SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 30, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

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 SEPTEMBER 30, 2022

_____	995/19	CA 18 01595	MICHAEL FARRUGGIO V RIVER MEADOWS, LLC
_____	408	CA 21 00545	ANESTACIA W. V KATHERINE OVINGTON
_____	587	KA 20 01458	PEOPLE V BRENDON A. YOUNG
_____	588	KA 19 01600	PEOPLE V HOWARD FARRELL
_____	589	KA 18 00719	PEOPLE V HERIBERTO RIVERA-MATEO
_____	590	KA 19 01871	PEOPLE V JEREMY A. ACOSTA
_____	591	KA 17 00685	PEOPLE V EFRAIN G. LOPEZ-CONTRERAS
_____	592	KA 17 00686	PEOPLE V EFRAIN G. LOPEZ-CONTRERAS
_____	593	KA 18 02056	PEOPLE V DEVON L. THOMAS
_____	595	CA 22 00156	JOHN D. CADORE V STATE OF NEW YORK
_____	597	CA 21 00892	CORY WASHINGTON-LIVINGSTON V MELINDA F. PURPURA
_____	599	CA 21 00862	DANIEL T. WARREN V TOWN OF WEST SENECA
_____	600	CA 21 00926	JULIE ALFORD V JEFFREY H. KATZ
_____	602	CA 21 01394	CAROL M. ALLEN V DAVID C. GRIMM, M.D.
_____	603	CA 21 01395	CAROL M. ALLEN V DAVID C. GRIMM, M.D.
_____	604	CA 21 00757	FUCCILLO AUTOMOTIVE GROUP, INC. V LIBERTY WARRANTY CORPORATION
_____	605	TP 22 00368	SERGEY GURIN V UTICA MUNICIPAL HOUSING AUTHORITY
_____	606	CA 22 00157	JOHN D. CADORE, ESQ. V STATE OF NEW YORK
_____	608	CA 21 01357	BRIGHTON GRASSROOTS, LLC V TOWN OF BRIGHTON PLANN
_____	609	CA 21 01360	BRIGHTON GRASSROOTS, LLC V TOWN OF BRIGHTON ZONIN
_____	610	CA 21 01361	BRIGHTON GRASSROOTS, LLC V TOWN OF BRIGHTON
_____	611	CA 21 01363	BRIGHTON GRASSROOTS, LLC V TOWN OF BRIGHTON ZONIN
_____	612	CA 21 01431	CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC M&F, LLC

_____	613	CA 21 01440	SAVE MONROE AVE., INC. V TOWN OF BRIGHTON
_____	614	CA 21 01441	SAVE MONROE AVE., INC. V TOWN OF BRIGHTON
_____	615	CA 21 01442	SAVE MONROE AVE, INC. V NEW YORK STATE DEPARTMENT
_____	616	CA 21 01443	SAVE MONROE AVE., INC. V TOWN OF BRIGHTON
_____	617	KA 16 02097	PEOPLE V ODYSSTY D. R.
_____	618	KA 19 00701	PEOPLE V STEPHANY RUCKDESCHEL
_____	619	KA 17 01717	PEOPLE V ZEBRICK GRANT, JR.
_____	620	KA 17 01718	PEOPLE V ZEBRICK GRANT, JR.
_____	622	KA 21 00804	PEOPLE V REGGIE D. CASWELL
_____	623	KA 20 00957	PEOPLE V PATRICK PONZO
_____	624	KA 19 02218	PEOPLE V RASHOD COSTON
_____	625	KA 20 00580	PEOPLE V RASHOD COSTON
_____	628	CA 22 00152	ELENA SPIVAK-BOBKO V GREGORY ARMS, LLC
_____	629	TP 22 00427	E AUTO DISCOUNT, INC. V MARK J.F. SCHROEDER
_____	630	CA 21 01636	DONNA ANDREWS V JCP GROCERIES, INC.
_____	633	CA 22 00330	KEVIN C. HARMON, JR. V BRIDGET A. WILLIAMS
_____	634	CA 21 01052	WILLIAMSVIILE RESIDENTS OPPOSED T V VILLAGE OF WILLIAMSVILLE PLANNING A
_____	641	CA 21 01318	BRUNCE SMITH V ANTHONY ANNUCCI
_____	644	CA 21 01520	CHAD ZIGENFUS V TOWN OF COHOCTON TOWN BOARD
_____	645	KA 20 00289	PEOPLE V NICHOLAS B. MAHAR
_____	646	KA 22 00353	PEOPLE V MATTHEW H. ALMOND
_____	647	KA 18 02409	PEOPLE V DENZEL K. LEWIS
_____	648	KA 16 00730	PEOPLE V ADAM L. THOMAS
_____	649	KA 16 00192	PEOPLE V HERBERT L. ARCH
_____	650	KAH 21 00130	WAYNE C. JAMES V DANIELLE DILL, PSY.D.
_____	651	KA 20 00342	PEOPLE V RASHOD HARVEY
_____	653	CAF 21 01100	WILSON L. DEJESUS V ANNE BLOSSICK
_____	661	CAF 21 00507	TRICIA A. N. V REGINALD J. N.
_____	662	CAF 21 01391	DEVAN R. HARRINGTON V JUSTIN R. CUTTEN
_____	663	CA 22 00220	AH WINES, INC. V C6 CAPITAL FUNDING LLC

_____	664	CA 21 01506	VALENTINO DIXON V STATE OF NEW YORK
_____	666	CA 21 01733	KIM M. CAPOZZOLO V ARCANGELO CAPOZZOLO
_____	667	OP 22 00303	ROBERT I. REED V NIAGARA COUNTY DISTRICT ATTORNEY
_____	669	CA 22 00324	VICKI LEISTNER V DAVID VANINI
_____	672	KA 14 01649	PEOPLE V ROBERT C. LEWIS
_____	674	KA 16 02370	PEOPLE V TRAVIS THURSTON
_____	675	KA 17 00277	PEOPLE V EDMUND S. BUNTLEY
_____	676	KA 18 01795	PEOPLE V JERRY L. JONES
_____	677	KA 18 02444	PEOPLE V JUAN A. ZENON
_____	679	KA 20 01053	PEOPLE V SAMUEL R. BLACKSHEAR
_____	680	CAF 21 00194	ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES V AZUJHON SIMS
_____	682	CAF 21 00702	RALPH INMAN V TERESA COLEMAN
_____	689	CA 21 01158	ASSUNTA BARNEY V DRYDEN MUTUAL INSURANCE COMPANY
_____	691	CA 21 01433	EGATE-95, LLC V FITNESS INTERNATIONAL, LLC
_____	692	CA 22 00153	EGATE-95, LLC V FITNESS INTERNATIONAL, LLC
_____	693	CA 21 01290	MICHELE IANNELLO WARD V BROTHERS OF MERCY NURSING
_____	695	KA 19 01915	PEOPLE V KYLE LOVINES
_____	696	KA 21 00211	PEOPLE V BRIAN CUATT
_____	699	KA 17 02213	PEOPLE V JOSE MOLINA
_____	702	CAF 21 00331	Mtr of LOGAN P. G.
_____	706	CAF 21 00631	JOHN H. FREDERICK, JR. V JENNIFER L. HEIDEMANN
_____	708	CA 21 01280	JANE DOE V STATE OF NEW YORK
_____	709	CA 21 01049	THOMAS E. CARCONE V JAMES NOON
_____	711	CA 21 01113	PHILLIP LAPE V STRUCTURED ASSET FUNDING, LLC
_____	714	CA 21 00258	JOSEPH S. V STATE OF NEW YORK
_____	715	CA 21 01753	ERIE INSURANCE COMPANY V WALSH DUFFIELD COMPANIES
_____	716	KA 12 01361	PEOPLE V EMMANUEL IBARRONDO
_____	717	KA 18 02223	PEOPLE V ANTWUAN J. WASHINGTON
_____	719	KA 16 01741	PEOPLE V BRYON K. JOHNSON
_____	724	CA 21 01378	TIESHA N. B. V K.M. FAMILY HOMES, LLC

_____	732	CA 21 01278	MARIO SARAIVA V NEW YORK STATE THRUWAY AUTHORITY
_____	734	CAF 21 01134	EBONY RILEY V JOSHUA KIDNEY
_____	745	CA 21 01404	DAVID MOLTRUP V LINDA JOYCE REID
_____	753	CA 21 01178	KENNETH MILLER V ERIC BEVARD

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

995/19

CA 18-01595

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

MICHAEL FARRUGGIO, AS EXECUTOR OF THE ESTATE OF THERESA FARRUGGIO, DECEASED, AND SUSAN KARPEN, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-RESPONDENTS,

V ORDER

918 JAMES RECEIVER, LLC, ET AL., DEFENDANTS, AND RIVER MEADOWS, LLC, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA, LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP, WHITE PLAINS (JEREMIAH FREI-PEARSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 21, 2018. The order, among other things, granted in part plaintiffs' motion for class action certification and denied the cross motion of defendant River Meadows, LLC for severance.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 10, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

408

CA 21-00545

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

Z.K., AN INFANT, BY HER PARENT AND NATURAL GUARDIAN ANESTACIA W., PLAINTIFF-RESPONDENT,

V ORDER

KATHERINE OVINGTON, DEFENDANT-APPELLANT.

THE LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (MICHAEL P. SCHUG OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BARNES FIRM, P.C., ROCHESTER (TIM R. HEDGES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered March 19, 2021. The order denied defendant's motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 16, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

587

KA 20-01458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDON A. YOUNG, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 1, 2017. The judgment convicted defendant upon a plea of guilty of criminal sexual act in the first 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 his plea of guilty of two counts of criminal sexual act in the first degree (Penal Law § 130.50 [4]). We agree with defendant that his waiver of the right to appeal was invalid (*see People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]; *see generally People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

588

KA 19-01600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD FARRELL, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered June 20, 2019. The judgment convicted defendant upon a plea of guilty of attempted sexual abuse 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 his plea of guilty of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]), defendant contends that his waiver of the right to appeal is invalid and that the imposition of certain surcharges and an internet restriction at sentencing was illegal. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see generally People v Thomas*, 34 NY3d 545, 560-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that defendant failed to preserve his contention that the imposition of the mandatory surcharge and the supplemental sex offense surcharge was illegal (*see People v Stebbins*, 171 AD3d 1395, 1397 [3d Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *People v Parker*, 137 AD3d 1625, 1626 [4th Dept 2016]; *People v King*, 57 AD3d 1495, 1496 [4th Dept 2008]). In any event, that contention lacks merit inasmuch as the statute requires the imposition of those surcharges (*see* Penal Law § 60.35 [1] [a] [i]; [b]; *see generally People v Guerrero*, 12 NY3d 45, 48 [2009]). We have considered defendant's further contention concerning the internet restriction imposed at sentencing and we conclude that it lacks merit.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

589

KA 18-00719

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERIBERTO RIVERA-MATEO, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS 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 (Alex R. Renzi, J.), rendered November 15, 2017. The judgment convicted defendant upon a jury verdict of assault in the second 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 assault in the second degree (Penal Law § 120.05 [2]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Contrary to defendant's contention, Supreme Court properly denied his repeated severance motions, inasmuch as he failed to demonstrate the requisite good cause for a discretionary severance from the codefendant's trial (*see* CPL 200.40 [1]; *People v Lundy*, 178 AD3d 1389, 1389 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]; *see generally People v Mahboubian*, 74 NY2d 174, 183 [1989]). As we held in the codefendant's appeal, defendant failed to show that his defense was in irreconcilable conflict with that of the codefendant before the trial, and no such conflict arose during the trial (*see People v Rivera*, 201 AD3d 1346, 1347 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]). Although defendant is correct that the codefendant would not have been bound by the court's *Sandoval* ruling (*see People v McGee*, 68 NY2d 328, 332-333 [1986]; *see also People v Wilson*, 120 AD3d 1531, 1533-1534 [4th Dept 2014], *affd* 28 NY3d 67 [2016], *rearg denied* 28 NY3d 1158 [2017]), the fact that defendant has a prior conviction did not automatically entitle him to severance to prevent the codefendant's attorney from questioning him regarding that conviction (*see People v Murray*, 155 AD3d 1106, 1109 [3d Dept 2017], *lv denied* 31 NY3d 1015 [2018]). There was no "significant possibility" that each defense would prejudice the other (*McGee*, 68 NY2d at 333) inasmuch as defendant did not show that " 'his

potential testimony would have given the codefendant an incentive to impeach his credibility' " (*People v Clark*, 66 AD3d 1489, 1489 [4th Dept 2009], *lv denied* 13 NY3d 906 [2009]; *see People v Campbell*, 118 AD3d 1464, 1466 [4th Dept 2014], *lv denied* 24 NY3d 959 [2014], *reconsideration denied* 24 NY3d 1218 [2015]).

Contrary to defendant's contention, the court did not err in refusing to charge the jury on the defense of justification. Viewing the record in the light most favorable to defendant (*see People v Brown*, 33 NY3d 316, 324 [2019], *rearg denied* 33 NY3d 1136 [2019]), we conclude that "there is no reasonable view of the evidence that [defendant] was anything other than the initial aggressor in his use of deadly physical force," and thus "he is not entitled to a jury instruction on justification" (*id.* at 325; *see People v Taylor*, 134 AD3d 508, 509 [1st Dept 2015], *lv denied* 28 NY3d 1075 [2016]; *People v Caldwell*, 98 AD3d 1272, 1273 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]).

Viewing the evidence in light of the elements of the crimes of which defendant was convicted 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]). In addition, the sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

590

KA 19-01871

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY A. ACOSTA, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered July 16, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the fifth 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 reducing the sentence of imprisonment imposed for criminal possession of a controlled substance in the first degree under count one of the indictment to a determinate term of 14 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]).

Defendant failed to preserve for our review his contention that the indictment was multiplicitous (*see* CPL 470.05 [2]; *People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *People v Box*, 145 AD3d 1510, 1513 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017]). 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]; *Edwards*, 159 AD3d at 1426; *Box*, 145 AD3d at 1513).

Defendant next contends that the police lacked a founded suspicion that criminal activity was afoot to support the canine sniff search of the exterior of his vehicle during a lawful traffic stop and, thus, County Court erred in refusing to suppress as fruit of the poisonous tree physical evidence seized thereafter, i.e., a set of

keys in the vehicle and drugs later found in a shared utility room of defendant's residential building in a toolbox that was unlocked by the keys. We reject that contention. Here, the court properly concluded that, based on the totality of the information known to the police prior to the lawful traffic stop, the police had the requisite "founded suspicion that criminal activity [was] afoot" to justify the canine sniff search of the exterior of defendant's vehicle (*People v Blandford*, 37 NY3d 1062, 1063 [2021], *cert denied* — US —, 142 S Ct 1382 [2022]; *see People v Devone*, 15 NY3d 106, 113-114 [2010]; *see also People v Lee*, 110 AD3d 1482, 1483 [4th Dept 2013]; *People v Oldacre*, 53 AD3d 675, 676 [3d Dept 2008]). After the dog alerted on the exterior of the vehicle, probable cause existed to search the vehicle and, therefore, the canine search of the interior—during which an officer noticed the set of keys—was lawful (*see People v Romero*, 120 AD3d 947, 948 [4th Dept 2014], *lv denied* 24 NY3d 1004 [2014]; *People v Boler*, 106 AD3d 1119, 1122 [3d Dept 2013]; *see also People v Offen*, 78 NY2d 1089, 1091 [1991]; *People v Blanche*, 183 AD3d 1196, 1199 [3d Dept 2020], *lv denied* 35 NY3d 1064 [2020]). Inasmuch as the canine sniff search was lawful, there is no basis for suppressing any evidence seized thereafter as the fruits of an illegal search.

Defendant also contends that he was deprived of a fair trial by the presence of uniformed officers in the courtroom gallery during summations. We reject that contention. A criminal defendant " 'is entitled to have [their] guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial' " (*Holbrook v Flynn*, 475 US 560, 567 [1986]; *see People v Nelson*, 27 NY3d 361, 367 [2016], *cert denied* — US —, 137 S Ct 175 [2016]). "Trial courts have the inherent authority and the affirmative obligation to control conduct and decorum in the courtroom, in order to promote the fair administration of justice for all" (*Nelson*, 27 NY3d at 367). Where, as here, that decorum is challenged on the basis of "state-sponsored courtroom practices," such as the presence of uniformed officers seated in the courtroom gallery (*id.* at 368 [internal quotation marks omitted]; *see Holbrook*, 475 US at 570-572; *Nelson*, 27 NY3d at 376-377 [Garcia, J., concurring]; *see generally Carey v Musladin*, 549 US 70, 75 [2006]), "the nature of our review is to determine whether an unacceptable risk is presented of impermissible factors coming into play" (*People v Allen*, 183 AD3d 1284, 1286 [4th Dept 2020], *affd* 36 NY3d 1033 [2021] [internal quotation marks omitted]; *see Holbrook*, 475 US at 570-572; *Nelson*, 27 NY3d at 368). Here, the trial transcript is devoid of any facts establishing the number of officers present, where in the gallery they were seated, whether each was in uniform or in plain clothes, or how many were armed with their service weapons, and thus there is no basis for us to conclude that their presence in the courtroom presented such a risk (*see Allen*, 183 AD3d at 1286; *People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]; *cf. People v Nguyen*, 156 AD3d 1461, 1462 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]; *People v Harriott*, 128 AD3d 470, 471 [1st Dept 2015], *lv denied* 26 NY3d 1008 [2015]).

Defendant failed to preserve for our review his further contention that he was deprived of a fair trial by a comment of the prosecutor during summation that improperly shifted the burden of proof (*see* CPL 470.05 [2]; *People v Kims*, 24 NY3d 422, 440 [2014]; *People v Cirino*, 203 AD3d 1661, 1664 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). In any event, that contention lacks merit. The prosecutor's comment constituted "a fair response to arguments raised by the defense on summation" (*People v Maddox*, 236 AD2d 832, 832-833 [4th Dept 1997], *lv denied* 89 NY2d 1037 [1997]). Moreover, even assuming, arguendo, that the prosecutor's comment improperly shifted the burden of proof, we conclude that "[t]he single improper comment was not so egregious that defendant was thereby deprived of a fair trial" (*People v Willson*, 272 AD2d 959, 960 [4th Dept 2000], *lv denied* 95 NY2d 873 [2000]; *see Box*, 145 AD3d at 1512).

We reject defendant's contention that the verdict is against the weight of the evidence with respect to his constructive possession of the drugs. 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, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see People v Barnes*, 197 AD3d 977, 978 [4th Dept 2021], *lv denied* 37 NY3d 1058 [2021]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to credit the testimony of the People's witnesses and reject the exculpatory testimony of defendant (*see People v Twillie*, 155 AD3d 1686, 1687 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *People v Rivera*, 281 AD2d 927, 928 [4th Dept 2001], *lv denied* 96 NY2d 906 [2001]), and we perceive no reason to disturb those credibility determinations (*see generally People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]).

We nonetheless agree with defendant that the aggregate sentence of imprisonment of 18 years is unduly harsh and severe. Preliminarily, we are " 'compelled to emphasize once again' that, contrary to the assertion in the People's brief, a criminal defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court in order to obtain a sentence reduction under CPL 470.15 (6) (b)" (*People v Curtis*, 196 AD3d 1145, 1146 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *see e.g. People v Dolison*, 200 AD3d 1632, 1633-1634 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]; *People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]). This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and we may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]). Upon our consideration of, among other things, defendant's largely remote criminal history, the nonviolent nature of the present offenses, and the disparity between the court's pretrial sentencing promise of 12 years of imprisonment if defendant pleaded guilty and the ultimate sentence imposed (*see People v Ellison*, 167 AD3d 1552, 1554 [4th Dept 2018]), we modify the judgment as a matter of discretion in the interest of justice by

reducing the sentence of imprisonment imposed for criminal possession of a controlled substance in the first degree under count one of the indictment to a determinate term of 14 years (*see* CPL 470.15 [6] [b]; *Romero*, 120 AD3d at 948).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

591

KA 17-00685

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EFRAIN G. LOPEZ-CONTRERAS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Joanne M. Winslow, J.), rendered February 14, 2017. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Memorandum: In appeal No. 1 defendant appeals from a judgment convicting him, upon his guilty plea, of assault in the second degree (Penal Law § 120.05 [4]). In appeal No. 2 he appeals from a separate judgment convicting him, also upon his guilty plea, of aggravated vehicular homicide (§ 125.14 [5]), manslaughter in the second degree (§ 125.15 [1]), and aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]). The convictions in both appeals stem from a fatal automobile collision involving defendant who was, at the time, driving under the influence of alcohol. As an initial matter, in both appeals we agree with defendant that his waiver of the right to appeal is invalid (*see generally People v Hunter*, 203 AD3d 1686, 1686 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022]) and thus does not foreclose our consideration of defendant's contentions regarding Supreme Court's refusal to suppress statements and evidence.

Contrary to defendant's contention in both appeals, however, he was not taken into custody when, after being found face-down and injured in a ditch and while awaiting the arrival of an ambulance, he was placed in the back of a patrol vehicle at the accident scene. We therefore conclude that the court properly refused to suppress the statements made by defendant at the accident scene and before he was read his *Miranda* rights because those statements were not the result of custodial interrogation and thus *Miranda* warnings were not required

(*see People v Palmer*, 204 AD3d 1512, 1513-1514 [4th Dept 2022]). Further, no *Miranda* warnings were required during the questioning at the accident scene because those "statements were not the product of police interrogation inasmuch as the officer asked defendant only preliminary questions that were investigatory and not accusatory" (*People v Defio*, 200 AD3d 1672, 1673 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022] [internal quotation marks omitted]; *see People v Carbonaro*, 134 AD3d 1543, 1547 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]; *People v Palmiere*, 124 AD2d 1016, 1016 [4th Dept 1986]). The record belies defendant's further contention that the court should have suppressed statements made at the accident scene because he did not understand the questions posed to him in English. Inasmuch as the court properly refused to suppress the statements made by defendant at the accident scene, we reject defendant's contention that the statements he made after waiving his *Miranda* rights and the results of a blood test conducted with defendant's consent should be suppressed as the fruit of an unlawful custodial interrogation (*see generally Palmiere*, 124 AD2d at 1016).

Contrary to defendant's further contention, the evidence at the suppression hearing supports the court's determination that defendant's consent to submit to the blood test was voluntary (*see generally Palmer*, 204 AD3d at 1514).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

592

KA 17-00686

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EFRAIN G. LOPEZ-CONTRERAS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Joanne M. Winslow, J.), rendered February 14, 2017. The judgment convicted defendant, upon a plea of guilty, of aggravated vehicular homicide, manslaughter in the second degree, and aggravated driving while intoxicated.

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

Same memorandum as in *People v Lopez-Contreras* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

593

KA 18-02056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON L. THOMAS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 (Brian D. Dennis, J.), rendered June 5, 2018. The judgment convicted defendant, upon a plea of guilty, of burglary in the second degree (three counts), grand larceny in the third degree, petit larceny (two counts) and attempted burglary 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, three counts of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that the evidence at the restitution hearing was insufficient to support the amount of restitution ordered. That contention is not encompassed by defendant's purported waiver of the right to appeal because any issue regarding any award of restitution was specifically excluded from such waiver (*see People v Johnson*, 50 AD3d 1567, 1567 [4th Dept 2008]). We nevertheless conclude that defendant's contention is without merit inasmuch as the People met their burden of establishing the amount of restitution by a preponderance of the evidence (*see People v Eatmon*, 207 AD3d 1160, 1161-1162 [4th Dept 2022]; *People v Shanley*, 189 AD3d 2108, 2109-2110 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]).

As defendant further contends and the People correctly concede, his waiver of the right to appeal is invalid (*see People v Rhode*, 194 AD3d 1425, 1426 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]; *see generally People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of defendant's challenge to the severity of his sentence. We

nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

595

CA 22-00156

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

JOHN D. CADORE, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129681.)
(APPEAL NO. 1.)

JOHN D. CADORE, CLAIMANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Richard E. Sise, J.), entered February 17, 2021. The order denied the motion of claimant for leave to reargue and renew his opposition to defendant's motion to dismiss the claim.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]) and the order is affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

597

CA 21-00892

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

CORY WASHINGTON-LIVINGSTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MELINDA F. PURPURA AND RACHEL M. PURPURA,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO (STEPHANIE MESSINA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered May 24, 2021. The order, insofar as appealed from, granted the motion of defendants for summary judgment on the issue of serious injury and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained in a motor vehicle accident in 2016 when her vehicle was struck from behind by a vehicle operated by defendant Rachel M. Purpura and owned by defendant Melinda F. Purpura. As relevant on appeal, plaintiff alleged that she sustained a serious injury to, inter alia, her cervical spine under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of Insurance Law § 5102 (d). Plaintiff alleged that her cervical injury necessitated a surgery performed in 2018. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court granted the motion and dismissed the complaint. Plaintiff appeals and we affirm.

Contrary to plaintiff’s contention, defendants met their initial burden of establishing that plaintiff did not sustain a serious injury under any of the categories alleged. Plaintiff had been involved in three prior motor vehicle accidents and a work-related accident that had resulted in injury to her spine, including her cervical spine. In support of their motion, defendants submitted a report and affirmation from a physician who had examined plaintiff, as well as a report from a radiologist. The physician and radiologist had reviewed plaintiff’s medical records, including MRIs, from before and after the 2016

accident. They opined, inter alia, that plaintiff's MRIs showed preexisting degenerative changes to her cervical spine that were unchanged by the 2016 accident and that there was no objective evidence of a new injury following that accident (*see Roger v Soos*, 175 AD3d 937, 938 [4th Dept 2019]; *Boroszko v Zylinski*, 140 AD3d 1742, 1744-1745 [4th Dept 2016]; *Heatter v Dmowski*, 115 AD3d 1325, 1326 [4th Dept 2014]). Although plaintiff had complained of pain in her cervical spine shortly after the accident, the physician opined that, based on his review of the records and MRIs, any aggravation of the cervical spine caused by the accident would have resolved in one to six weeks.

Plaintiff failed to raise an issue of fact in opposition. Although plaintiff contends that she had measurable decreased cervical range of motion when examined after the 2016 accident, plaintiff failed to refute the expert opinions submitted by defendants that plaintiff had not sustained any additional limitation causally related to the 2016 accident by, for example, a comparison of plaintiff's pre- and post-2016 accident records and MRIs (*see Boroszko*, 140 AD3d at 1745; *see generally Roger*, 175 AD3d at 938-939).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

599

CA 21-00862

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

DANIEL T. WARREN, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF WEST SENECA, DEFENDANT-RESPONDENT.

DANIEL T. WARREN, PLAINTIFF-APPELLANT PRO SE.

GRECO TRAPP, PLLC, BUFFALO (CHRIS G. TRAPP OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 2, 2021. The order denied the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by plaintiff and by the attorney for defendant on August 24, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

600

CA 21-00926

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

JULIE ALFORD, AS EXECUTOR OF AND ON BEHALF OF THE ESTATE OF ROBERT J. GENCO, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY H. KATZ AND KATZ AND BAEHRE, A GENERAL PARTNERSHIP, DEFENDANTS-RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (PAUL G. FERRARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered May 28, 2021. The order, insofar as appealed from, granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendants' motion is denied and the complaint is reinstated.

Memorandum: Plaintiff commenced this legal malpractice action as executor of and on behalf of the estate of her father, Robert J. Genco (decedent), alleging that defendants were negligent in the drafting of decedent's will. In 2006, and before decedent and his wife were married, they entered into a prenuptial agreement that provided that decedent's wife waived any rights to decedent's retirement and deferred compensation accounts, and decedent's will would include a $1 million qualified terminal interest property trust (QTIP trust) for his wife's benefit. In 2007, decedent executed a will that included the QTIP trust bequest. In 2015, decedent changed the designation on his retirement accounts to designate his wife as the primary beneficiary of contributions decedent made after the date of their marriage and, in 2017, he signed a will that was prepared by defendants. In that will, decedent bequeathed to his wife $1 million, reduced by testamentary substitutes including retirement accounts for which she was the beneficiary, but there was no bequest for a QTIP trust. After decedent died, his wife filed a claim against his estate pursuant to SCPA 1803, claiming that she was entitled to, inter alia, $1 million to fund the QTIP trust and, when that claim was rejected, decedent's wife commenced an action against plaintiff as executor of

decedent's estate. Plaintiff then commenced this action, alleging that defendants negligently drafted the 2017 will. Specifically, in this action plaintiff alleges that decedent changed the beneficiary designation on his retirement accounts in exchange for his wife's waiver of her right under the prenuptial agreement to receive the QTIP trust, but defendants negligently failed to have decedent's wife execute a written amendment and/or waiver to the prenuptial agreement.

Before any discovery was conducted, defendants moved for summary judgment dismissing the complaint on the ground that it was premature because the action of decedent's wife against plaintiff was still pending. Although the two actions were not consolidated, Supreme Court issued a decision and order that resolved both actions. In the wife's action against plaintiff, the court granted the wife's motion for summary judgment and ordered plaintiff to fund a QTIP trust with $1 million. In this action, the court, inter alia, granted defendants' motion and dismissed the complaint and, as limited by her brief, plaintiff now appeals from the order to that extent.

We agree with plaintiff that the court erred in granting defendants' motion. Even assuming, arguendo, that plaintiff's action was premature at the time defendants brought their motion, it was no longer premature once the court granted the wife's motion for summary judgment in the wife's action against plaintiff. Contrary to defendants' contention, plaintiff, as the personal representative of decedent's estate, may bring a claim for legal malpractice alleging that defendants were negligent in the estate planning for decedent (*see Estate of Schneider v Finmann*, 15 NY3d 306, 309-310 [2010]). "Damages in a legal malpractice case are designed to 'make the injured client whole' " (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 [2007], quoting *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 42 [1990]), and defendants failed to meet their initial burden of establishing that decedent's estate did not sustain any damages or that any damages were speculative (*cf. Leeder v Antonucci*, 195 AD3d 1592, 1593 [4th Dept 2021]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

602

CA 21-01394

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

CAROL M. ALLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. GRIMM, M.D., SHARON L. MANSFIELD, FNP-C,
CANANDAIGUA ORTHOPAEDIC ASSOCIATES, P.C.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

HIRSCH & TUBIOLO, P.C., ROCHESTER (TAYLOR MARIE HOLMES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ZIFF LAW FIRM, LLP, ELMIRA (CHRISTINA BRUNER SONSIRE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a decision and order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered August 18, 2021. The decision and order, inter alia, denied the motion of defendants David C. Grimm, M.D., Sharon L. Mansfield, FNP-C, and Canandaigua Orthopaedic Associates, P.C., insofar as it sought to dismiss the complaint against them.

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

Memorandum: In this medical malpractice action, plaintiff seeks damages for injuries that she allegedly sustained as a result of a carpal tunnel and trigger thumb release surgery performed by defendant David C. Grimm, M.D., and the post-operative care provided by Grimm and defendant Sharon L. Mansfield, FNP-C. Grimm, Mansfield, and defendant Canandaigua Orthopaedic Associates, P.C. (collectively, defendants) moved to dismiss the complaint against them and, alternatively, for summary judgment dismissing the complaint against them. In appeal No. 1, defendants appeal from a decision and order that determined regarding the motion insofar as it sought summary judgment that issues of fact existed with respect to the claims arising from the post-operative care provided by defendants, but the sole ordering paragraph denied the motion only insofar as it sought to dismiss the complaint against defendants. In appeal No. 2, defendants appeal from an order containing ordering paragraphs denying the motion insofar as it sought to dismiss the complaint against defendants and granting the motion insofar as it sought summary judgment dismissing the complaint against defendants, except with respect to the claims

arising from the post-operative care provided by defendants. We affirm in appeal No. 2.

As an initial matter, we conclude that the paper in appeal No. 1 constituted a mere decision with respect to the issues raised by defendants on appeal, i.e., regarding the motion insofar as it sought summary judgment dismissing the claims concerning defendants' post-operative care of plaintiff. Thus, appeal No. 1 must be dismissed, although the issues raised on that appeal will be considered under appeal No. 2 (*see generally AH Wines, Inc. v C6 Capital Funding LLC*, 199 AD3d 1328, 1328 [4th Dept 2021]).

In appeal No. 2, defendants bore the initial "burden of establishing the absence of any departure from good and accepted medical practice *or* that plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]). We agree with defendants that they satisfied their initial burden on the motion insofar as it sought summary judgment dismissing the claims against them regarding post-operative care by establishing that there was no departure from good and accepted medical practice (*see generally Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). Specifically, defendants submitted the sufficiently " 'detailed, specific and factual' " affidavit of Grimm in which he opined, inter alia, that defendants' post-operative care of plaintiff was appropriate (*Campbell*, 189 AD3d at 2150; *see Webb*, 133 AD3d at 1386). We conclude, however, that defendants did not address the issue of causation, and thus the burden shifted to plaintiff to raise an issue of fact on the issue of deviation only (*see Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]; *cf. Simko v Rochester Gen. Hosp.*, 199 AD3d 1408, 1409 [4th Dept 2021]).

Contrary to defendants' contention, however, we conclude that plaintiff raised an issue of fact in opposition by submitting, inter alia, a detailed expert affirmation that " 'squarely oppose[d]' " the opinion of Grimm (*Fargnoli*, 186 AD3d at 1005). Contrary to defendants' further contention, this is not a case in which plaintiff's expert "misstate[d] the facts in the record," nor did the expert offer an opinion that was "vague, conclusory, speculative, [or] unsupported by the medical evidence in the record" (*Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021] [internal quotation marks omitted]). Under the circumstances here and the specific remaining claims that defendants negligently provided post-operative treatment, the precise terminology used by plaintiff's expert in describing the nature of the alleged injury underlying the need for additional post-operative care did not render the expert's opinion speculative or unsupported (*see id.* at 1383-1384).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

603

CA 21-01395

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

CAROL M. ALLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. GRIMM, M.D., SHARON L. MANSFIELD, FNP-C,
CANANDAIGUA ORTHOPAEDIC ASSOCIATES, P.C.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

HIRSCH & TUBIOLO, P.C., ROCHESTER (TAYLOR MARIE HOLMES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ZIFF LAW FIRM, LLP, ELMIRA (CHRISTINA BRUNER SONSIRE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered September 7, 2021. The order, insofar as appealed from, denied in part the motion of defendants David C. Grimm, M.D., Sharon L. Mansfield, FNP-C, and Canandaigua Orthopaedic Associates, P.C., for summary judgment dismissing the complaint against them.

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

Same memorandum as in *Allen v Grimm* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

604

CA 21-00757

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

LIBERTY WARRANTY CORPORATION, DOING BUSINESS AS
LAWLEY AUTOMOTIVE DEALERSHIP SOLUTIONS, INC.,
PLAINTIFF,

V ORDER

FUCCILLO AUTOMOTIVE GROUP, INC., DEFENDANT.

FUCCILLO AUTOMOTIVE GROUP, INC.,
PLAINTIFF-APPELLANT,

V

LIBERTY WARRANTY CORPORATION, DOING BUSINESS
AS LAWLEY AUTOMOTIVE DEALERSHIP SOLUTIONS, INC.,
TODD F. BEST, THOMAS R. BURKE, JR.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

BELLAVIA BLATT, P.C., MINEOLA (STEVEN H. BLATT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (SARAH A. O'BRIEN OF COUNSEL), FOR DEFENDANT-RESPONDENT LIBERTY WARRANTY CORPORATION, DOING BUSINESS AS LAWLEY AUTOMOTIVE DEALERSHIP SOLUTIONS, INC.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered April 22, 2021. The order granted in part the motion of defendants-respondents to dismiss the complaint of plaintiff-appellant.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

605

TP 22-00368

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

IN THE MATTER OF SERGEY GURIN, PETITIONER,

V MEMORANDUM AND ORDER

UTICA MUNICIPAL HOUSING AUTHORITY, DOING BUSINESS AS PEOPLE FIRST, RESPONDENT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (SCOTT LIEBERMAN OF COUNSEL), FOR PETITIONER.

THE LAW FIRM OF FRANK W. MILLER, PLLC, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Oneida County [Patrick F. MacRae, J.], entered December 8, 2021) to review a determination of respondent. The determination terminated petitioner's employment with respondent.

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

Memorandum: In this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination following a hearing pursuant to Civil Service Law § 75 that found him guilty of several disciplinary charges and terminated his employment as a maintenance mechanic in housing complexes operated by respondent. Initially, we note that petitioner challenges the procedures employed by respondent and the penalty imposed, but does not raise a substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court (*see Matter of Fundergurg v New York State Off. of Children & Family Servs.*, 148 AD3d 1667, 1668 [4th Dept 2017]; *Matter of Lynch v New York State Dept. of Motor Vehs. Appeals Bd.*, 125 AD3d 1326, 1326-1327 [4th Dept 2015]). Nevertheless, in the interest of judicial economy, we address the merits of petitioner's challenges (*see Lynch*, 125 AD3d at 1326).

Petitioner first contends that respondent failed to make an informed decision based upon an independent appraisal of the evidence introduced at the hearing, and that respondent merely accepted the recommendation of its executive director. We conclude that there is no evidence in the record that supports those contentions and, "in the absence of a 'clear' revelation that the administrative body 'made no

independent appraisal and reached no independent conclusion,' its decision will not be disturbed" (*Matter of Taub v Pirnie*, 3 NY2d 188, 195 [1957]; *see Matter of Farabell v Town of Macedon*, 62 AD3d 1246, 1248 [4th Dept 2009]; *see also Matter of Uncle Sam Garages, LLC v Capital Dist. Transp. Auth.*, 171 AD3d 1260, 1262 [3d Dept 2019], *lv denied* 33 NY3d 912 [2019]).

With respect to petitioner's further contention that the penalty is so excessive that it shocks the conscience, it is well settled that our review of challenges to the penalty imposed by an administrative agency "is extremely limited" (*Matter of Oliver v D'Amico*, 151 AD3d 1614, 1618 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018], *rearg denied* 31 NY3d 1066 [2018]). Even if we would have reached a different decision if called upon to determine the appropriate sanction in the first instance, we "do not have any 'discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed' " (*id.*, quoting *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see Matter of Marentette v City of Canandaigua*, 159 AD3d 1410, 1412 [4th Dept 2018], *lv denied* 31 NY3d 912 [2018]). Contrary to petitioner's contention, the penalty of termination imposed here is not " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Kelly*, 96 NY2d at 38), and thus it does not constitute an abuse of discretion as a matter of law.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

606

CA 22-00157

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

JOHN D. CADORE, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 135656.)
(APPEAL NO. 2.)

JOHN D. CADORE, CLAIMANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Richard E. Sise, J.), entered March 31, 2021. The order granted defendant's motion to dismiss the claim.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

608

CA 21-01357

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

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON TOWN BOARD, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 1.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON TOWN BOARD, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 8, 2021. The order denied the motion of petitioner-plaintiff for a preliminary injunction.

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

Memorandum: Petitioners and petitioners-plaintiffs (collectively, petitioners) commenced these related proceedings and hybrid CPLR article 78 proceedings and declaratory judgment actions to challenge the construction of a retail plaza on Monroe Avenue in the Town of Brighton. In these consolidated appeals, petitioners each appeal from orders, all of which were issued pursuant to a single "Global Decision," that collectively denied each of the 10 motions made by petitioners seeking preliminary injunctive relief pertaining to the ongoing construction.

It is well settled that "[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Delphi Hospitalist Servs. LLC v Patrick*, 163 AD3d 1441, 1441 [4th Dept 2018] [internal quotation marks omitted]). Upon a motion for a preliminary injunction, the party seeking injunctive relief "must demonstrate by clear and convincing evidence: (1) 'a probability of success on the merits;' (2) 'danger of irreparable injury in the absence of an injunction;' and (3) 'a balance of equities in its favor' " (*Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020]). Here, Supreme Court did not abuse its discretion in denying petitioners' motions. Petitioners failed to establish irreparable injury or that a balance of equities favored them (*see Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1058 [4th Dept 2020]). We have considered petitioners' remaining contentions and conclude that none warrants modification or reversal of the orders.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

609

CA 21-01360

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

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON ZONING BOARD OF APPEALS,
TOWN OF BRIGHTON OFFICE OF BUILDING INSPECTOR,
TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC,
MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC.,
DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING
BUSINESS AS DANIELE FAMILY COMPANIES,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON OFFICE OF BUILDING INSPECTOR, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 21, 2021. The order denied the motion of petitioner for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

610

CA 21-01361

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

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, TOWN OF BRIGHTON PLANNING BOARD, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES,
RESPONDENTS-DEFENDANTS-RESPONDENTS,
ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 3.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, AND TOWN OF BRIGHTON PLANNING BOARD.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 9, 2021. The order denied the motion of petitioner-plaintiff for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

611

CA 21-01363

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

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
ET AL., RESPONDENTS,
M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC,
MARDANTH ENTERPRISES, INC., AND DANIELE
MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS
AS DANIELE FAMILY COMPANIES,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 4.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 22, 2021. The order denied the motion of petitioner for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

612

CA 21-01431

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

IN THE MATTER OF CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC, SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, NMS ALLENS CREEK, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 5.)

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT CLOVER/ALLEN'S CREEK NEIGHBORHOOD ASSOCIATION LLC.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN, AND STEVEN M. DEPERRIOR.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, AND MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, AND TOWN BOARD OF TOWN OF BRIGHTON.

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 9, 2021. The order denied the motions of petitioners-plaintiffs for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

613

CA 21-01440

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, TOWN OF BRIGHTON PLANNING BOARD, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, THE DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 6.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, AND TOWN OF BRIGHTON PLANNING BOARD.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, AND THE DANIELE FAMILY COMPANIES.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 27, 2021. The order denied the motion of petitioners-plaintiffs for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

614

CA 21-01441

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, THE DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 7.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON, AND TOWN BOARD OF TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, AND THE DANIELE FAMILY COMPANIES.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 9, 2021. The order denied the motion of petitioners-plaintiffs for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

615

CA 21-01442

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

IN THE MATTER OF SAVE MONROE AVE,, INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, ET AL., RESPONDENTS, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, THE DANIELE FAMILY COMPANIES, TOWN OF BRIGHTON AND TOWN BOARD OF TOWN OF BRIGHTON, RESPONDENTS-RESPONDENTS. (APPEAL NO. 8.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, AND THE DANIELE FAMILY COMPANIES.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON AND TOWN BOARD OF TOWN OF BRIGHTON.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 9, 2021. The order denied the motion of petitioners for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

616

CA 21-01443

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON, NEW YORK OFFICE OF BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY OF BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC, RESPONDENTS-RESPONDENTS. (APPEAL NO. 9.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON, NEW YORK OFFICE OF BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, AND RAMSEY BOEHNER, IN HIS CAPACITY OF BUILDING INSPECTOR.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 8, 2021. The order denied the motion of petitioners for a preliminary injunction.

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

Same memorandum as in *Matter of Brighton Grassroots, LLC v Town of Brighton Planning Bd.* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

617

KA 16-02097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ODYSSTY D.R., DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered August 19, 2016. The appeal was held by this Court by order entered March 19, 2021, decision was reserved and the matter was remitted to Monroe County Court for further proceedings. The proceedings were held and completed.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]). On remittal, the court adjudicated defendant a youthful offender and, inasmuch as defendant had already served a term of imprisonment exceeding the maximum sentence that could have been imposed, the court sentenced defendant to time served.

Defendant's only remaining contentions on the initial appeal involve challenges to the validity of the waiver of the right to appeal and to the severity of the sentence. Regardless of the validity of the waiver of the right to appeal, defendant's contentions are moot inasmuch as defendant has served the sentence in its entirety (*see People v Scarborough*, 205 AD3d 1220, 1221-1222 [3d Dept 2022]; *People v Williams*, 199 AD3d 1446, 1447 [4th Dept 2021], *lv denied* 38 NY3d 931 [2022]; *People v Griffin*, 239 AD2d 936, 936 [4th Dept 1997]). Defendant's contention raised on resubmission to this Court—i.e., that the conviction should be vacated and replaced with a finding that defendant is a youthful offender (*see* CPL 720.20 [3]), is also moot inasmuch as County Court granted defendant's application for a youthful offender adjudication, vacated the originally imposed sentence as illegal, and sentenced defendant to time served—i.e., the court awarded defendant all the relief to which he was entitled (*cf.*

People v Sutki S., 188 AD3d 1270, 1271 [2d Dept 2020]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

618

KA 19-00701

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANY RUCKDESCHEL, ALSO KNOWN AS JANE DOE,
DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Alex R. Renzi, J.), rendered April 25, 2018. The judgment convicted defendant upon her plea of guilty of attempted murder in the second 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that her waiver of the right to appeal is invalid and that her 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 her challenge to the severity of her sentence (*see People v Campbell*, 196 AD3d 1064, 1064-1065 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]; *see generally People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

619

KA 17-01717

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ZEBRICK GRANT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 16, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

620

KA 17-01718

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ZEBRICK GRANT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 16, 2017. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree and robbery in the second degree.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

622

KA 21-00804

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGGIE CASWELL, DEFENDANT-APPELLANT.

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

REGGIE CASWELL, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 12, 2021. Defendant was resentenced upon his conviction of attempted robbery in the third degree.

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

Memorandum: Defendant was convicted of, inter alia, attempted robbery in the third degree (Penal Law §§ 110.00, 160.05), and he now appeals from a resentence with respect to that count. He contends in his main brief that he was improperly resentenced as a second felony offender because he was neither personally served with a copy of the second felony offender statement that the People filed with Supreme Court and provided to defense counsel nor arraigned on it before the court imposed the resentence. We reject that contention and conclude that "strict compliance with [CPL 400.21] was not required inasmuch as defendant received reasonable notice of the accusations against him and was provided an opportunity to be heard with respect to those accusations during the [resentencing] proceeding" (*People v Gonzalez*, 61 AD3d 1428, 1429 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]). Thus, "any technical failure to comply with the procedure set out in CPL 400.21 'was harmless, and [remitting] for [personal service of the second felony offender statement] and resentencing would be futile and pointless' " (*People v Terborg*, 195 AD3d 1605, 1606 [4th Dept 2021], *lv denied* 37 NY3d 995 [2021], quoting *People v Bouyea*, 64 NY2d 1140, 1142 [1985]).

We reject defendant's further contention in his main brief that the court erred by failing to order a new presentence report or to make a record of having reviewed any prior presentence report before it resentenced him. As an initial matter, any such contention is

unpreserved for our review inasmuch as defendant did not request an updated presentence report, object to the lack of any mention of a presentence report, updated or otherwise, at the resentencing, or move to vacate the resentencing on any ground relating to the lack of a presentence report (*see generally People v Pinet*, 201 AD3d 1370, 1371 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]; *People v Griffin*, 120 AD3d 1529, 1530 [4th Dept 2014]). In any event, we conclude that the court did not abuse its discretion in failing to order an updated presentence report pursuant to CPL 390.20 (1) before resentencing defendant. "The decision whether to obtain an updated report at resentencing is a matter resting in the sound discretion of the sentencing [j]udge" (*People v Kuey*, 83 NY2d 278, 282 [1994]; *see People v Woods*, 122 AD3d 1400, 1401 [4th Dept 2014], *lv denied* 25 NY3d 1210 [2015]; *People v Lard*, 71 AD3d 1464, 1465 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]). As we have repeatedly recognized, "[w]here as here, [the] defendant has been continually incarcerated between the time of the initial sentencing and resentencing, to require an update . . . does not advance the purpose of CPL 390.20 (1)" (*Lard*, 71 AD3d at 1465 [internal quotation marks omitted]; *see People v Rajab*, 133 AD3d 1241, 1241 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]). We further conclude that the court did not err in imposing the resentence without making a record that it had reviewed any prior presentence report. "[I]t is well established that the mere absence of any reference to the presentence report at sentencing is insufficient to rebut the presumption of regularity accorded to judicial proceedings" (*Pinet*, 201 AD3d at 1371 [internal quotation marks omitted]; *see People v Whilby*, 188 AD3d 425, 426 [1st Dept 2020], *lv denied* 36 NY3d 1060 [2021]).

Moreover, we reject defendant's contention in his pro se supplemental brief that the court improperly denied him a hearing to challenge his second felony offender status. Defendant was previously adjudicated to be a predicate felon, a finding that we affirmed on appeal (*People v Caswell*, 56 AD3d 1300, 1304 [4th Dept 2008], *lv denied* 11 NY3d 923 [2009], *reconsideration denied* 12 NY3d 781 [2009], *cert denied* 556 US 1286 [2009]) and that is binding on defendant here (*see* CPL 400.21 [8]; *People v Grimes*, 196 AD3d 1088, 1090 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]; *People v Christian*, 229 AD2d 991, 991 [4th Dept 1996], *lv denied* 88 NY2d 1020 [1996], *cert denied* 543 US 841 [2004]).

Defendant's remaining contentions in his pro se supplemental brief are not properly before us. To the extent that defendant seeks to challenge his original sentence, any such contention is not properly before us inasmuch as "a defendant who appeals from a resentence only may not challenge the underlying judgment" (*People v Nelson*, 195 AD3d 1442, 1443 [4th Dept 2021]; *see generally* CPL 450.30 [3]; *People v Bradford*, 138 AD3d 1436, 1437 [4th Dept 2016], *lv denied* 27 NY3d 1149 [2016]; *People v Smith*, 21 AD3d 1360, 1360 [4th Dept 2005], *lv denied* 5 NY3d 885 [2005]). Furthermore, defendant's contentions with respect to his motion pursuant to CPL 440.20 are not properly before us on appeal from the resentence, and defendant failed to obtain leave to appeal from the order deciding that motion (*see*

People v Loiz, 175 AD3d 872, 873 [4th Dept 2019]; *People v Moore*, 81 AD3d 1325, 1325 [4th Dept 2011], *lv denied* 16 NY3d 897 [2011]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

623

KA 20-00957

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK PONZO, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered July 13, 2020. The judgment convicted defendant upon a jury verdict of burglary in the first degree, attempted robbery in the first degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, conspiracy in the fourth degree, menacing in the second degree, and harassment 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 upon a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [4]) and attempted robbery in the first degree (§§ 110.00, 160.15 [4]), defendant contends that County Court erred in refusing to suppress certain statements that he made to a State Trooper, on the ground that he was in custody at the time and had not received *Miranda* warnings. Contrary to defendant's contention, the record of the suppression hearing establishes that defendant was not in custody at the time he made the relevant statements (*see People v Lewis*, 39 AD3d 1279, 1279 [4th Dept 2007], *lv denied* 9 NY3d 866 [2007]) and therefore *Miranda* warnings were not required (*see People v Paulman*, 5 NY3d 122, 129 [2005]; *People v Hughes*, 199 AD3d 1332, 1334 [4th Dept 2021]).

We reject defendant's further contention that the court abused its discretion in failing to conduct a minimal inquiry into defendant's request for assignment of substitute counsel (*see generally People v Porto*, 16 NY3d 93, 99 [2010]). "[W]here a defendant makes a seemingly serious request for new counsel, the court must make some minimal inquiry to determine whether the claim is meritorious" (*People v Robinson*, 195 AD3d 1527, 1528 [4th Dept 2021]; *see People v Sides*, 75 NY2d 822, 824-825 [1990]). Here, defendant's

motion seeking the assignment of new counsel contained "conclusory assertions that he and defense counsel disagreed about trial strategy" (*People v Brady*, 192 AD3d 1557, 1558 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]) and that defense counsel was ineffective (*see People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]), as well as "general assertions of dissatisfaction with defense counsel's representation" (*People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]). Therefore, defendant did not make the requisite "seemingly serious request" to warrant an inquiry as to whether he was entitled to assignment of substitute counsel (*Robinson*, 195 AD3d at 1528; *see Brady*, 192 AD3d at 1558; *Lewicki*, 118 AD3d at 1329).

Furthermore, we conclude that, "[b]y making only a general motion to dismiss the charges . . . after the People rested their case . . . , and by failing to renew . . . the motion at the close of his case . . . , defendant failed to preserve his contention that his conviction . . . is not supported by legally sufficient evidence" (*People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932 [2015]). In any event, 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 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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).

We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

624

KA 19-02218

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHOD COSTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 13, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree and petit larceny.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and petit larceny (§ 155.25). In appeal No. 2, he appeals from a judgment revoking the sentence of probation previously imposed upon that conviction and imposing an indeterminate term of incarceration.

With respect to appeal No. 1, defendant contends that he was deprived of effective assistance of counsel because his attorney took a position adverse to him with respect to his pro se motion to withdraw his plea of guilty. We reject that contention. The record establishes that, although County Court denied the motion, the court made its determination before defense counsel made the comments that were adverse to defendant's position on the motion (*cf. People v Mitchell*, 21 NY3d 964, 966-967 [2013]). Therefore, we conclude that the court's denial of the motion was not influenced by defense counsel's statements (*see People v Martinez*, 166 AD3d 1558, 1559-1560 [4th Dept 2018]; *People v Carter-Doucette*, 124 AD3d 1323, 1324 [4th Dept 2015], *lv denied* 25 NY3d 988 [2015]; *People v Wester*, 82 AD3d 1677, 1678 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]).

Contrary to defendant's further contention in appeal No. 1, the court did not abuse its discretion in denying the motion. It is well settled that "there is no requirement that a defendant personally

recite the facts underlying his or her crime[s] during the plea colloquy" (*People v Bullock*, 78 AD3d 1697, 1698 [4th Dept 2010], *lv denied* 16 NY3d 742 [2011] [internal quotation marks omitted]; *see People v Brinson*, 192 AD3d 1559, 1560 [4th Dept 2021]), and the record here "establishes that defendant confirmed the accuracy of [the court's] recitation of the facts underlying the crime[s]" (*People v Gordon*, 98 AD3d 1230, 1230 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012] [internal quotation marks omitted]; *see People v Pryce*, 148 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 29 NY3d 1085 [2017]). We have considered defendant's remaining contentions concerning appeal No. 1 and conclude that they lack merit.

Finally, with respect to appeal No. 2, defendant's sole contention is that his sentence is unduly harsh and severe. Defendant has completed serving his sentence and, therefore, his challenge to the severity of the sentence is moot (*see People v Kelley*, 186 AD3d 1103, 1103 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]). We thus dismiss that appeal (*see People v Pompeo*, 151 AD3d 1949, 1950 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *People v Laney*, 117 AD3d 1481, 1482 [4th Dept 2014]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

625

KA 20-00580

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHOD COSTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered December 10, 2019. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Coston* ([appeal No. 1] — AD3d — [Sept. 30, 2022] [4th Dept 2022]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

628

CA 22-00152

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

ELENA SPIVAK-BOBKO, AS POWER OF ATTORNEY FOR IRINA RIFMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY ARMS, LLC, DEFENDANT-APPELLANT.

GERBER CIANO KELLY BRADY LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered January 24, 2022. The judgment awarded plaintiff money damages after a nonjury trial.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by setting aside the verdict with respect to damages for future pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for future pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for future pain and suffering to $100,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff, as power of attorney for Irina Rifman, commenced this action seeking damages for injuries that then-78-year-old Rifman, a tenant residing in property owned by defendant, sustained when she was scalded by excessively hot water while she was in the bathtub in her apartment. Defendant appeals from a judgment entered upon a nonjury verdict finding that defendant was negligent, that defendant's negligence was a substantial factor in causing Rifman's "scalding/burn injuries," that Rifman was negligent, and that her negligence was a substantial factor in causing her injuries. Supreme Court attributed 90% of the fault to defendant and 10% of the fault to Rifman. The court awarded plaintiff, inter alia, damages for past pain and suffering in the amount of $450,000, and damages for future pain and suffering in the amount of $182,000 to cover a period of 9.1 years.

Our scope of review after a nonjury trial is as broad as that of the trial court (*see Northern Westchester Professional Park Assoc. v*

Town of Bedford, 60 NY2d 492, 499 [1983]; *Burke v Women Gynecology & Childbirth Assoc., P.C.*, 195 AD3d 1393, 1394 [4th Dept 2021]; *Howard v Pooler*, 184 AD3d 1160, 1163 [4th Dept 2020]). It is well settled, however, that the decision of a court following a nonjury trial should not be disturbed on appeal "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993] [internal quotation marks omitted]).

Contrary to defendant's contention, the court properly determined that defendant was negligent and that defendant's negligence was a proximate cause of Rifman's injuries by applying the doctrine of res ipsa loquitur (*see Durso v Wal-Mart Stores*, 270 AD2d 877, 877 [4th Dept 2000]; *see generally Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). The doctrine of res ipsa loquitur permits a factfinder to "infer negligence from the circumstances of the occurrence" (*Kambat*, 89 NY2d at 495). Here, the trial evidence established that Rifman's injury was of a type that "ordinarily does not occur in the absence of someone's negligence"; that it was "caused by an agency or instrumentality within the exclusive control of the defendant," i.e., the heater generating the excessively hot water; and that Rifman played no part in setting the water temperature (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [internal quotation marks omitted]). Defense witnesses testified that only maintenance employees had access to the water heater, which was kept in a locked room in the basement of defendant's building. It was not unreasonable for the court to conclude that, because the water heater was within defendant's exclusive control and Rifman's injury resulted from negligence related to the water heater's temperature setting, defendant was "more likely than not" to be at fault (*Kambat*, 89 NY2d at 494 [internal quotation marks omitted]). A plaintiff is "not obligated to eliminate every alternative explanation for the event" (*id.* at 497), and instead "must only show that the likelihood of other possible causes of the injury is so reduced that the greater probability lies at the defendant's door" (*Lancia v Good Samaritan Hosp.*, 201 AD3d 913, 916 [2d Dept 2022]). Although a witness testified that the lock on the door had been changed and that there was a possibility that the room was left unlocked, the court also was free to reject the "theory of the 'phantom vandal' " (*Nesbit v New York City Tr. Auth.*, 170 AD2d 92, 96 [1st Dept 1991]).

We agree with defendant, however, that the award of damages for future pain and suffering deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Based on the evidence presented at trial, we conclude that $100,000 for future pain and suffering damages is the maximum amount that the court could have awarded as reasonable compensation (*see Barnhard v Cybex Intl., Inc.*, 89 AD3d 1554, 1557 [4th Dept 2011]; *Bissell v Town of Amherst*, 56 AD3d 1144, 1147-1148 [4th Dept 2008], *lv denied in part and dismissed in part* 12 NY3d 878 [2009]; *Allison v Erie County Indus. Dev. Agency*, 35 AD3d 1159, 1161 [4th Dept 2006]). We therefore modify the judgment

accordingly, and we grant a new trial on damages for future pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for future pain and suffering to $100,000, in which event the judgment is modified accordingly.

We have examined defendant's remaining contention and conclude that it does not require reversal or further modification of the judgment.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

629

TP 22-00427

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF E AUTO DISCOUNT, INC.,
PETITIONER,

V MEMORANDUM AND ORDER

MARK J.F. SCHROEDER, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

LAW OFFICE OF ROBERT D. BERKUN, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Paul Wojtaszek, J.], entered April 28, 2021) to review a determination of respondent. The determination, inter alia, found that petitioner violated Vehicle and Traffic Law § 415 (9) (c) and suspended petitioner's dealership registration for a period of 30 days and imposed a civil penalty.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted by annulling that part of the determination finding that petitioner violated Vehicle and Traffic Law § 415 (9) (c) and vacating the penalty imposed thereon, and as modified the determination is confirmed without costs.

Memorandum: Petitioner, the operator of a registered used automobile dealership, commenced this CPLR article 78 proceeding seeking to annul that part of a determination finding that it violated Vehicle and Traffic Law § 415 (9) (c). That finding was based upon petitioner's allegedly fraudulent statement to a customer (complainant) that a vehicle that it sold to the complainant came with an extended warranty. We agree with petitioner that the determination with respect to that finding is not supported by substantial evidence (*see generally Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239 [1997]; *Matter of West v State Univ. of N.Y. at Buffalo, Off. of Vice-President for Student Affairs*, 159 AD3d 1486, 1487 [4th Dept 2018]).

At the hearing before the Administrative Law Judge (ALJ),

respondent presented the testimony of an investigator establishing that petitioner sold the complainant a 2011 Jeep with a six-month or 7,500-mile extended power train warranty through nonparty Penn Warranty Corporation (PWC). The complainant testified that, when he attempted to make a claim under the warranty approximately five months after he purchased the vehicle, PWC informed him that it could not find the extended warranty for the 2011 Jeep in its system. Both the investigator and the complainant testified that petitioner's owner blamed PWC's inability to find the extended warranty on a "glitch in the system," which prevented the payment for the warranty from being made. However, petitioner presented the testimony of a PWC employee, who testified that an extended warranty had been purchased. According to the employee, at the time the complainant filed a claim, the warranty had expired due to mileage and, thus, there was no active contract in the system at that time. Indeed, it is undisputed that the warranty had expired due to mileage at the time the claim was made and, contrary to the ALJ's finding, PWC's employee explicitly testified to the existence of a record showing that the warranty had been purchased.

Furthermore, respondent did not submit any evidence establishing that petitioner willfully or purposefully misled the complainant with respect to the extended warranty (*cf. Matter of Licari v New York State Dept. of Motor Vehs.*, 153 AD3d 1598, 1598-1599 [4th Dept 2017]; *Matter of DeMarco v New York State Dept. of Motor Vehs.*, 150 AD3d 1671, 1672-1673 [4th Dept 2017]; *Matter of Romeo v Adduci*, 151 AD2d 947, 948 [3d Dept 1989]). To the contrary, the evidence at the hearing established that petitioner believed that the warranty had, in fact, been purchased inasmuch as petitioner faxed the complainant a copy of the warranty receipt in order to assist the complainant in filing a claim. It was only after PWC was unable to find the vehicle's warranty in its system for a second time that petitioner informed the complainant, albeit incorrectly, that the warranty had not been paid for due to a "glitch in the system." We therefore modify the determination by granting the petition, annulling that part of the determination finding that petitioner violated Vehicle and Traffic Law § 415 (9) (c), and vacating the penalty imposed thereon, i.e., suspension of petitioner's dealer registration for 30 days plus a monetary penalty of $500.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

630

CA 21-01636

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

DONNA ANDREWS AND LAWRENCE ANDREWS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JCP GROCERIES, INC., DOING BUSINESS AS
SAVE-A-LOT FOOD STORES, DEFENDANT-RESPONDENT.

ALEXANDER & ASSOCIATES, EAST SYRACUSE (JAMES L. ALEXANDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered October 18, 2021. The order granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that defendant had constructive notice of the allegedly dangerous condition, and as modified the order is affirmed without costs.

Memorandum: In this personal injury action arising from an accident in which Donna Andrews (plaintiff) slipped and fell in defendant's supermarket, plaintiffs appeal from an order that granted defendant's motion for summary judgment dismissing the complaint. Generally, "landowners and business proprietors have a duty to maintain their properties in reasonably safe condition" (*Cox v McCormick Farms, Inc.*, 144 AD3d 1533, 1533-1534 [4th Dept 2016]; *see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). Thus, "[i]n seeking summary judgment, a defendant landowner [or business proprietor] has the initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of a dangerous condition on the premises" (*Menear v Kwik Fill*, 174 AD3d 1354, 1357 [4th Dept 2019]).

Here, contrary to plaintiffs' contention, defendant met its initial burden on its motion of establishing that it did not have actual notice of any dangerous condition by submitting evidence "that

[it] did not receive any complaints concerning the area where plaintiff fell and [was] unaware of any water or other substance in that location prior to plaintiff's accident" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *see Danielak v State of New York*, 185 AD3d 1389, 1389-1390 [4th Dept 2020], *lv denied* 35 NY3d 918 [2020]). In opposition, plaintiffs failed to raise a triable issue of fact with respect to actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Similarly, defendant met its initial burden on its motion of establishing that it did not create the dangerous condition that caused plaintiff to slip (*cf. generally Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544, 544-545 [1st Dept 2011]; *Henderson v L & K Collision Corp.*, 146 AD2d 569, 571 [2d Dept 1989]) and, in opposition, plaintiffs failed to raise a triable issue of fact whether defendant created that condition. Thus, we reject plaintiffs' contention that Supreme Court erred in granting the motion in those respects.

We agree with plaintiffs, however, that the court erred in granting the motion with respect to the claim that defendant had constructive notice of the dangerous condition, and we therefore modify the order accordingly. Defendant failed to meet its initial burden on that issue inasmuch as its own submissions raise triable issues of fact whether the wet floor "was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendant's employees] to discover and remedy it" (*Navetta*, 106 AD3d at 1469 [internal quotation marks omitted]; *see Clarke v Wegmans Food Mkts., Inc.*, 147 AD3d 1401, 1402 [4th Dept 2017]; *King v Sam's E., Inc.*, 81 AD3d 1414, 1415 [4th Dept 2011]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). Although defendant submitted the affidavit and deposition testimony of its former store manager, in which he indicated that store employees routinely frequented the area and would have looked for dangerous conditions, defendant's evidence failed to establish that the employees actually performed any security sweeps on the day of the incident, or that anyone actually inspected the area in question before plaintiff's fall. Consequently, defendant failed to eliminate all issues of fact with respect to constructive notice (*see Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]; *Johnson v Panera, LLC*, 59 AD3d 1118, 1118 [4th Dept 2009]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

633

CA 22-00330

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF THE ESTATE OF JOHN W. HARMON, DECEASED.

KEVIN C. HARMON, JR., PETITIONER-RESPONDENT;
LORAN BETH CARTER, OBJECTANT-APPELLANT.

BRIDGET A. WILLIAMS, GUARDIAN AD LITEM FOR MCKENZIE S., RESPONDENT-RESPONDENT.

ORDER

GERALD P. GORMAN, ORCHARD PARK, FOR OBJECTANT-APPELLANT.

NANCY J. BIZUB, WEST SENECA, FOR PETITIONER-RESPONDENT.

BRIDGET A. WILLIAMS, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered August 23, 2021. The order, inter alia, granted petitioner's motion for summary judgment dismissing the objections to probate of decedent's will.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 29, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

634

CA 21-01052

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF WILLIAMSVIILE RESIDENTS OPPOSED TO BLOCHER REDEVELOPMENT, LLC, CHRISTINE HUNT, DANIEL HUNT, RICHARD CUMMINGS, KATHLEEN CUMMINGS, REBECCA WALSER, RUDOLPH HEIN, WILLIAM HEIN, DIANE HEIN AND VICTORIA D'ANGELO, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF WILLIAMSVILLE PLANNING AND ARCHITECTURAL REVIEW BOARD, VILLAGE OF WILLIAMSVILLE, NEW YORK, THE BLOCHER HOMES, INC., AND PEOPLE, INC., RESPONDENTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HOPKINS SORGI & MCCARTHY PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), AND BOND, SCHOENECK & KING PLLC, BUFFALO, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Daniel Furlong, J.), entered July 7, 2021 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the supplemental petition-complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and action for declaratory judgment and seek, inter alia, to annul the determinations of respondent-defendant Village of Williamsville Planning and Architectural Review Board (Planning Board) issuing a negative declaration pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) and granting site plan and architectural review approvals with respect to the proposed repurposing of an existing 57-residential unit, 24,780-square-foot building to an 87-unit mixed-income apartment complex (Project). Petitioners appeal from a judgment dismissing their supplemental petition-complaint. We affirm.

As a preliminary matter, we note that this is properly only a CPLR article 78 proceeding inasmuch as the relief sought by petitioners is available under CPLR article 78 without the necessity of a declaration (*see generally* CPLR 7801).

Petitioners contend that the negative declaration must be annulled because the Planning Board failed to complete a full environmental assessment form (EAF) pursuant to SEQRA. We agree with petitioners that the Planning Board improperly classified the Project as an unlisted action (*see* 6 NYCRR 617.2 [al]), rather than as a type I action (*see* 6 NYCRR 617.4). Although SEQRA's procedural mechanisms are in place to ensure that SEQRA's purposes are not thwarted, and therefore strict compliance with procedural mechanisms is required (*see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]; *Centerville's Concerned Citizens v Town Bd. of Town of Centerville*, 56 AD3d 1129, 1130 [4th Dept 2008]), a misclassification does not always lead to the annulment of the negative declaration if the lead agency conducts the equivalent of a type I review notwithstanding the misclassification (*see e.g. Matter of Hartford/North Bailey Homeowners Assn. v Zoning Bd. of Appeals of Town of Amherst*, 63 AD3d 1721, 1723 [4th Dept 2009], *lv denied in part and dismissed in part* 13 NY3d 901 [2009]). Here, the Planning Board conducted a coordinated review and its meeting minutes and the comprehensive 31-page negative declaration demonstrate that it thoroughly addressed the environmental factors that were necessary to issue the SEQRA negative declaration even upon a type I evaluation (*see Matter of Residents Against Wal-Mart v Planning Bd. of Town of Greece*, 60 AD3d 1343, 1344 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *Matter of Ahearn v Zoning Bd. of Appeals of Town of Shawangunk*, 158 AD2d 801, 803-804 [3d Dept 1990], *lv denied* 76 NY2d 706 [1990]; *see also Matter of Steele v Town of Salem Planning Bd.*, 200 AD2d 870, 872 [3d Dept 1994], *lv denied* 83 NY2d 757 [1994]). Inasmuch as the Planning Board "consider[ed] the same criteria when making a determination concerning significant adverse environmental impacts whether the action was classified as type I or unlisted" (*Matter of Citizens for Responsible Zoning v Common Council of City of Albany*, 56 AD3d 1060, 1061 [3d Dept 2008]), we conclude that the Planning Board properly complied with SEQRA's mandates (*see Matter of Coursen v Planning Bd. of Town of Pompey*, 37 AD3d 1159, 1160 [4th Dept 2007]; *cf. Matter of Miranda Holdings, Inc. v Town Bd. of the Town of Orchard Park*, 206 AD3d 1662, 1663-1664 [4th Dept 2022]; *Centerville's Concerned Citizens*, 56 AD3d at 1130).

We further reject petitioners' contention that the Planning Board erred in determining that the project will have no significant adverse impact on the environment. Here, the Planning Board "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]; *see Hartford/North Bailey Homeowners Assn.*, 63 AD3d at 1723-1724).

Finally, we have considered petitioners' remaining contentions

regarding the site plan and architectural review approvals and conclude that they do not warrant modification or reversal of the judgment.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

641

CA 21-01318

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF BRUNCE SMITH,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,
RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered August 12, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

644

CA 21-01520

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF CHAD ZIGENFUS, BERTON CANDEE,
STEVE TRUDE AND HANS DAATSELAAR,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF COHOCTON TOWN BOARD AND BARON WINDS, LLC,
RESPONDENTS-RESPONDENTS.

GARY A. ABRAHAM, GREAT VALLEY, FOR PETITIONERS-APPELLANTS.

YOUNG/SOMMER LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), FOR RESPONDENT-RESPONDENT BARON WINDS, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Steuben County (Kevin M. Nasca, J.), entered July 13, 2021 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, dismissed the amended petition and complaint insofar as it seeks relief pursuant to CPLR article 78 and declared that Town of Cohocton Local Law No. 4 of 2019 was not unlawfully enacted.

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

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioners appeal from a judgment that, inter alia, dismissed the amended petition and complaint insofar as it sought relief pursuant to CPLR article 78 and declared that respondent Town of Cohocton Town Board (Town Board) did not act unlawfully in enacting Local Law No. 4 of 2019, which amended the local zoning law to raise the maximum allowable height of wind turbines erected in the Town of Cohocton from 500 feet to 650 feet.

Petitioners contend that the Town Board acted improperly in enacting Local Law No. 4 because one of its voting members had a conflict of interest that required his recusal, and the Town Board could not invoke the rule of necessity to permit him to vote despite the conflict inasmuch as a quorum of the Town Board was available to vote. That contention differs from the contention raised by petitioners in their amended petition and complaint, i.e., that three of the five members of the Town Board were disqualified from voting by a conflict of interest, which would render a quorum unavailable. Petitioners' contention is thus raised for the first time on appeal

and is not properly before this Court (*see Matter of Elmwood Vil. Charter Sch. v Buffalo City Sch. Dist.*, 195 AD3d 1542, 1543 [4th Dept 2021]; *Matter of Majka v Utica City School Dist.*, 247 AD2d 845, 846 [4th Dept 1998]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). We have considered petitioners' remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

645

KA 20-00289

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS B. MAHAR, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS, FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered August 15, 2019. The appeal was held by this Court by order entered February 5, 2021, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (191 AD3d 1237 [4th Dept 2021]). The proceedings were held and completed.

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 three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) after a conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]). We previously held this case, reserved decision, and remitted the matter to County Court to comply with Correction Law §§ 168-d (3) and 168-n (3) by setting forth the findings of fact and conclusions of law upon which it based its determinations (*People v Mahar*, 191 AD3d 1237, 1237 [4th Dept 2021]). Upon remittal, the court issued a written decision that fulfilled its statutory obligations.

Contrary to defendant's contention, the court properly assessed 25 points under risk factor 2, for sexual contact with the victim (sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual abuse). The evidence consisted of a letter prepared by a mental health counselor who conducted clinical assessments of three of the four children who had lived with defendant, all three of whom disclosed that defendant had had sexual contact with them. One child disclosed that defendant had engaged in anal sexual conduct with two of the four children. We conclude that the statements of the children constituted reliable hearsay that provided the requisite clear and convincing evidence for the assessment of points under that risk factor (*see People v Darrah*, 153 AD3d 1528, 1528 [3d Dept 2017]; *People v Law*, 94 AD3d 1561, 1562-1563 [4th Dept 2012], *lv denied* 19

NY3d 809 [2012]; *People v Burch*, 90 AD3d 1429, 1430-1431 [3d Dept 2011]).

Defendant further contends that the court erred in assessing 30 points under risk factor 3 for having three or more victims. It is well settled that, in determining the number of victims, " 'the hearing court is not limited to the crime of which defendant was convicted' " (*People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see People v Jones*, 196 AD3d 1179, 1180 [4th Dept 2021], *lv denied* 37 NY3d 916 [2021]; *People v Tubbs*, 124 AD3d 1094, 1094 [3d Dept 2015]). Thus, contrary to defendant's contention, the fact that he pleaded guilty with respect to only one victim is not dispositive (*see People v Urrego*, 145 AD3d 923, 923-924 [2d Dept 2016], *lv denied* 29 NY3d 905 [2017]). The court properly considered reliable hearsay evidence that there were at least two additional victims in the case that ultimately resulted in defendant's conviction (*see People v Morrison*, 156 AD3d 831, 831-832 [2d Dept 2017]; *People v Madera*, 100 AD3d 1111, 1112 [3d Dept 2012]; *People v Radage*, 98 AD3d 1194, 1194 [3d Dept 2012], *lv denied* 20 NY3d 855 [2012]).

We agree with defendant that the court erred in assessing 20 points for risk factor 4, for a continuing course of sexual misconduct. The documents in the record do not specify when defendant's acts of sexual misconduct "occurred relative to each other and thus [are] insufficient to establish a continuing course of sexual misconduct" (*People v Farrell*, 142 AD3d 1299, 1300 [4th Dept 2016]; *see People v Ellis*, 204 AD3d 1388, 1389-1390 [4th Dept 2022]; *People v Edmonds*, 133 AD3d 1332, 1332 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). Even without those 20 points, however, defendant is still a level three risk (*see generally People v Loughlin*, 145 AD3d 1426, 1427 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]).

Finally, we reject defendant's contention that the court erred in assessing 10 points under risk factor 12, for not accepting responsibility. Although defendant made some admissions in his statements to the police, he also tried to blame the children for any sexual contact, and some of his explanations were incredible. We conclude that "[t]aking all of defendant's statements together, . . . they do not reflect a genuine acceptance of responsibility as required by the risk assessment guidelines" (*Ellis*, 204 AD3d at 1389 [internal quotation marks omitted]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

646

KA 22-00353

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW ALMOND, DEFENDANT-APPELLANT.

JOSEPH A. LOBOSCO, ROCHESTER, 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 (Richard M. Healy, J.), rendered January 20, 2021. The judgment convicted defendant upon a nonjury verdict of predatory sexual assault against a child (two counts), sexual abuse in the first degree and endangering the welfare of a child (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 nonjury verdict of, inter alia, two counts of predatory sexual assault against a child (Penal Law § 130.96), under a theory of accomplice liability (*see* § 20.00). Defendant's conviction stems from two incidents in which defendant's paramour engaged in oral sexual conduct with a child less than thirteen years old in defendant's presence, allegedly at defendant's urging.

Defendant contends that the evidence is legally insufficient to support the conviction because the testimony of his paramour accomplice was not supported by the requisite corroborative evidence (*see* CPL 60.22 [1]). That contention is not preserved for our review inasmuch as defendant did not renew his motion for a trial order of dismissal after presenting evidence (*see People v Brown*, 194 AD3d 1398, 1399 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). In any event, we conclude that the testimony of the victim that defendant engaged in sex with the accomplice during one of the incidents, as well as a sworn statement from defendant that he was present during one of the incidents and that he found the idea of the victim being "with" his accomplice "hot," " 'tend[ed] to connect the defendant with the commission of the crime[s] in such a way as [could] reasonably satisfy the [finder of fact] that the accomplice [was] telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see* CPL 60.22 [1]; *People v Larregui*, 164 AD3d 1622, 1623 [4th Dept 2018], *lv denied* 32

NY3d 1126 [2018]). Although the victim was not entirely consistent in his account, also testifying that defendant was "dozing off" during the incidents, we note that " '[t]he role of the additional evidence is only to connect the defendant with the commission of the crime[s], not to prove that [the defendant] committed [them]' " (*Reome*, 15 NY3d at 192). We further conclude that, " '[i]nasmuch as the conviction is supported by legally sufficient evidence, defense counsel was not ineffective in failing to preserve defendant's legal sufficiency challenge for our review' " (*People v Rookard*, 156 AD3d 1394, 1395 [4th Dept 2017], *lv denied* 31 NY3d 1017 [2018]; *see People v Hill*, 147 AD3d 1501, 1502 [4th Dept 2017], *lv denied* 29 NY3d 1080 [2017]; *People v Goley*, 113 AD3d 1083, 1085 [4th Dept 2014]).

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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). On the record before us, the testimony adduced at trial, and any inconsistencies contained therein, "merely presented issues of credibility for the factfinder to resolve" (*People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *see People v Withrow*, 170 AD3d 1578, 1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]), and we see no reason to disturb County Court's credibility determinations here.

Defendant failed to object to the court's questioning of the People's witnesses, and therefore we conclude that defendant "failed to preserve for our review his contention that he was denied a fair trial by the court's questioning of witnesses" (*People v West*, 129 AD3d 1629, 1630 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *see* CPL 470.05 [2]; *People v Charleston*, 56 NY2d 886, 887 [1982]). In any event, that contention lacks merit. The court was "entitled to question witnesses to clarify testimony and to facilitate the progress of the trial and to elicit relevant and important facts" (*People v Williams*, 107 AD3d 1516, 1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013] [internal quotation marks omitted]; *see People v Pham*, 178 AD3d 1438, 1438-1439 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]; *People v Pollard*, 70 AD3d 1403, 1405 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010]), and we conclude that it did not improperly "take[] on either the function or appearance of an advocate" (*People v Arnold*, 98 NY2d 63, 67 [2002]; *see People v Yut Wai Tom*, 53 NY2d 44, 57-58 [1981]).

We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

647

KA 18-02409

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENZEL K. LEWIS, DEFENDANT-APPELLANT.

CONNIE M. LOZINSKY, NIAGARA FALLS, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (CARRINGTON M. CROSSLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered August 2, 2018. The judgment convicted defendant upon his plea of guilty of manslaughter 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 his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid for several reasons and that his sentence is unduly harsh and severe. Defendant initially contends that his waiver of the right to appeal is invalid because he did not understand that the maximum sentence could be imposed. We reject that contention. Supreme Court informed defendant of the sentencing range, including the maximum sentence, and we conclude that defendant "acknowledged that he understood the bargained-for plea agreement and that no promises or commitments had been made with respect to sentencing" (*People v Chandler*, 214 AD2d 1027, 1027 [4th Dept 1995], *lv denied* 86 NY2d 792 [1995]). Defendant further contends that his waiver of the right to appeal is invalid due to the lack of a specific sentence promise. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid on that basis and therefore does not preclude our review of his challenge to the severity of his sentence (*cf. People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *People v Plass*, 150 AD3d 1558, 1559 [3d Dept 2017], *lv denied* 29 NY3d 1094 [2017]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that the sentence is not unduly harsh or severe.

Finally, defendant contends that he was denied effective assistance of counsel at sentencing. Even assuming, arguendo, that

defendant's contention survives his guilty plea (*see People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]; *People v McFarley*, 144 AD3d 1521, 1522 [4th Dept 2016]), that contention is based in part on matters outside the record. We conclude that because "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the [mixed] claim *in its entirety*' " (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]; *see People v Johnson*, 195 AD3d 1420, 1421-1422 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

648

KA 16-00730

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM L. THOMAS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 19, 2016. The judgment convicted defendant upon a jury verdict of robbery in the second degree (two counts) and robbery in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts and on the law, count three of the indictment is dismissed, and a new trial is granted on the remaining counts of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [2] [a]) and one count of robbery in the third degree (§ 160.05). Defendant's conviction stems from three purse-snatching incidents occurring on different dates.

Contrary to defendant's contention, Supreme Court properly denied that part of his omnibus motion seeking to sever the counts of the indictment. The three offenses, although based upon different incidents, were all defined "by the same or similar statutory provisions" and were thus joinable in one indictment (CPL 200.20 [2] [c]). A court, "in the interest of justice and for good cause shown," may order such offenses to be tried separately (CPL 200.20 [3]). Defendant, however, failed to demonstrate good cause for severance (*see People v Vickers*, 148 AD3d 1535, 1536-1537 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]; *see generally People v Shapiro*, 50 NY2d 747, 757 [1980]). " 'The assertion that the trier of fact . . . would be unable to consider separately the evidence pertaining to each [robbery] was purely speculative' " (*People v McKinnon*, 15 AD3d 842, 843 [4th Dept 2005], *lv denied* 4 NY3d 888 [2005]). Here, the proof was presented to the jury separately with respect to each incident and was "straightforward and easily segregated" (*People v Daymon*, 239 AD2d

907, 908 [4th Dept 1997], *lv denied* 94 NY2d 821 [1999]). We therefore conclude that the court did not abuse its discretion in denying severance (*see People v Keegan*, 133 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *People v Bonner*, 94 AD3d 1500, 1501 [4th Dept 2012], *lv denied* 19 NY3d 1101 [2012], *reconsideration denied* 20 NY3d 1059 [2013]).

We reject defendant's contention that the evidence is legally insufficient on the issue of identity. 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 defendant's identity as the perpetrator of all three robberies (*see People v McGuire*, 196 AD3d 1155, 1157 [4th Dept 2021], *lv denied* 37 NY3d 1163 [2022]; *People v Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]). On the first count, the victim testified that the man she observed walking by the bus she was riding after it stopped and before she alighted was the man who stole her purse, and defendant was identified by two other witnesses as the man in the bus surveillance video walking past the bus. On the second count, the victim identified defendant at trial as the perpetrator. On the third count, we conclude under the circumstances of this case that the evidence that defendant's fingerprint was found on the handle of the door to the victim's apartment building constitutes legally sufficient evidence of defendant's identity as the perpetrator (*see generally People v Safford*, 74 AD3d 1835, 1836 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011], *reconsideration denied* 16 NY3d 899 [2011]).

Defendant further contends that the verdict is against the weight of the evidence on the issue of identity. Viewing the evidence in light of the elements of robbery in the second degree and robbery in the third degree on the first and second counts of the indictment as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We reach a different conclusion, however, on defendant's contention with respect to robbery in the second degree under the third count of the indictment. The victim of that robbery could not identify defendant as the perpetrator and, although defendant's fingerprint was found on the handle of the door to the victim's apartment building, there was no testimony that the perpetrator had ever touched that door handle, much less that he touched that door handle during the course of the robbery in question. We conclude that the People failed to prove beyond a reasonable doubt that defendant was the perpetrator, and thus the verdict with respect to count three of the indictment is against the weight of the evidence (*see generally id.*). We therefore reverse that part of the judgment convicting defendant of count three of the indictment and dismiss that count of the indictment.

Defendant also contends that the court erred in denying his motion seeking to file a late notice of alibi. We agree. When requested by the People, a defendant must serve upon the People and

file with the court a notice of alibi within eight days of the People's service of such demand (*see* CPL 250.20 [1]). "For good cause shown, the court may extend the period for service of the notice" (*id.*). Although a court has discretion to allow the late notice, that discretion is not absolute (*see People v Berk*, 88 NY2d 257, 265-266 [1996], *cert denied* 519 US 859 [1996]). "Exclusion of relevant and probative testimony as a sanction for a defendant's failure to comply with a statutory notice requirement implicates a defendant's constitutional right to present witnesses in his own defense" (*id.* at 266; *see Taylor v Illinois*, 484 US 400, 409 [1988]; *People v Perkins*, 166 AD3d 1285, 1287 [3d Dept 2018], *lv denied* 33 NY3d 980 [2019]). Sanctions less than preclusion may be appropriate, such as granting an adjournment to allow the People to conduct an investigation (*see* CPL 250.20 [3]; *Taylor*, 484 US at 413-414).

Here, on the day prior to jury selection, defendant filed a motion to permit the late service of a notice of alibi with respect to the first two counts of the indictment. In an affirmation in support of the motion, defense counsel explained that, just days after defendant's arraignment on the indictment, defendant informed him of the existence of a potential alibi witness, and defense counsel's investigator confirmed the alibi with the witness a week later. Defense counsel averred that, despite his awareness of that witness, he failed to notify the court and the prosecutor of the existence of the witness simply through his own negligence. Defense counsel had no objection to a brief adjournment for the People to investigate the alibi. Defense counsel's averments and statements to the court established that his failure to comply with the time limits of CPL 250.20 was not willful or motivated by a desire to obtain a tactical advantage but simply a mistake (*see People v Almonte*, 171 AD3d 470, 471 [1st Dept 2019], *lv denied* 33 NY3d 1102 [2019]; *People v Green*, 70 AD3d 39, 45 [2d Dept 2009]) and, under these circumstances, defendant's constitutional right to offer the testimony of the alibi witness outweighed any prejudice to the People or their interest in having the trial begin as scheduled (*see People v Lukosavich*, 189 AD3d 1895, 1901 [3d Dept 2020]; *see generally Berk*, 88 NY2d at 266; *People v Collins*, 30 AD3d 1079, 1079-1080 [4th Dept 2006], *lv denied* 7 NY3d 811 [2006]). The court therefore abused its discretion in precluding the testimony of the alibi witness (*see Green*, 70 AD3d at 45-46). The evidence against defendant was not overwhelming, and thus the harmless error doctrine is inapplicable here (*see id.* at 46). We therefore reverse those parts of the judgment convicting defendant of counts one and two of the indictment and grant a new trial on those counts.

In light of our determination, we do not address defendant's remaining contentions.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

649

KA 16-00192

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERBERT L. ARCH, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 15, 2015. The judgment convicted defendant upon a jury verdict of offering a false instrument for filing 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 offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]). Even assuming, arguendo, that defendant preserved for our review his contention that the indictment was rendered duplicitous by the evidence presented at trial (*see People v Allen*, 24 NY3d 441, 449-450 [2014]), we nevertheless reject that contention.

"A count in an indictment is void as duplicitous when that 'single count charges more than one offense' " (*People v Reid*, 198 AD3d 819, 820 [2d Dept 2021], *lv denied* 37 NY3d 1164 [2022], quoting *People v Alonzo*, 16 NY3d 267, 269 [2011]; *see* CPL 200.30 [1]). "Even if a count is valid on its face, it is nonetheless duplicitous where the evidence presented at trial makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" (*Reid*, 198 AD3d at 820 [internal quotation marks omitted]; *see People v Casiano*, 117 AD3d 1507, 1509 [4th Dept 2014]). As relevant to this case, a person is guilty of offering a false instrument for filing in the first degree when, "knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, he or she offers or presents it to a public office, public servant, public

authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation" (Penal Law § 175.35 [1]; *see generally People v Chaitin*, 94 AD2d 705, 705 [2d Dept 1983], *affd* 61 NY2d 683 [1984]; *People v Hure*, 16 AD3d 774, 775 [3d Dept 2005], *lv denied* 4 NY3d 854 [2005]). Here, the sole count of the indictment, charging defendant with offering a false instrument for filing in the first degree, was predicated upon his submission of a single application to register the title of a trailer with the New York State Department of Motor Vehicles (DMV). In addition, the "multiple falsehoods" contained in each document that was included with that application were related, and "each of the falsehoods was intended to mislead" the DMV about the trailer (*People v Ribowsky*, 77 NY2d 284, 289 [1991]). Under these circumstances, the sole count of the indictment was not rendered duplicitous by the trial evidence (*see id.*; *cf. People v Quinn*, 103 AD3d 1258, 1258-1259 [4th Dept 2013]; *see also Reid*, 198 AD3d at 820; *People v Sabo*, 16 AD3d 920, 920-921 [3d Dept 2005], *lv denied* 5 NY3d 794 [2005]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

650

KAH 21-00130

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WAYNE C. JAMES, PETITIONER-APPELLANT,

V ORDER

DANIELLE DILL, ACTING EXECUTIVE DIRECTOR,
CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENT-RESPONDENT.

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 1, 2020 in a habeas corpus proceeding. The judgment denied the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

651

KA 20-00342

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RASHOD HARVEY, DEFENDANT-APPELLANT.

RASHOD HARVEY, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY 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 Supreme Court, Monroe County (Thomas E. Moran, J.), entered January 29, 2020. 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.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

653

CAF 21-01100

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF WILSON L. DEJESUS,
PETITIONER-RESPONDENT,

V ORDER

ANNE BLOSSICK, RESPONDENT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 1, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that the subject child reside primarily with petitioner during the school year.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

661

CAF 21-00507

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF MYA N.

AUDRIANA S.R., PETITIONER-APPELLANT,

ORDER

V

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
TRICIA A.N. AND REGINALD J.N.,
RESPONDENTS-RESPONDENTS.

TRICIA A.N., PETITIONER-RESPONDENT,

V

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
REGINALD J.N., RESPONDENTS-RESPONDENTS,
AND AUDRIANA S.R., RESPONDENT-APPELLANT.

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

ASHLEY J. WEISS, MOUNT MORRIS, FOR RESPONDENT-RESPONDENT LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Livingston County (Barry L. Porsch, A.J.), entered February 19, 2021 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded Tricia A.N. and Audriana S.R. joint legal custody of the subject child.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

662

CAF 21-01391

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JUSTIN R. CUTTEN,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

DEVAN R. HARRINGTON,
RESPONDENT-PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

GERALD J. VELLA, SPRINGVILLE, FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered September 3, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties share joint custody of the subject child with primary placement with respondent-petitioner Devan R. Harrington.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

663

CA 22-00220

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

AH WINES, INC., GREAT COLISEUM, L.L.C., THE GREAT COLISEUM, L.L.C., GREAT COLISEUM, L.L.C., DOING BUSINESS AS AH WINES, LODI CITY WINERY, LODI WINE COMPANY, WINERY DIRECT DISTRIBUTORS AND JEFFREY WAYNE HANSEN, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

C6 CAPITAL FUNDING LLC, DEFENDANT-RESPONDENT.

THE BASILE LAW FIRM P.C., JERICHO (ERIC J. BENZENBERG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CARTER LEDYARD & MILBURN LLP, NEW YORK CITY (JACOB HERSHEL NEMON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered February 1, 2022. The judgment dismissed the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking to vacate a judgment by confession on the ground that it was based on a criminally usurious loan. After plaintiffs filed an initial motion for, inter alia, summary judgment on the amended complaint and that motion was denied without prejudice, plaintiffs filed a second motion seeking the same relief. They now appeal from an order that, inter alia, denied their second motion and, upon searching the record, granted summary judgment in favor of defendant and directed entry of a judgment dismissing the amended complaint. We deem the appeal to be taken from the judgment subsequently entered on that order inasmuch as the notice of appeal "from an order directing summary judgment [is] deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of" this Court (CPLR 5501 [c]), and we affirm the judgment.

Preliminarily, we note that plaintiffs do not address in their brief on appeal the dismissal of the third and fourth causes of action in the amended complaint, and we therefore deem any challenge to the dismissal of those causes of action abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

With respect to the other two causes of action, which are based on usury, we conclude that, contrary to plaintiffs' contention, Supreme Court properly granted summary judgment in favor of defendant on the ground that those causes of action are time-barred under CPLR 215 (6). The confession of judgment was signed on November 5, 2018, and it was entered in the court on February 28, 2019. Plaintiffs commenced this action on July 2, 2020. Consequently, even assuming, arguendo, that plaintiffs' first two causes of action are not barred by General Obligations Law § 5-521 (*cf. Paycation Travel, Inc. v Global Merchant Cash, Inc.*, 192 AD3d 1040, 1041 [2d Dept 2021]; *Intima-Eighteen, Inc. v Schreiber Co.*, 172 AD2d 456, 457 [1st Dept 1991], *lv denied* 78 NY2d 856 [1991]), we conclude that plaintiffs "may not assert a cause of action based on usury since the one-year statute of limitations has expired" (*Glassman v Zoref*, 291 AD2d 430, 431 [2d Dept 2002]; *see Mill St. Realty v Reineke*, 159 AD2d 494, 494 [2d Dept 1990]; *see also Rebeil Consulting Corp. v Levine*, 208 AD2d 819, 820 [2d Dept 1994]).

In light of our determination, we do not consider plaintiffs' remaining contentions.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

664

CA 21-01506

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

VALENTINO DIXON, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 135327.)

NEUFELD SCHECK & BRUSTIN, LLP, NEW YORK CITY (MARY K. MCCARTHY OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered April 21, 2021. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

666

CA 21-01733

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

KIM M. CAPOZZOLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARCANGELO CAPOZZOLO, DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, BUFFALO (KENNETH A. OLENA OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 23, 2021. The order committed defendant to the Erie County Correctional Facility for 30 days.

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

Memorandum: In this civil contempt proceeding, defendant appeals from an order that, upon a finding of willful contempt, committed him to the Erie County Correctional Facility for a term of 30 days. Defendant contends, inter alia, that the punishment of incarceration was an abuse of the civil contempt statute. Even assuming, arguendo, that the issues raised on appeal are preserved for our review, we are unable to determine whether defendant's contentions have merit inasmuch as the 19-page record before us does not contain sufficient information to enable us to determine whether Supreme Court properly imposed a punishment of jail time. Defendant, as the appellant, "submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028 [4th Dept 1994]; *see Matter of Jon Z. [Margaret Z.]*, 151 AD3d 1854, 1855 [4th Dept 2017]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

667

OP 22-00303

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF PEOPLE OF THE STATE OF NEW YORK
EX REL. ROBERT I. REED, PETITIONER,

V ORDER

NIAGARA COUNTY DISTRICT ATTORNEY, RESPONDENT.

ROBERT I. REED, PETITIONER PRO SE.

Proceeding pursuant to CPLR article 70 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b] [2]) for a writ of habeas corpus and other relief.

It is hereby ORDERED that said petition is unanimously dismissed without costs as moot.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

669

CA 22-00324

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

VICKI LEISTNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID VANINI AND BUFFALO BARKS, LLC,
DEFENDANTS-RESPONDENTS.

THE LAW OFFICES OF MATTHEW ALBERT, DARIEN CENTER (MATTHEW ALBERT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (MICHAEL R. SCHUG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 7, 2021. The order granted the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the second cause of action in the amended complaint insofar as it seeks economic damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, emotional distress after her dog died while at defendant Buffalo Barks, LLC, a dog daycare facility owned by defendant David Vanini. Supreme Court granted defendants' CPLR 3211 (a) (7) motion to dismiss the amended complaint, and plaintiff now appeals.

Initially, we note that, on a motion to dismiss pursuant to CPLR 3211 (a) (7), we "must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference' " (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]).

We reject plaintiff's contention that the court erred in granting that part of defendants' motion seeking to dismiss the first cause of action, which alleged both negligent and "intentional/reckless" infliction of emotional distress. It is well-settled that New York

"does not recognize a claim for negligent infliction of emotional distress for the loss of animals" (*Kyprianides v Warwick Val. Humane Socy.*, 59 AD3d 600, 601 [2d Dept 2009]; *see Schrage v Hatzlacha Cab Corp.*, 13 AD3d 150, 150 [1st Dept 2004]; *DeJoy v Niagara Mohawk Power Corp.*, 13 AD3d 1108, 1109 [4th Dept 2004]; *Lewis v DiDonna*, 294 AD2d 799, 801 [3d Dept 2002]). The tort of intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Liability for intentional infliction of emotional distress is rare, and is appropriate "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at 122 [internal quotation marks omitted]). The tort of reckless infliction of emotional distress has the same elements (*see Dana v Oak Park Marina*, 230 AD2d 204, 208-209 [4th Dept 1997]). "[R]eckless conduct is encompassed within the tort denominated intentional infliction of emotional distress" (*id.* at 209).

Here, accepting plaintiff's allegations as true and granting her every possible favorable inference, we conclude that the alleged conduct of defendants falls short of the standard for intentional or reckless infliction of emotional distress (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]; *Gilewicz v Buffalo Gen. Psychiatric Unit*, 118 AD3d 1298, 1299-1300 [4th Dept 2014]). Defendants did not intentionally kill plaintiff's dog (*cf. Barrish v Chiesa*, 182 AD3d 496, 496 [1st Dept 2020]). At most, the allegations of the amended complaint show that plaintiff's dog was killed when defendants' facility should not have been open or was inadequately staffed; staff should have been outside where the dogs were playing; plaintiff's dog should not have been in the same area as larger dogs; Vanini tampered with evidence and engaged in a cover-up after the incident; and, on two occasions after the incident, Vanini drove past plaintiff's place of business and made an offensive gesture. Those allegations do not amount to the type of extreme and outrageous conduct that is actionable (*see Kyprianides*, 59 AD3d at 601). The court therefore properly granted that part of the motion seeking to dismiss the cause of action for negligent and intentional/reckless infliction of emotional distress for failure to state a cause of action (*see Gilewicz*, 118 AD3d at 1300).

We agree with plaintiff, however, that the court erred in granting that part of the motion seeking to dismiss the second cause of action to the extent it seeks economic damages for the loss of plaintiff's dog, and we therefore modify the order accordingly. Defendants do not dispute that a party may recover for the economic loss of a dog due a defendant's negligence (*see e.g. Schrage*, 13 AD3d at 150; *Melton v South Shore U-Drive*, 32 AD2d 950, 951 [2d Dept 1969]; *Blauvelt v Cleveland*, 198 App Div 229, 229-230 [4th Dept 1921]), but they contend that plaintiff's second cause of action sought damages only for emotional distress. Giving the pleading a liberal

construction, as we must, we conclude that plaintiff's request for "special damages" in her amended complaint was broad enough to encompass her request for economic damages. Indeed, in opposing defendants' motion, plaintiff clarified that her second cause of action was seeking economic damages in addition to damages for emotional distress.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

672

KA 14-01649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. LEWIS, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Peter C. Bradstreet, J.), dated March 17, 2014. The appeal was held by this Court by order entered October 5, 2018, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (165 AD3d 1600 [4th Dept 2018]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from an order insofar as it failed to grant that part of his pro se motion seeking DNA testing pursuant to CPL 440.30 (1-a) of a rape kit and the victim's shirt and pants that were secured in connection with his conviction of rape in the first degree (Penal Law § 130.35 [2]). We previously held the case, reserved decision, and remitted the matter to County Court for a ruling on that part of defendant's motion (*People v Lewis*, 165 AD3d 1600, 1600 [4th Dept 2018]). Upon remittal, the court denied that part of the motion. We affirm.

Initially, even assuming, arguendo, that defendant correctly contends that the court failed to comply with CPL 440.30 (7), we conclude that the record is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering a further remittal unnecessary (*see People v Jones*, 109 AD3d 1108, 1108-1109 [4th Dept 2013], *affd* 25 NY3d 57 [2015]; *People v Krivak*, 186 AD3d 1712, 1715 [2d Dept 2020], *lv denied* 36 NY3d 974 [2020]; *People v Mingo*, 141 AD3d 423, 423 [1st Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Furthermore, contrary to defendant's contention, the court properly denied that part of the motion seeking DNA testing of the rape kit, shirt, and pants " 'because defendant failed to establish that there was a reasonable probability that, had those items been

tested and the results been admitted at trial, the verdict would have been more favorable to defendant' " (*People v Swift*, 108 AD3d 1060, 1061 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]; *see People v Comfort*, 165 AD3d 1608, 1609 [4th Dept 2018], *lv denied* 32 NY3d 1110 [2018]; *People v Burr*, 17 AD3d 1131, 1131-1132 [4th Dept 2005], *lv denied* 5 NY3d 760 [2005], *reconsideration denied* 5 NY3d 804 [2005]).

There was no issue of identification here inasmuch as the victim and defendant knew each other. The victim testified that, after an evening of heavy drinking, she fell asleep and was awakened when she felt defendant having sexual intercourse with her. Defendant admitted in his third statement to the police that he started having sexual intercourse with the victim, but then she pushed away from him. The only issue for the jury to resolve was whether the rape occurred as testified to by the victim and admitted by defendant in his third statement to the police, or whether there was no sexual contact at all as testified to by defendant at trial, and the jury resolved that issue against defendant. With respect to the victim's shirt and pants, there was no evidence that they would contain defendant's DNA because the victim testified that she was not wearing those items of clothing on the night of the incident. With respect to the rape kit, even if DNA testing showed that defendant's DNA was not present, it would not have resulted in a favorable verdict to defendant because the absence of defendant's DNA was not proof that sexual intercourse did not occur. Thus, the victim's testimony would not have been impeached or controverted by evidence that defendant's DNA was not present in the rape kit (*see generally People v Sposito*, 140 AD3d 1308, 1311 [3d Dept 2016], *affd* 30 NY3d 1110 [2018]; *People v Letizia*, 141 AD3d 1129, 1130 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016], *reconsideration denied* 28 NY3d 1186 [2017]; *Swift*, 108 AD3d at 1061-1062).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

674

KA 16-02370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS THURSTON, DEFENDANT-APPELLANT.

KATHRYN M. FESTINE, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 18, 2016. The judgment convicted defendant upon a plea of guilty of aggravated vehicular homicide and aggravated vehicular assault.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the conditional discharge imposed on count one of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant was convicted upon his plea of guilty of aggravated vehicular homicide (Penal Law § 125.14 [4]) and aggravated vehicular assault (§ 120.04-a [4]). On the count of aggravated vehicular homicide, defendant was sentenced to an indeterminate term of imprisonment of 5 to 15 years with a consecutive 3-year term of conditional discharge with the requirement that defendant install an ignition interlock device on any vehicle operated by him. As defendant contends and the People correctly concede, based on the offenses for which defendant was convicted, Penal Law § 60.21 does not apply (*see People v Giacona*, 130 AD3d 1565, 1566 [4th Dept 2015]; *People v Flagg*, 107 AD3d 1613, 1614 [4th Dept 2013], *lv denied* 22 NY3d 1138 [2014]). Thus, the sentence is illegal insofar as County Court imposed the conditional discharge on the count of aggravated vehicular homicide (*see People v Campagna*, 172 AD3d 1904, 1905 [4th Dept 2019]; *Flagg*, 107 AD3d at 1614). "Although this issue was not raised before the [sentencing] court . . . , we cannot allow an [illegal] sentence to stand" (*Campagna*, 172 AD3d at 1905 [internal quotation marks omitted]). The proper remedy is to vacate the conditional discharge imposed on the count of aggravated vehicular homicide (*see generally Giacona*, 130 AD3d at 1566; *Flagg*, 107 AD3d at 1614), and we therefore modify the judgment accordingly.

Finally, we note that the certificate of conviction and uniform

sentence and commitment form must be amended to correct a clerical error (*see People v Lewis*, 185 AD3d 1542, 1543 [4th Dept 2020], *lv denied* 35 NY3d 1114 [2020]). Both the certificate of conviction and the uniform sentence and commitment form erroneously state that defendant was convicted of aggravated vehicular assault under Penal Law § 120.04 (4), and both should therefore be amended to correctly reflect that defendant was convicted of that offense under Penal Law § 120.04-a (4).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

675

KA 17-00277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDMUND S. BUNTLEY, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER, JEFFREY WICKS, PLLC (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 30, 2016. The judgment convicted defendant upon a jury verdict of burglary in the first degree, assault in the second degree, strangulation in the second degree and petit larceny.

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 burglary in the first degree (Penal Law § 140.30 [2]), assault in the second degree (§ 120.05 [6]), strangulation in the second degree (§ 121.12), and petit larceny (§ 155.25). Contrary to defendant's contention, defense counsel was not ineffective for failing to object to the victim's testimony that defendant "always" choked her or in failing to request that County Court conduct a *Buford* inquiry in response to generalized information implicating potential juror misconduct during the jury's deliberations. It is well settled that a claim of ineffective assistance "requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics" (*People v Rivera*, 71 NY2d 705, 708-709 [1988]; *see People v Kates*, 162 AD3d 1627, 1632 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019], *cert denied* — US —, 141 S Ct 117 [2020]). "To prevail on an ineffective assistance claim, a defendant must 'demonstrate the absence of strategic or other legitimate explanations'—i.e., those that would be consistent with the decisions of a 'reasonably competent attorney'—for the alleged deficiencies of counsel" (*People v Maffei*, 35 NY3d 264, 269 [2020]).

Here, defense counsel may have had a strategic reason for not objecting to the victim's testimony concerning defendant's prior acts

of domestic violence inasmuch as defense counsel may not have wished to call further attention to that brief testimony (*see People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *People v Masi*, 151 AD3d 1389, 1391 [3d Dept 2017], *lv denied* 30 NY3d 1062 [2017]). Defense counsel also may have had a strategic reason for not seeking a *Buford* inquiry, given the vague and generalized information regarding potential juror misconduct during the course of deliberations. The identification evidence at defendant's trial was based solely on the victim's testimony and defendant introduced evidence of an alibi. At the time that the allegation of possible juror misconduct arose, the jury had been deliberating for several hours and had requested readback of testimony and portions of the court's jury instructions. Thus, defense counsel may have opted to allow the jury to continue deliberating rather than seek a *Buford* inquiry inasmuch as defense counsel could reasonably have believed that there was a greater likelihood of acquittal if the course of deliberations was not interrupted (*see generally People v Tineo-Santos*, 160 AD3d 465, 466-467 [1st Dept 2018], *lv denied* 31 NY3d 1088 [2018]). Consequently, we conclude that defendant has failed to demonstrate the absence of legitimate explanations for defense counsel's alleged shortcomings (*see generally People v Burton*, 191 AD3d 1311, 1314-1315 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]). We have reviewed defendant's remaining allegation of ineffective assistance of counsel and conclude that it lacks merit.

Defendant's remaining contentions are unpreserved for appellate review (*see generally* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19 [1995]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

676

KA 18-01795

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY L. JONES, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 30, 2018. The judgment convicted defendant upon a jury verdict of 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 a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, Supreme Court did not abuse its discretion in admitting certain surveillance video footage in evidence. We conclude that "[t]he video recording was sufficiently authenticated with the testimony of [an office manager] who . . . was familiar with the operation of the building's video recording surveillance system . . . , as well as with the testimony of the police [officer] who viewed the video recording immediately after the events while investigating the crime and testified that the recording admitted at trial truly and accurately represent[ed] what was before the camera" (*People v Johnson*, 192 AD3d 1612, 1614 [4th Dept 2021] [internal quotation marks omitted]; *see People v Patterson*, 93 NY2d 80, 84 [1999]; *People v Costello*, 128 AD3d 848, 848 [2d Dept 2015], *lv denied* 26 NY3d 927 [2015], *reconsideration denied* 26 NY3d 1007 [2015]). Contrary to defendant's suggestion, "[a]ny gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Oquendo*, 152 AD3d 1220, 1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). Further, we conclude that the video footage was not so "indistinct that the jury would have to speculate concerning [its] contents and would not learn anything relevant from [it]" (*People v Turner*, 197 AD3d 997, 998 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021] [internal quotation marks omitted]).

Defendant further contends that the court erred in permitting the People to elicit testimony from two witnesses about an order of protection against defendant that had been issued in the victim's favor after a prior altercation between the victim and defendant. Even assuming, arguendo, that the court erred in permitting the testimony, we conclude that any such error is harmless (*see generally People v Hartsfield*, 204 AD3d 1502, 1504-1505 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]; *People v Brooks*, 26 AD3d 867, 867 [4th Dept 2006], *lv denied* 6 NY3d 892 [2006]; *People v Johnson*, 15 AD3d 890, 891 [4th Dept 2005], *lv denied* 4 NY3d 887 [2005]). Here, the evidence adduced at trial, irrespective of the challenged testimony, overwhelmingly established defendant's guilt (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Defendant admitted to being present at the victim's residence shortly before the murder occurred; a witness placed defendant and the victim in the same positions as shown on the video footage, depicting an altercation between two individuals outside the victim's residence; the victim's blood was found on pieces of defendant's clothing; and defendant had scratches and cuts to his face, neck, and hands shortly after the incident. We further conclude that "there is no '*significant probability* . . . that the jury would have acquitted . . . defendant had it not been for' the court's presumed error in admitting the challenged testimony" (*Hartsfield*, 204 AD3d at 1505, quoting *Crimmins*, 36 NY2d at 242). Each witness presented only brief testimony regarding the existence of the order of protection. Further, during his interrogation, defendant himself acknowledged the existence of the order of protection and the underlying altercation, and those statements were admitted and played before the jury (*see generally People v Horn*, 186 AD3d 1117, 1121 [4th Dept 2020], *lv denied* 36 NY3d 973 [2020]). Further, there is "nothing in the record [that] indicates that the jury focused on the challenged testimony or was in any way swayed by it" (*Hartsfield*, 204 AD3d at 1505).

To the extent that defendant preserved his contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, 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 Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see id.*; *People v Metales*, 171 AD3d 1562, 1564 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]).

Contrary to defendant's contention, the court did not err in granting the People's motion to amend the bill of particulars. At any time before trial, "the prosecutor may, without leave of the court, serve upon defendant and file with the court an amended bill of particulars" (CPL 200.95 [8]; *see People v Burke*, 197 AD3d 967, 967 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Wright*, 13 AD3d 803, 803-804 [3d Dept 2004], *lv denied* 4 NY3d 857 [2005]). Here,

"[b]ecause the amendment [to the bill of particulars] was made by the People prior to jury selection[,] [it] was . . . statutorily permissible," and the People were not required to seek leave of the court (*Burke*, 197 AD3d at 967 [internal quotation marks omitted]; *see* CPL 200.95 [8]; *Wright*, 13 AD3d at 804). In any event, amending the bill of particulars to expand the time frame within which the offense occurred did not unduly prejudice defendant or alter the People's theory that defendant killed the victim in the morning of the day his body was found (*see generally Burke*, 197 AD3d at 967-968; *People v Mayo*, 19 AD3d 710, 711 [3d Dept 2005]). Further, contrary to defendant's contention, the fact that the prosecutor amended the bill of particulars a week after her discussion of the time of death with the medical examiner did not establish a lack of good faith (*see People v Parker*, 186 AD2d 157, 157 [2d Dept 1992], *lv denied* 80 NY2d 1029 [1992]).

We also reject defendant's contention that certain statements made by the prosecutor in summation deprived him of a fair trial. Here, the disputed statements were "fair comment on the evidence and did not exceed the broad bounds of rhetorical comment permissible in closing argument" (*People v Davis*, 38 AD3d 1170, 1172 [4th Dept 2007], *lv denied* 9 NY3d 842 [2007], *cert denied* 552 US 1065 [2007] [internal quotation marks omitted]). Even assuming, arguendo, that the prosecutor's statements were improper, we conclude that, viewing the prosecutor's "summation as a whole, those comments were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

677

KA 18-02444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN A. ZENON, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered January 12, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). 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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that Supreme Court committed a mode of proceedings error when it failed to read the exact text of a jury note to defense counsel before counsel and the court agreed on a response to the note. We agree with defendant that the record fails to reflect that the court provided defense counsel with meaningful notice of the substantive jury note (*see* CPL 310.30; *People v O'Rama*, 78 NY2d 270, 277-278 [1991]).

The record reflects that the court received the note from the jury and properly marked it as a court exhibit. The jury note stated, in relevant part, "[p]lease go over manslaughter *vs* murder 2 elements of the charges from your instructions" (emphasis added). The court did not read the note verbatim and the record does not reflect that the court showed the note to the parties. Rather, the record reflects that the court informed the parties that the jury wanted the court to "go over the instructions for manslaughter *and* [m]urder in the [s]econd [d]egree" (emphasis added). We conclude that by improperly

paraphrasing the jury note, the court failed to give meaningful notice of the note (*see People v Copeland*, 175 AD3d 1316, 1319 [2d Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *see generally People v Kisoon*, 8 NY3d 129, 135 [2007]). Contrary to the People's contention, the difference between the content of the note and the court's words altered the meaning of the jury's request (*cf. People v Carter*, 201 AD3d 551, 551 [1st Dept 2022], *lv denied* 38 NY3d 949 [2022]). We therefore reverse the judgment and grant a new trial.

In light of our determination, we do not address defendant's remaining contentions.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

679

KA 20-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL R. BLACKSHEAR, ALSO KNOWN AS SAMUEL BLACKSHEAR, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (ANDREW J. DIPASQUALE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered March 22, 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: On appeal from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in determining that he was not eligible for youthful offender treatment because his conviction was for an armed felony offense (*see* CPL 1.20 [41]; 720.10 [2] [a] [ii]) and none of the statutory mitigating factors was present (*see* CPL 720.10 [3]). As an initial matter, as the People correctly concede, defendant's waiver of the right to appeal is invalid " 'because [it] encompassed post-conviction motions' " (*People v Grabowski*, 200 AD3d 1718, 1718 [4th Dept 2021]).

On the merits, defendant does not dispute that he was convicted of an armed felony offense (*see* CPL 1.20 [41]), but contends that the court should have determined him to be eligible for youthful offender treatment because there were "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]). We conclude that the court did not abuse its discretion in denying youthful offender treatment upon its finding that no such mitigating circumstances existed (*see generally People v Dukes*, 156 AD3d 1443, 1443 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]). Contrary to defendant's contention, the record does not reflect that defendant merely possessed the subject handgun in order to defend others. Rather, the record establishes that defendant possessed the handgun while engaging in an act of retaliation, during which he

pursued his target in order to fire the gun at that person at close range (*see generally People v Jones*, 166 AD3d 1479, 1480 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]). After the court determined, in its discretion, that none of the mitigating factors set forth in CPL 720.10 (3) was present and stated the reasons for that determination on the record, "no further determination [with respect to youthful offender treatment was] required" (*People v Gonzalez*, 171 AD3d 1502, 1503 [4th Dept 2019]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

680

CAF 21-00194

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

IN THE MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF TONIQUA L. DUNCAN, PETITIONER-APPELLANT,

V ORDER

AZUJHON SIMS, RESPONDENT-RESPONDENT.

ROBERT C. FIGLIOLA, BUFFALO, FOR PETITIONER-APPELLANT.

AZUJHON SIMS, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered July 24, 2020 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to an order of the Support Magistrate.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

682

CAF 21-00702

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

IN THE MATTER OF RALPH INMAN,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

TERESA COLEMAN,
RESPONDENT-PETITIONER-APPELLANT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

TRIGILIO CIAMBRONE PARTNERSHIP, BUFFALO (ELIZABETH CIAMBRONE OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

JAMIE L. CODJOVI, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered May 3, 2021 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted petitioner-respondent sole legal and physical custody of the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order that, inter alia, awarded petitioner-respondent father sole legal and physical custody of the subject child and designated him the child's primary residential parent, subject to the mother's rights to parenting time as set forth in the order. We reject the mother's contention that there is not a sound and substantial basis in the record to support Family Court's determination that it was in the child's best interests to award the father sole custody. In making a custody determination, " 'the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances' " (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]). Contrary to the mother's contention, the court acknowledged that the wishes of the child favored the mother. Because that factor alone is "not . . . determinative," we perceive no error

in how the court considered it (*Sheridan*, 129 AD3d at 1569 [internal quotation marks omitted]; *see Dintruff v McGreevy*, 34 NY2d 887, 888 [1974]). We further conclude that the court properly weighed and considered the remaining relevant factors, which favored the father, and we perceive no basis to disturb the award of sole custody to the father (*see Matter of Radley v Radley*, 107 AD3d 1578, 1579 [4th Dept 2013], *lv denied* 22 NY3d 852 [2013]).

The record reveals that the mother consented to the subject child's adult sister's testimony in camera and therefore the mother has waived the contention that the court erred in conducting the in camera hearing (*see Matter of Washington v Marquis*, 97 AD3d 930, 931 [3d Dept 2012]; *see also Matter of Aikens v Nell*, 91 AD3d 1308, 1308 [4th Dept 2012]). We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

689

CA 21-01158

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

ASSUNTA BARNEY, INDIVIDUALLY AND DOING BUSINESS
AS ACTION TOP SOIL, PLAINTIFF-RESPONDENT,

V ORDER

DRYDEN MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (BRANDON SNYDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CERIO LAW OFFICES, PLLC, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 12, 2021. The order denied defendant’s motion to dismiss certain claims.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 8, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

691

CA 21-01433

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

IN THE MATTER OF EGATE-95, LLC,
PETITIONER-APPELLANT,

V ORDER

FITNESS INTERNATIONAL, LLC,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR PETITIONER-APPELLANT.

KLEHR HARRISON HARVEY BRANZBURG LLP, PHILADELPHIA, PENNSYLVANIA (A. GRANT PHELAN, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND MAGAVERN MAGAVERN GRIMM LLP, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered October 4, 2021. The order and judgment, among other things, denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

692

CA 22-00153

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

IN THE MATTER OF EGATE-95, LLC,
PETITIONER-APPELLANT,

V ORDER

FITNESS INTERNATIONAL, LLC,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR PETITIONER-APPELLANT.

KLEHR HARRISON HARVEY BRANZBURG, LLP, PHILADELPHIA, PENNSYLVANIA (A. GRANT PHELAN, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND MAGAVERN MAGAVERN GRIMM LLP, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 28, 2022. The order, among other things, granted petitioner's motion for leave to reargue and renew its petition and, upon reargument and renewal, adhered to the prior determination denying the petition.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

693

CA 21-01290

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

MICHELE IANNELLO WARD, AS EXECUTOR OF THE ESTATE OF MICHAEL S. IANNELLO, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

BROTHERS OF MERCY NURSING AND REHABILITATION CENTER AND BROTHERS OF MERCY NURSING HOME COMPANY, DEFENDANTS-APPELLANTS-RESPONDENTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (JESSE A. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered August 23, 2021. The order, inter alia, granted in part and denied in part the motion of defendants for summary judgment dismissing the complaint.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

695

KA 19-01915

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE LOVINES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered February 14, 2019. The judgment convicted defendant upon a plea of guilty of manslaughter 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 his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that the sentence imposed 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 Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]; *see generally People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that the sentence is not unduly harsh or severe. The record belies defendant's further contention that County Court failed to give sufficient consideration to the psychiatric report prepared on his behalf for sentencing purposes. We agree with defendant, however, that the presentence report has not been redacted as the court ordered during sentencing, and therefore all copies of it must be redacted to correct that oversight (*see People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [Aug. 29, 2022]; *see generally People v Washington*, 170 AD3d 1608, 1609-1610 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

696

KA 21-00211

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN CUATT, DEFENDANT-APPELLANT.

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

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered January 20, 2021. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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 his plea of guilty, of grand larceny in the third degree (Penal Law § 155.35 [1]). We affirm.

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because he was not informed at the time of the plea proceeding that he would have to pay restitution. Where, as here, a "plea bargain d[oes] not include restitution, . . . the [sentencing] court . . . err[s] in awarding restitution without affording [the] defendant the opportunity to withdraw [the] plea" (*People v Richardson*, 173 AD3d 1859, 1861 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019], *reconsideration denied* 34 NY3d 1081 [2019]; *see People v Williams*, 120 AD3d 721, 723 [2d Dept 2014], *lv denied* 25 NY3d 1078 [2015]). In this case, however, County Court "properly afforded defendant the option of either withdrawing his guilty plea and proceeding to trial . . . or accepting [a] proper sentence" that included restitution (*People v D'Avolio*, 176 AD2d 1245, 1246 [4th Dept 1991], *lv denied* 79 NY2d 855 [1992]; *see generally People v Maliszewski*, 13 NY3d 756, 757 [2009]; *People v Jackson*, 216 AD2d 950, 951 [4th Dept 1995], *lv denied* 86 NY2d 796 [1995]). "[B]y declining to withdraw his guilty plea, [defendant] chose the latter option" (*D'Avolio*, 176 AD2d at 1246; *see generally Maliszewski*, 13 NY3d at 757; *Jackson*, 216 AD2d at 951). Defendant's challenge to the validity of the plea on the aforementioned ground thus is not preserved for our review (*see People v Williams*, 27 NY3d 212, 221-222 [2016]), and we decline to exercise our power to review it as a matter of discretion

in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that there is no basis in the record supporting the amount of restitution and that the court should have conducted a hearing before determining the amount thereof. That contention likewise is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" (*People v Horne*, 97 NY2d 404, 414 n 3 [2002]; *see People v Jones*, 108 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]). 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]).

Finally, defendant contends that he is entitled to vacatur of the plea because it was induced by an alleged promise that has purportedly gone unfulfilled "[f]or reasons that are outside the record." Inasmuch as defendant's contention "involves matters outside the record on appeal[, it] must be raised via a motion pursuant to CPL 440.10" (*People v Congdon*, 204 AD3d 1516, 1517 [4th Dept 2022], *lv denied* 38 NY3d 1070 [2022]; *see generally People v Bradley*, 196 AD3d 1168, 1169 [4th Dept 2021]; *People v Solas*, 106 AD2d 417, 417 [2d Dept 1984]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

699

KA 17-02213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MOLINA, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 11, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree (three counts), criminal sale of a controlled substance in the third degree, and criminally using drug paraphernalia 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 three counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), one count of criminal sale of a controlled substance in the third degree (§ 220.39 [1]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). We affirm.

Defendant's contention that the evidence is legally insufficient to support the conviction is unpreserved for our review because defendant's general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). 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]).

We reject defendant's contention that Supreme Court abused its discretion in its *Sandoval* ruling, pursuant to which the prosecutor was permitted to question defendant about his 2009 convictions for, inter alia, assault in the second degree, grand larceny in the third degree, and criminal possession of stolen property in the third degree (*see People v Sandoval*, 34 NY2d 371, 374 [1974]). Contrary to defendant's contention, a court's exercise of discretion "should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning" (*People v Walker*, 83 NY2d 455, 459 [1994]; *see People v Scott*, 189 AD3d 2062, 2063 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), particularly where, as here, "the basis of the court's decision may be inferred from the parties' arguments" (*Walker*, 83 NY2d at 459). Further, we conclude that the convictions were "probative of his credibility inasmuch as such acts showed the 'willingness . . . [of defendant] to place the advancement of his individual self-interest ahead of principle or of the interests of society' " (*People v Turner*, 197 AD3d 997, 999 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]; *see Sandoval*, 34 NY2d at 377) and that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of those convictions on which the court permitted inquiry] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*Sandoval*, 34 NY2d at 378; *see People v Green*, 197 AD3d 993, 996 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]).

Defendant contends that the court erred in failing to make any inquiry into his request for substitution of counsel. Even assuming, arguendo, that the letter defendant sent to the court amounted to a request for substitution of counsel, we conclude that defendant abandoned any request for substitution of counsel inasmuch as he expressed no further dissatisfaction with defense counsel and made no request for substitution of counsel at trial (*see People v Ocasio*, 81 AD3d 1469, 1470 [4th Dept 2011], *lv denied* 16 NY3d 898 [2011], *cert denied* 565 US 910 [2011]; *see also People v Hobart*, 286 AD2d 916, 916 [4th Dept 2001], *lv denied* 97 NY2d 683 [2001]).

Finally, the sentence imposed is not unduly harsh or severe.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

702

CAF 21-00331

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

IN THE MATTER OF LOGAN P.G.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WILLIAM G., RESPONDENT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (AMANDA L. OREN OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered February 1, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent permanently neglected the subject child and transferred custody and guardianship of 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 that, inter alia, terminated his parental rights on the ground of permanent neglect. The father's sole contention on appeal is that Family Court abused its discretion in denying the request of his attorney for an adjournment so that the father, who was not present, could testify. We reject that contention (*see generally Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]). "[T]he determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Sanchez v Alvarez*, 151 AD3d 1869, 1869 [4th Dept 2017]). Here, in support of the request, the father's attorney offered no explanation as to why the father failed to appear (*see Sophia M.G.-K.*, 84 AD3d at 1747). Moreover, the court noted that the father had been informed of the date of the hearing and the consequences of his nonappearance, and the court stated that the hearing had been scheduled prior to an earlier hearing date at which the father had been present. The father's counsel did not dispute any of those facts and could not explain the father's absence. Counsel thus "failed to demonstrate that the need

for the adjournment . . . was not based on a lack of due diligence on the part of the [father] or [his] attorney" (*Sanchez*, 151 AD3d at 1869 [internal quotation marks omitted]; *see Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Matter of Elias QQ. [Stephanie QQ.]*, 72 AD3d 1165, 1166 [3d Dept 2010]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

706

CAF 21-00631

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

IN THE MATTER OF JOHN H. FREDERICK, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JENNIFER L. HEIDEMANN AND KATHLEEN M. HEIDEMANN,
RESPONDENTS-RESPONDENTS.

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

DUKE LAW FIRM, P.C., LAKEVILLE (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT JENNIFER L. HEIDEMANN.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered March 2, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent Jennifer L. Heidemann sole legal custody and primary physical placement of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, among other things, awarded respondent mother sole legal and physical custody of the subject child, with visitation to the father and to respondent grandmother. Contrary to the father's contention, Family Court considered the appropriate factors in making its custody determination (*see generally Matter of Caughill v Caughill*, 124 AD3d 1345, 1346 [4th Dept 2015]). The court's determination, made after a hearing, that the best interests of the child are served by awarding custody to the mother "is entitled to great deference . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Baker v Mackey*, 196 AD3d 1161, 1162 [4th Dept 2021]; *Matter of Schram v Nine*, 193 AD3d 1361, 1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]). We will not disturb that determination where, as here, "the record establishes that it is the product of the court's careful weighing of [the] appropriate factors" (*Timothy MYC*, 151 AD3d at 1732 [internal quotation marks omitted]; *see Schram*, 193 AD3d at 1362) and " 'it is supported by a sound and substantial basis

in the record' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1393 [4th Dept 2016]; *see Williams v Williams*, 100 AD3d 1347, 1348 [4th Dept 2012]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

708

CA 21-01280

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

JANE DOE, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 125775.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (CHRISTOPHER ANDREW LIBERATI-CONANT OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an interlocutory judgment of the Court of Claims (Catherine C. Schaewe, J.), entered February 17, 2021. The interlocutory judgment, inter alia, granted that part of claimant's motion seeking partial summary judgment on the issue of liability.

It is hereby ORDERED that the interlocutory judgment so appealed from is unanimously reversed on the law without costs and that part of the motion seeking partial summary judgment on the issue of liability is denied.

Memorandum: Claimant commenced this action to recover damages resulting from an incident in which claimant, a patient at a healthcare facility owned and operated by defendant, State of New York (State), was sexually assaulted by another patient at the facility. The State appeals from an interlocutory judgment that, inter alia, granted claimant's motion seeking, among other things, partial summary judgment on the issue of liability. We reverse.

We reject the State's contention that the Court of Claims applied the incorrect principles of negligence to the instant claim. As the court below correctly stated, "[a] hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252 [2002]; *see Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]; *see generally Mochen v State of New York*, 57 AD2d 719, 720 [4th Dept 1977]). A hospital is not, however, "an insurer of patient safety" and is not required "to keep each patient under constant surveillance" (*N.X.*, 97 NY2d at 253). Instead, "[a]s with any liability in tort, the scope of a hospital's duty is circumscribed by those risks which are reasonably foreseeable" (*id.*).

We agree with the State, however, that the court erred in granting the motion to the extent that it sought partial summary judgment on the issue of liability. Although claimant met her initial burden on the motion by submitting the medical records of her assailant and the affidavit of an expert who opined that those records reflected that the assailant posed a reasonably foreseeable risk, the State raised a triable issue of fact in opposition (*see generally Williams*, 112 AD3d at 918). Specifically, the State submitted the opinion of an expert explaining that, although the assailant had exhibited sexually inappropriate and sometimes aggressive behavior prior to the assault, such behavior was not uncommon for individuals suffering, as did the assailant, from certain mental health conditions. The State's expert opined that because the assailant had not previously exhibited conduct rising to the sort of violent sexual assault perpetrated against claimant, the assailant's medical history did not render it reasonably foreseeable that he would commit such an act and the healthcare facility's precautions were thus appropriate.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

709

CA 21-01049

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

THOMAS E. CARCONE, JOHN A. KARWACKI AND MILTON P. REEVES, IN THEIR CAPACITY AS MEMBERS OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA AND ON BEHALF OF ALL MEMBERS OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, PLAINTIFFS-RESPONDENTS,

V ORDER

JAMES NOON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA AND UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, DEFENDANTS-APPELLANTS.

DAVID A. LONGERETTA, UTICA, FOR DEFENDANTS-APPELLANTS.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (LISA F. JOSLIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered June 4, 2021. The order, among other things, denied the motion of defendants to disqualify counsel for plaintiffs.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

711

CA 21-01113

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

PHILLIP LAPE, PLAINTIFF-RESPONDENT,

V ORDER

STRUCTURED ASSET FUNDING, LLC, DOING BUSINESS AS 123 LUMPSUM, DEFENDANT-APPELLANT, INSURANCE COMPANY OF NORTH AMERICA, AND LIFE INSURANCE COMPANY OF NORTH AMERICA, DEFENDANTS.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDWARD STONE LAW P.C., NEW YORK CITY (EDWARD S. STONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 28, 2021. The order denied the motion of defendant Structured Asset Funding, LLC, doing business as 123 Lumpsum seeking summary judgment dismissing the complaint against it.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

714

CA 21-00258

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF JOSEPH S., FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Oneida County Court (Gregory J. Amoroso, A.J.), entered April 29, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued petitioner's commitment to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order determining, inter alia, that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10. While this appeal was pending, and based on subsequent orders releasing petitioner to a regimen of strict and intensive supervision and treatment, petitioner withdrew his contention on appeal that respondents failed to establish by clear and convincing evidence that he had such an inability to control his behavior that he was likely to commit sex offenses if not confined to a secure treatment facility. With regard to petitioner's remaining contention on appeal, we affirm for reasons stated in that part of County Court's decision and order determining that petitioner suffers from a mental abnormality. We add only that the subsequent orders do not render the remaining issue on appeal moot (*see* Mental Hygiene Law § 10.09 [b]; *see generally Matter of Groves v State of New York*, 124 AD3d 1213, 1213 [4th Dept 2015]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

715

CA 21-01753

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

ERIE INSURANCE COMPANY, AN ASSIGNEE OF
MICHAEL DEL VECCHIO REMODELING, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

WALSH DUFFIELD COMPANIES, INC., AS SUCCESSOR BY
MERGER WITH DON ALLEN AGENCY, INC., DEFENDANT,
DON ALLEN AGENCY, INC., INDIVIDUALLY, AND MICHAEL
SHAY, INDIVIDUALLY AND IN HIS CAPACITY AS AN
INSURANCE BROKER, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JONATHAN SCHAPP OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered November 10, 2021. The order, among other things, denied the motion of defendants Don Allen Agency, Inc., individually, and Michael Shay, individually and in his capacity as an insurance broker, for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 8, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

716

KA 12-01361

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL IBARRONDO, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), 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 (Robert B. Wiggins, J.), rendered May 22, 2012. The appeal was held by this Court by order entered May 5, 2017, decision was reserved and the matter was remitted to Livingston County Court for further proceedings (150 AD3d 1644 [4th Dept 2017]). The proceedings were held and completed (Kevin Van Allen, J.).

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 sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]). We previously held this case, reserved decision, and remitted the matter to County Court to rule on undetermined issues raised by the People in opposition to that part of defendant's omnibus motion seeking to suppress a statement he gave to a New York State Department of Corrections and Community Supervision Investigator on the grounds that, among other things, the statement was involuntary and was preceded by an unequivocal request for counsel (*People v Ibarrondo*, 150 AD3d 1644, 1645-1646 [4th Dept 2017]). Upon remittal, the court (Van Allen, J.) determined that defendant's statement was given knowingly, intelligently, and voluntarily, that defendant did not make an unequivocal request for counsel, and that defendant's statement was thus admissible. We affirm.

Defendant contends that the court should have suppressed his statement because he is a native Spanish speaker and the People failed to establish that he understood and knowingly, voluntarily, and intelligently waived his *Miranda* rights. We reject that contention. To the contrary, we conclude that the People established that the Investigator provided defendant with oral and written *Miranda* warnings

in Spanish (*see People v Esquerdo*, 71 AD3d 1424, 1425 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]) and that defendant " 'grasped that he . . . did not have to speak to the interrogator; that any statement might be used to [his] disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued' " (*People v Jin Cheng Lin*, 26 NY3d 701, 726 [2016], quoting *People v Williams*, 62 NY2d 285, 289 [1984]).

Contrary to defendant's further contention, the part of his statement in which he wrote that he would discuss certain issues with a lawyer did not constitute an unequivocal request for an attorney (*see People v Bowman*, 194 AD3d 1123, 1127-1129 [3d Dept 2021], *lv denied* 37 NY3d 963 [2021]; *People v Henry*, 111 AD3d 1321, 1321-1322 [4th Dept 2013], *lv denied* 23 NY3d 1021 [2014]; *see generally People v Glover*, 87 NY2d 838, 839 [1995]), and thus the court properly declined to suppress the statement on that ground.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

717

KA 18-02223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWUAN J. WASHINGTON, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 14, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Preliminarily, as defendant correctly contends and the People do not dispute, the record does not establish that defendant 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 Shanks*, 37 NY3d 244, 253 [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of the period of postrelease supervision imposed by the court, we nevertheless conclude that such aspect of his sentence is not unduly harsh or severe.

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

719

KA 16-01741

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYON K. JOHNSON, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 13, 2015. The judgment convicted defendant upon a jury verdict 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 a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, defense counsel was not ineffective for asking law enforcement witnesses whether and how each of them was familiar with defendant, even though that line of questioning alerted the jury to the fact that defendant had prior contacts with law enforcement. It is well settled that a claim of ineffective assistance of counsel requires proof of "less than meaningful representation; a simple disagreement with strategies . . . [or] tactics . . . , weighed long after the trial, does not suffice" (*People v Flores*, 84 NY2d 184, 187 [1994]; *see People v Singleton*, 203 AD3d 1671, 1672 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]). The defendant must " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see also People v Anderson*, 159 AD3d 1592, 1594 [4th Dept 2018], *lv denied* 31 NY3d 1077 [2018], *reconsideration denied* 32 NY3d 934 [2018]).

Here, defense counsel's "strategy was to suggest that the police had improper motives against . . . defendant because of their knowledge of his prior [law enforcement contacts], and had manufactured the evidence against him" (*People v Mercedes*, 182 AD2d 778, 779 [2d Dept 1992], *lv denied* 80 NY2d 835 [1992]). Although defense counsel thus elicited "damaging testimony" during

cross-examination of the People's law enforcement witnesses, there was "a discernible strategy in the questions posed by defense counsel" (*People v Yelle*, 303 AD2d 1043, 1044 [4th Dept 2003], *lv denied* 100 NY2d 626 [2003]; *see also People v Harriger*, 199 AD3d 1482, 1482-1483 [4th Dept 2021]). We therefore conclude that defendant has failed to demonstrate the absence of a legitimate explanation for defense counsel's alleged shortcomings (*see generally People v Burton*, 191 AD3d 1311, 1314-1315 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

724

CA 21-01378

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

TERRELL E., AN INFANT, BY HIS PARENT AND NATURAL GUARDIAN, TIESHA N.B., AND TIESHA N.B., INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V ORDER

K.M. FAMILY HOMES, LLC, DEFENDANT-APPELLANT.

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (E.W. GARO GOZIGIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE REID & POMEROY, PLLC, SYRACUSE (MAUREEN E. MANEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered July 16, 2021. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

732

CA 21-01278

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

MARIO SARAIVA, CLAIMANT-RESPONDENT,

V ORDER

NEW YORK STATE THRUWAY AUTHORITY,
DEFENDANT-APPELLANT.
(CLAIM NO. 128270.)

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF LAWRENCE PERRY BIONDI, P.C., WHITE PLAINS (LISA M. COMEAU OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered June 9, 2021. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment dismissing the claim.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

734

CAF 21-01134

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

IN THE MATTER OF EBONY RILEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSHUA KIDNEY, RESPONDENT-RESPONDENT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR PETITIONER-APPELLANT.

TED A. BARRACO, PITTSFORD, FOR RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered July 21, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole custody and primary physical residency of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, modified a prior custody order by granting respondent father sole custody of the parties' daughter. We affirm.

The mother's contention that Family Court should have ordered a child protective investigation of the father pursuant to Family Court Act § 1034 is unpreserved for our review (*see Matter of Kakwaya v Twinamatsiko*, 159 AD3d 1590, 1591 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *Matter of Canfield v McCree*, 90 AD3d 1653, 1654 [4th Dept 2011]; *see also Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1437 [4th Dept 2011]).

We reject the mother's further contention that the court erred in granting the father sole custody of the subject child. "[A] court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (*Matter of Saunders v Stull*, 133 AD3d 1383, 1383 [4th Dept 2015]; *see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]) and "will not be disturbed as long as it is supported by a sound and substantial basis in the record"

(*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]; *see Dubuque*, 79 AD3d at 1744). Here, the court's determination that the father is better able to provide for the child's needs is supported by the requisite sound and substantial basis in the record and thus will not be disturbed (*see Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]).

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

745

CA 21-01404

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

DAVID MOLTRUP, PLAINTIFF-RESPONDENT,

V ORDER

LINDA JOYCE REID, DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZIMMERMAN LAW OFFICE, SYRACUSE (AARON ZIMMERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 10, 2021. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 11 and 16, 2022,

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court

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

753

CA 21-01178

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

KENNETH MILLER, PLAINTIFF-APPELLANT,

V ORDER

ERIC BEVARD, GRETCHEN BEVARD AND DAVID STROTHERS,
DEFENDANTS-RESPONDENTS.

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE (THOMAS P. GIVAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (ROGER W. BRADLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ERIC BEVARD AND GRETCHEN BEVARD.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID STROTHERS.

Appeal from an order and judgment (one paper) of the Supreme Court, Jefferson County (James P. McClusky, J.) entered June 21, 2021. The order and judgment, among other things, dismissed the amended complaint.

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

Entered: September 30, 2022

Ann Dillon Flynn
Clerk of the Court