted, DSS established by clear and convincing evidence that respondents subjected Ariana to severe abuse and subjected Serenity to derivative severe abuse, and respondents failed to meet their burden of establishing that reasonable efforts would be in the best interests of the children, would not be contrary to the children's health and safety, and would likely result in the reunification of respondents and the children in the foreseeable future (*see Aliah J.*, 174 AD3d at 900; *Matter of Sasha M.*, 43 AD3d 1401, 1402 [4th Dept 2007]).

We have considered the father's remaining contentions in appeal No. 3 and conclude that they are without merit.

With respect to appeal No. 4, we reject respondents' contentions that the court erred in terminating their parental rights instead of issuing a suspended judgment. Upon a finding pursuant to Social Services Law § 384-b (8) (a) that a child has been severely abused by his or her parent, "the court shall enter an order of disposition either (i) committing the guardianship and custody of the child, pursuant to this section, or (ii) suspending judgment . . . upon a further finding, based on clear and convincing, competent, material and relevant evidence introduced at a dispositional hearing, that the best interests of the child require such commitment or suspension of judgment" (§ 384-b [8] [f]). We agree with the court that it was in the best interests of the children to terminate respondents' parental rights and not to issue a suspended judgment (*see Matter of Aliah*

M.J.-N. [Candice J.—Anna J.], 182 AD3d 557, 559-560 [2d Dept 2020]; *Matter of Vivienne Bobbi-Hadiya S. [Makena Asanta Malika McK.]*, 126 AD3d 545, 547 [1st Dept 2015], *lv denied* 25 NY3d 909, 1064 [2015]; *Matter of Alicia EE. [Adam FF.]*, 86 AD3d 663, 664 [3d Dept 2011], *lv denied* 17 NY3d 713 [2011]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

37.1
CAF 20-00817
PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARIANA F. AND SERENITY F.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

ROBERT F., RESPONDENT,
AND TARA L., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Barry L. Porsch, A.J.), entered January 27, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject children in the custody of petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Ariana F.F. (Robert E.F., Sr.-Tara M.L.)* ([appeal No. 1] — AD3d — [Feb. 4, 2022] [4th Dept 2022]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

37

CAF 20-00713

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARIANA F. AND SERENITY F.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ROBERT F., RESPONDENT-APPELLANT,
AND TARA L., RESPONDENT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Barry L. Porsch, A.J.), entered January 27, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, granted that part of petitioner's motion requesting that reasonable efforts are not required to reunify respondent with the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Matter of Ariana F.F. (Robert E.F., Sr.-Tara M.L.)* ([appeal No. 1] — AD3d — [Feb. 4, 2022] [4th Dept 2022]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

38

CAF 20-00715

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARIANA F. AND SERENITY F.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TARA L., AND ROBERT F., RESPONDENTS-APPELLANTS.
(APPEAL NO. 4.)

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT TARA L.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT ROBERT F.

ASHLEY J. WEISS, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Livingston County (Barry L. Porsch, A.J.), entered April 20, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights and freed the subject children for adoption.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Ariana F.F. (Robert E.F., Sr.-Tara M.L.)* ([appeal No. 1] — AD3d — [Feb. 4, 2022] [4th Dept 2022]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

44

CA 21-00402

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF BERNICE CURRY-MALCOLM,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
RESPONDENT,
HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT,
RUSH-HENRIETTA CENTRAL SCHOOL DISTRICT,
ROCHESTER CITY SCHOOL DISTRICT, ASSOCIATION
OF SUPERVISORS AND ADMINISTRATORS OF
ROCHESTER, AND BROWN HUTCHINSON LLP,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

BERNICE CURRY-MALCOLM, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENT NEW YORK STATE TEACHERS' RETIREMENT SYSTEM.

FERRARA, FIORENZA PC, EAST SYRACUSE (MILES G. LAWLOR OF COUNSEL), FOR RESPONDENTS-RESPONDENTS HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT AND RUSH-HENRIETTA CENTRAL SCHOOL DISTRICT.

STEVEN G. CARLING, ACTING GENERAL COUNSEL, ROCHESTER CITY SCHOOL DISTRICT, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR RESPONDENT-RESPONDENT ROCHESTER CITY SCHOOL DISTRICT.

ARTHUR P. SCHEUERMANN, GENERAL COUNSEL, SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE, LATHAM (JENNIFER L. CARLSON OF COUNSEL), FOR RESPONDENT-RESPONDENT ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS OF ROCHESTER.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY CAMPBELL OF COUNSEL), FOR RESPONDENT-RESPONDENT BROWN HUTCHINSON LLP.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered August 4, 2020 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the pre-answer motions to dismiss the petition brought by respondents Honeoye Falls-Lima Central School District, Rush-Henrietta Central School District, Rochester City School District, Association of Supervisors and Administrators of Rochester, and Brown Hutchinson LLP.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

45

CA 21-00771

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF BERNICE CURRY-MALCOLM,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
RESPONDENT-RESPONDENT,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

BERNICE CURRY-MALCOLM, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered December 8, 2020 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition against respondent New York State Teachers' Retirement System.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

53

KA 20-00294

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEZIRAE J. MARTIN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered October 30, 2019. The judgment convicted defendant, upon a plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of burglary in the third degree (Penal Law § 140.20), defendant contends that her waiver of the right to appeal is unenforceable and that her sentence is unduly harsh and severe. As the People correctly concede, the waiver of the right to appeal is invalid because County Court "mischaracterized it as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), especially in light of the fact that defendant has already completed the jail portion of her sentence and has been released to probation.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

64

CA 20-00763

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

LANCASTER MANOR LLC AND LANCASTER MANOR REALTY, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COMPREHENSIVE AT LANCASTER, LLC, DOING BUSINESS AS SYMPHONY MANOR AT LANCASTER, BROADWAY LANCASTER REALTY, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

COMPREHENSIVE AT LANCASTER, LLC, DOING BUSINESS AS SYMPHONY MANOR AT LANCASTER, AND BROADWAY LANCASTER REALTY, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

NEIL ZYSKIND, MARY AGNES MANOR, LLC, MARY AGNES MANOR MANAGEMENT, LLC, MARY AGNES MANOR REALTY, LLC, LANCASTER MANOR LLC, LANCASTER MANOR REALTY, LLC, THIRD-PARTY DEFENDANTS-RESPONDENTS, ET AL., THIRD-PARTY DEFENDANTS.

SCHLOSS & SCHLOSS, AIRMONT (JONATHAN B. SCHLOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

LAZARUS & LAZARUS, P.C., NEW YORK CITY (YVETTE J. SUTTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS AND THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered May 14, 2020. The order, among other things, granted in part the motion of third-party defendants-respondents to dismiss the third-party complaint as against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion with respect to the fourth cause of action and reinstating that cause of action, and as modified the order is affirmed without costs.

Memorandum: In this dispute arising from operation and purchase agreements involving an adult care facility, defendants-third-party plaintiffs Comprehensive at Lancaster, LLC, doing business as Symphony Manor at Lancaster, and Broadway Lancaster Realty, LLC (collectively,

Comprehensive plaintiffs) appeal from an order that, inter alia, granted in part the motion of third-party defendants-respondents to dismiss the third-party complaint pursuant to CPLR 3211 (a) (7). Preliminarily, although plaintiffs-third-party defendants Lancaster Manor LLC and Lancaster Manor Realty, LLC filed a notice of cross appeal, they do not raise any contentions related thereto, and we therefore deem the cross appeal abandoned and dismissed (*see* 22 NYCRR 1250.10 [a]; *Brown v State of New York* [appeal No. 2], 144 AD3d 1535, 1537 [4th Dept 2016], *affd* 31 NY3d 514 [2018]). As the Comprehensive plaintiffs contend on their appeal and third-party defendants-respondents correctly concede, Supreme Court erred in granting that part of the motion seeking to dismiss the fourth cause of action for attorneys' fees (*see generally Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). We therefore modify the order accordingly. We have considered the Comprehensive plaintiffs' remaining contentions and conclude that none warrants reversal or further modification of the order.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

65

CA 20-01221

PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF APPLICATION OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V ORDER

JACK D., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 22, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 17, 2021,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

86

KA 19-01964

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. JACKSON, JR., DEFENDANT-APPELLANT.

THE FOTI LAW FIRM, ROCHESTER (NEIL GUNTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 4, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Preliminarily, we agree with defendant that the record does not establish that he validly waived his right to appeal. Supreme Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant's contention that the court erred by failing to conduct a minimal inquiry into his request for substitution of counsel "is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]; *see People v Harris*, 182 AD3d 992, 994 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]). To the extent that defendant's contention implicates the voluntariness of the plea, it

lacks merit. Defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Morris*, 183 AD3d 1254, 1255 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]). Rather, defendant made only " 'vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense' " (*People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]) and "conclusory assertions that he and defense counsel disagreed about . . . strategy" (*People v Brady*, 192 AD3d 1557, 1558 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). In any event, we conclude that the court "conducted the requisite 'minimal inquiry' to determine whether substitution of counsel was warranted" (*People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018], quoting *People v Sides*, 75 NY2d 822, 825 [1990]). The record establishes that the court "allowed defendant to air his concerns about defense counsel, and . . . reasonably concluded that defendant's vague and generic objections had no merit or substance" (*People v Linares*, 2 NY3d 507, 511 [2004]), and "properly concluded that defense counsel was 'reasonably likely to afford . . . defendant effective assistance' of counsel" (*People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], quoting *People v Medina*, 44 NY2d 199, 208 [1978]; *see Chess*, 162 AD3d at 1579).

Although defendant's challenge to the court's refusal to suppress tangible evidence survives his guilty plea (*see* CPL 710.70 [2]; *People v Poole*, 55 AD3d 1354, 1355 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]), defendant's challenge is "not preserved for our review inasmuch as he failed to raise th[e] specific contention [he now advances on appeal] in his motion papers, at the suppression hearing, or in his posthearing papers as a ground for suppression" (*People v Burden*, 191 AD3d 1260, 1261 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *see* CPL 470.05 [2]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Burden*, 191 AD3d at 1261).

Finally, defendant contends that he was denied effective assistance of counsel, which rendered his plea involuntary, because defense counsel failed to advise him of his right to testify at the suppression hearing. Defendant's contention survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[']s allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]). Here, however, defendant's contention "is based primarily on matters outside the record and must be raised pursuant to a CPL 440.10 motion" (*People v Richards*, 177 AD3d 1280, 1282 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]; *see People v Balenger*, 70 AD3d 1318, 1318 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received an advantageous

plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]; *see Spencer*, 170 AD3d at 1615).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

87

KA 16-00386

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERROD L. HUNTER, DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 3, 2016. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]) and criminal possession of a weapon in the third degree ([CPW 3d] § 265.02 [1]). Contrary to defendant's contention, there was no defect in the grand jury proceedings. Even assuming, arguendo, that the grand jurors saw a document referencing defendant's prior conviction that was used to refresh the recollection of a witness, we note that one of the elements of CPW 3d is that the defendant "has been previously convicted of any crime" (*id.*). Where, as here, "a prior conviction elevates an offense, it is not an improper procedure to present proof of the prior conviction to the [g]rand [j]ury along with the remainder of the evidence concerning the defendant's alleged commission of the offense" (*People v Adorno*, 216 AD2d 686, 687 [3d Dept 1995], *lv denied* 86 NY2d 839 [1995]; *see People v Murray*, 163 AD3d 1000, 1000-1001 [2d Dept 2018], *lv denied* 32 NY3d 1208 [2019]). To the extent defendant contends that Supreme Court erred in denying his CPL 440.10 motion, that contention is not properly before us inasmuch as defendant "did not obtain leave to appeal" the denial of that motion (*People v Acosta*, 19 AD3d 1041, 1041 [4th Dept 2005], *lv denied* 5 NY3d 803 [2005]; *see People v Fuller*, 124 AD3d 1394, 1395 [4th Dept 2015], *lv denied* 25 NY3d 989 [2015]).

Defendant further contends that he was denied effective

assistance of counsel based on defense counsel's failure to secure medical expert testimony regarding the nature of the victim's injuries. "It is well established that, '[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to' call such a witness" (*People v Burgos*, 90 AD3d 1670, 1670 [4th Dept 2011], *lv denied* 19 NY3d 862 [2012], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Barbuto*, 126 AD3d 1501, 1504 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). Defendant failed to do so (*see Barbuto*, 126 AD3d at 1504). Moreover, defendant failed to demonstrate "that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence" (*People v Smith*, 126 AD3d 1528, 1530-1531 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016] [internal quotation marks omitted]). We have considered defendant's remaining allegation of ineffective assistance of counsel and conclude that it does not warrant reversal or modification of the judgment.

Finally, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction of attempted murder in the second degree and assault in the first degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

93

KA 21-00341

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES HUMPHREY, DEFENDANT-APPELLANT.

RONALD S. NIR, KEW GARDENS, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 28, 2020. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress physical evidence seized from defendant's residence during the execution of a search warrant. We reject that contention.

"It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016], citing *People v Mercado,* 68 NY2d 874, 875-876 [1986], *cert denied* 479 US 1095 [1987], and *People v Bigelow*, 66 NY2d 417, 423 [1985]). "Affording great deference to the determination of the issuing Magistrate and reviewing the application 'in a common-sense and realistic fashion' " (*People v Park*, 266 AD2d 913, 913 [4th Dept 1999]), we conclude that the search warrant was supported by probable cause.

Relying on the information obtained from an anonymous source, law enforcement officials lawfully secured multiple bags of garbage from a garbage tote at the end of a driveway on two occasions (*see People v Ramirez-Portoreal*, 88 NY2d 99, 112-113 [1996]; *People v Crump*, 125 AD3d 999, 1000 [2d Dept 2015], *lv denied* 25 NY3d 1162 [2015], *cert*

denied 577 US 978 [2015]; *People v Harris*, 83 AD3d 1220, 1221-1222 [3d Dept 2011], *lv denied* 17 NY3d 817 [2011]). At the time of each "trash pull," defendant's vehicle was in the driveway. In multiple bags, white residue and narcotics packaging materials were found. The residue taken from the bags secured on both dates was field-tested and yielded a positive reaction for the presence of cocaine. In addition, evidence obtained as a result of those "trash pulls" linked defendant to that address. Even assuming, arguendo, that the information obtained from the anonymous source was not reliable, we conclude that "the evidence in defendant's trash of illegal activity, *even standing alone*, was sufficient to support a reasonable belief that drugs and/or evidence of drug sales might be found in defendant's [residence]" (*Harris*, 83 AD3d at 1222 [emphasis added]; *see United States v Leonard*, 884 F3d 730, 734-735 [7th Cir 2018]) and to support the issuance of the search warrant. "While one search turning up [narcotics] in the trash might be a fluke, two indicate a trend. Whether it be a particularly large quantity of drugs . . . or multiple positive tests of different trash pulls within a fairly short time, both tend to 'suggest[ ] repeated and ongoing drug activity in the residence' " (*Leonard*, 884 F3d at 734, quoting *United States v Abernathy*, 843 F3d 243, 255 [6th Cir 2016]).

Although defendant also contends that his plea should be vacated because he was not provided an official laboratory report regarding the narcotics seized from his residence before he entered his plea, it is well settled that a defendant, after pleading guilty, forfeits his or her "right to challenge the sufficiency of the evidence supporting the indictment" (*People v Ocejo*, 202 AD2d 523, 523 [2d Dept 1994], *lv denied* 83 NY2d 1006 [1994]; *see generally People v Suber*, 19 NY3d 247, 250 [2012]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

111

KA 19-00544

PRESENT: WHALEN, P.J., SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. ADORNO DAVILLA, ALSO KNOWN AS
ROBERT ADORNO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered February 20, 2019. The judgment convicted defendant upon his plea of guilty of assault in the second degree, resisting arrest, obstructing governmental administration in the second degree and harassment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, assault in the second degree (Penal Law § 120.05 [3]). Defendant contends that his plea was "improperly" entered because he provided only "yes" and "no" responses to questions asked of him during the plea colloquy. Defendant failed to preserve for our review that challenge to the factual sufficiency of the plea allocution because he did not move to withdraw his guilty plea or vacate the judgment of conviction (*see People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *People v Bennett*, 165 AD3d 1624, 1625 [4th Dept 2018]). This case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, we conclude that defendant's "monosyllabic responses to [Supreme Court's] questions did not render the plea invalid" (*People v Loper*, 118 AD3d 1394, 1395 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015] [internal quotation marks omitted]; *see Bennett*, 165 AD3d at 1625; *People v Barrett*, 153 AD3d 1600, 1600 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]).

Contrary to defendant's further contention, the sentence is not

unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

117

KA 18-01569

PRESENT: WHALEN, P.J., SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. GILMORE, DEFENDANT-APPELLANT.

LELAND D MCCORMAC III, INTERIM PUBLIC DEFENDER, UTICA (JAMES P. GODEMANN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered February 28, 2018. The judgment convicted defendant upon a jury verdict of assault in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even if we assume, arguendo, that a different verdict would not have been unreasonable, we conclude that " 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]).

Defendant's contention that the sentence constitutes cruel and unusual punishment is not preserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v McDermid*, 177 AD3d 1412, 1412 [4th Dept 2019], *lv denied* 34 NY3d 1161 [2020]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that he was punished for exercising his right to trial is also not preserved for our review (*see People v Gorton*, 195 AD3d 1428, 1430

[4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *People v Dupuis*, 192 AD3d 1626, 1627 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]). In any event, it is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that [the] defendant was punished for asserting his [or her] right to trial" (*People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020] [internal quotation marks omitted]), and here we conclude that "there is no indication in the record before us that [County Court] acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.* [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

118

CAF 20-00943

PRESENT: WHALEN, P.J., SMITH, CENTRA, AND PERADOTTO, JJ.

IN THE MATTER OF LARAE L.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HEATHER L., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 9, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order, entered upon her default, that, inter alia, adjudicated the subject child to be permanently neglected, terminated the mother's parental rights, and transferred custody of the child to petitioner. Preliminarily, contrary to the contention of the Attorney for the Child, the mother properly served and timely filed her notice of appeal (*see* Family Ct Act §§ 1113, 1115; Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8], Executive Order [A. Cuomo] No. 202.67 [9 NYCRR 8.202.67]; *cf. Matter of Fraser v Fraser*, 185 AD3d 1444, 1444-1445 [4th Dept 2020]). Nonetheless, the order appealed from was entered following a fact-finding and dispositional hearing at which the mother failed to appear and in which her attorney, although present, elected not to participate. The order was thus entered upon the mother's default (*see Matter of Tyrone O. [Lillian G.]*, 199 AD3d 1386, 1387 [4th Dept 2021]; *Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]). Consequently, in this Court's prior order in response to petitioner's motion, we dismissed the mother's appeal except insofar as the mother challenges the denial

of her attorney's request for an adjournment or raises any other issue that was the subject of contest before Family Court (*see Tyrone O.*, 199 AD3d at 1387; *Ramere D.*, 177 AD3d at 1386). Contrary to the mother's contention, we conclude that the court did not abuse its discretion in denying her attorney's request for an adjournment (*see Tyrone O.*, 199 AD3d at 1387; *Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021]; *see generally* Family Ct Act § 1048 [a]). The remaining issue raised by the mother is not reviewable on appeal from the order entered upon her default because it was not a subject of contest before the court (*cf. Matter of Dinunzio v Zylinski*, 175 AD3d 1079, 1080-1082 [4th Dept 2019]).

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

119

CAF 20-01598

PRESENT: WHALEN, P.J., SMITH, CENTRA, AND PERADOTTO, JJ.

IN THE MATTER OF AYDEN D.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOHN D., RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered December 4, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order of fact-finding and disposition that, inter alia, terminated his parental rights with respect to the subject child. Contrary to the father's contention, we conclude that petitioner established by clear and convincing evidence that it made the requisite diligent efforts, i.e., "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child" (Social Services Law § 384-b [7] [f]; *see Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1518-1519 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]). Contrary to the father's contention, petitioner was not required, as part of its diligent efforts obligation, to forgo requiring the father to participate in a sex offender program or to formulate an alternative plan to accommodate his refusal to admit his role in the events that led to the removal of the child (*see Matter of Emerald L.C. [David C.]*, 101 AD3d 1679, 1680 [4th Dept 2012]).

We likewise reject the father's contention that petitioner failed to establish by clear and convincing evidence that he permanently neglected the child. Permanent neglect "may be found only after it is established that the parent has failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the

child although physically and financially able to do so" (*Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). It is well settled that, to plan for the child's future, " 'the parent must take meaningful steps to correct the conditions that led to the child's removal' " (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). Here, the father failed to take responsibility for the events that led to the child's removal and failed to complete the recommended sex offender counseling aimed at addressing those events (*see Matter of Gloria Melanie S.*, 47 AD3d 438, 438 [1st Dept 2008]; *see generally Jerikkoh W.*, 134 AD3d at 1551).

Contrary to the father's further contention, petitioner met its burden of establishing by a preponderance of the evidence that termination of his parental rights, rather than a suspended judgment, is in the best interests of the child (*see Matter of Deon M. [Vernon B.]*, 170 AD3d 1586, 1587 [4th Dept 2019], *lv denied* 35 NY3d 903 [2020]). We have considered the father's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: February 4, 2022

Ann Dillon Flynn
Clerk of the Court