SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 23, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1010/19

CA 19-00291

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

PARAGON MASONRY, LLC, PLAINTIFF-APPELLANT,

V ORDER

FARMINGTON LAWN CARE, INC., AND COUNTRYMAX CICERO, LLC, DEFENDANTS-RESPONDENTS.

SHEATS & BAILEY, PLLC, LIVERPOOL (JASON B. BAILEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PIRRELLO, PERSONTE & FEDER PLLC, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 9, 2019. The order, among other things, denied plaintiff's motion for partial summary judgment.

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: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

36

CA 19-01593

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

SALLY GUIDO AND CARLEEN CHARLOTTE BISHOP, ALSO KNOWN AS CHARLOTTE BISHOP, JOINT GUARDIANS OF THE PROPERTY OF JOHN GUIDO, AND SALLY GUIDO, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V ORDER

COUNTY OF CAYUGA, JACKIE WOJESKI, RN, CAYUGA COUNTY JAIL, CAROL WALLACE, RN, CAYUGA COUNTY JAIL, "JANE" LITTY, RN, CAYUGA COUNTY JAIL, CPT. JOHN MACK, C.O. "JOHN" FLETCHER, SGT. "JOHN" PERKINS, PANGH LAY KOOI, MD, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOLDBLATT & ASSOCIATES, P.C., MOHEGAN LAKE (KENNETH B. GOLDBLATT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GALE GALE & HUNT, LLC, SYRACUSE (KEVIN T. HUNT OF COUNSEL), FOR THIRD-PARTY DEFENDANT CHARLES HENNEMEYER, M.D. AND FOURTH-PARTY DEFENDANT AUBURN RADIOLOGY, P.C.

MACKENZIE HUGHES, LLP, SYRACUSE (CHRISTOPHER A. POWERS OF COUNSEL), FOR THIRD-PARTY DEFENDANT PHILIP GOTTLIEB, M.C.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ZACHARY MATTISON OF COUNSEL), FOR THIRD-PARTY DEFENDANT DARYL HENDERSON, M.D. AND FOURTH-PARTY DEFENDANT OLEAN RADIOLOGY, P.C.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 20, 2019. The order, among other things, granted in part the motion of plaintiffs for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 21 and 22, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

246

CA 19-01456

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

BARBARA ATTEA-LUDWICK, PLAINTIFF-RESPONDENT,

V ORDER

MATTHEW R. THOMAS, ET AL., DEFENDANTS,
AND PATRICIA A. THOMAS, DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT MATTHEW R. THOMAS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 2, 2019. The order, among other things, denied the cross motion of defendant Patricia A. Thomas for summary judgment and sanctions.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 26, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

557

CA 19-02100

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

TARA K. RUDY AND LORNE M. RUDY,
CLAIMANTS-RESPONDENTS,

V ORDER

ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL
DISTRICT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MCGIVNEY, KLUGER, CLARK & INTOCCIA, P.C., SYRACUSE (LEIGH A. LIEBERMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT E. LAHM, PLLC, SYRACUSE (JOSHUA M. GILLETTE OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 15, 2019. The order, among other things, granted claimants' application for leave to serve a late notice of claim.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 15, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

558

CA 19-02101

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

TARA K. RUDY AND LORNE M. RUDY,
CLAIMANTS-RESPONDENTS,

V ORDER

ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL
DISTRICT, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MCGIVNEY, KLUGER, CLARK & INTOCCIA, P.C., SYRACUSE (LEIGH A. LIEBERMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT E. LAHM, PLLC, SYRACUSE (JOSHUA M. GILLETTE OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 3, 2019. The order denied respondent's motion for leave to renew its opposition to claimants' motion for leave to serve a late notice of claim.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 15, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

588.1

KA 18-00800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT WOODWARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRENNA J. RYAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 8, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a forged instrument in the second degree and criminal tax fraud in the third degree.

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

Same memorandum as in *People v Woodward* ([appeal No. 2] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

588.2

KA 18-00801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT WOODWARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRENNA J. RYAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 8, 2018. The judgment convicted defendant upon a plea of guilty of identity theft in the first 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 plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and criminal tax fraud in the third degree (Tax Law § 1804) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of identity theft in the first degree (Penal Law § 190.80). We reject defendant's contention in appeal No. 1 that the sentence is unduly harsh and severe. With respect to appeal No. 2, we agree with defendant that his waiver of the right to appeal is invalid because County Court "conflated the right to appeal with those rights automatically forfeited by the guilty plea" (*People v Rogers*, 159 AD3d 1558, 1558 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]) and mischaracterized the waiver of the right to appeal, leading defendant to believe that the waiver was an absolute bar to taking an appeal (*see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The record therefore does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]) or that he understood that the waiver was not an "absolute bar[] to the pursuit of all potential remedies" (*Thomas*, 34 NY3d at 566). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020] [internal

quotation marks omitted]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

609

CA 19-01062

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

YOLONDA G. PERONI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. PERONI, DEFENDANT-APPELLANT.

TIMOTHY A. BENEDICT, ROME, FOR DEFENDANT-APPELLANT.

COHEN & COHEN, UTICA (RICHARD A. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 30, 2018 in a divorce action. The order denied the motion of defendant to, inter alia, vacate a default judgment of divorce and portions of the parties' separation agreement.

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

Memorandum: Plaintiff and defendant were married in 2000 and, in May 2017, plaintiff commenced this divorce action. The parties negotiated the distribution of their property and reached a settlement, which resulted in a separation agreement. Pursuant to that agreement, the parties agreed, inter alia, that plaintiff's pension was her separate property and that defendant's retirement account was his separate property. The matter then proceeded as an expedited uncontested divorce action, and a judgment of divorce was entered upon defendant's default. The separation agreement was incorporated but not merged into the judgment of divorce. Thereafter, defendant moved to, inter alia, vacate the default judgment of divorce and those portions of the separation agreement addressing the pension and retirement accounts and sought to have those accounts distributed pursuant to the *Majauskas* formula (*see Majauskas v Majauskas*, 61 NY2d 481, 489-491 [1984]). Defendant now appeals from the order denying that motion, and we affirm.

Defendant initially contends that Supreme Court erred in denying his motion insofar as it sought to set aside the provisions of the separation agreement addressing the pension and retirement accounts because those provisions are manifestly unfair or the product of fraud or overreach by plaintiff. We reject that contention. Where, as here, a "separation agreement is incorporated but not merged into the divorce judgment, vacatur of the divorce judgment [would have] no

effect on the enforceability of the agreement; the agreement survives as a separate and enforceable contract" (*Kellman v Kellman*, 162 AD2d 958, 958 [4th Dept 1990]; *see Bryant v Carty*, 118 AD3d 1459, 1459 [4th Dept 2014]; *see also Marshall v Marshall*, 124 AD3d 1314, 1317 [4th Dept 2015]). Thus, in order to set aside the separation agreement, defendant was required to commence a plenary action or assert an affirmative defense or counterclaim, which he did not do; "such relief cannot be obtained on motion" (*Gaines v Gaines*, 188 AD2d 1048, 1048 [4th Dept 1992]; *see Christian v Christian*, 42 NY2d 63, 72 [1977]; *Bryant*, 118 AD3d at 1459).

We reject defendant's further contention that the court erred in denying the motion insofar as it sought to vacate the judgment of divorce pursuant to CPLR 5015 (a) (1). Although the courts have adopted a "liberal policy with respect to vacating default judgments in matrimonial actions" (*DePerno v DePerno*, 158 AD3d 1313, 1313 [4th Dept 2018] [internal quotation marks omitted]), a party seeking to vacate a default judgment pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a meritorious defense (*see DePerno*, 158 AD3d at 1313; *see also Ward v Ward*, 172 AD3d 955, 956 [2d Dept 2019]). Moreover, "it is well settled that [t]he determination of whether . . . to vacate a default . . . is generally left to the sound discretion of the court" (*Mills v Mills*, 111 AD3d 1306, 1307 [4th Dept 2013], *lv dismissed* 22 NY3d 1167 [2014] [internal quotation marks omitted]).

We conclude that defendant failed to establish a reasonable excuse for his default. To the extent that he contends that the side effects of certain medications impaired his judgment and constituted a reasonable excuse, we conclude that he failed to submit any evidence to support his conclusory allegation (*see Calle v Calle*, 28 AD3d 1209, 1209 [4th Dept 2006]; *see also Dankenbrink v Dankenbrink*, 154 AD3d 809, 810 [2d Dept 2017]; *Ruparelia v Ruparelia*, 136 AD3d 1266, 1269 [3d Dept 2016]). Moreover, the fact that defendant chose not to retain an attorney when he had sufficient time in which to do so does not establish a reasonable excuse for his default (*see Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1099 [4th Dept 2013]; *Mauro v Mauro*, 148 AD2d 684, 685 [2d Dept 1989]; *cf. Bird v Bird*, 77 AD3d 1382, 1383 [4th Dept 2010]). Because defendant failed to establish a reasonable excuse for the default, we need not determine whether he had a potentially meritorious defense (*see Abbott*, 109 AD3d at 1100).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

614

KA 16-00658

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

TAMIYA JACKSON, ALSO KNOWN AS TAMIYA N. JACKSON,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM 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 March 16, 2016. The judgment convicted defendant upon a jury verdict of grand larceny in the third degree.

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

Opinion by BANNISTER, J.:

Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]), arising from the theft of wireless speakers valued in excess of $3,000 from a Target store in the Town of Greece. Prior to trial, the People moved in limine for permission to introduce testimony from the store's asset protection team leader (APT leader) regarding the contents of destroyed video surveillance footage that had depicted the incident. According to the People, on the day he became aware of the missing speakers, the APT leader viewed the video surveillance footage from the night before and, on that footage, he observed a male and a female working in concert to load the speakers into a shopping cart and further observed the female, i.e., defendant, pushing the cart past all points of sale and exiting the store with the male. The APT leader burned a limited amount of the footage onto a DVD, including footage that showed defendant and the male suspect leaving the store with a shopping cart containing merchandise, and he printed still photographs of both suspects. In the weeks that followed, the APT leader recognized defendant on two occasions when she visited the same Target store. However, by the time she was determined to be a suspect, the original surveillance footage, including the portion showing the speakers being loaded into the cart that was not preserved on DVD, had been destroyed consistent with the store's customary

procedures. Defendant opposed the motion, arguing, inter alia, that the proposed testimony of the APT leader regarding the contents of the unpreserved footage would violate the best evidence rule. Supreme Court granted the People's motion, determining, inter alia, that the People met their heavy burden of establishing that the APT leader had a recollection of what he observed on the video footage and could testify in detail about it and, thus, that the proposed testimony came within an exception to the best evidence rule. The central issue on this appeal is whether the court erred in admitting the APT leader's testimony regarding the contents of the unpreserved footage under the relevant exception to the best evidence rule. We conclude that the court did not err in admitting the testimony in question.

The best evidence rule "simply requires the production of an original writing where its contents are in dispute and sought to be proven" (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994]). "The rule protects against fraud, perjury, and inaccurate recollection by allowing the [factfinder] to judge a document by its own literal terms" (*People v Haggerty*, 23 NY3d 871, 876 [2014]). "Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence . . . and has not procured its loss or destruction in bad faith" (*Schozer*, 84 NY2d at 644). The proponent of the secondary evidence "has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility" (*id.* at 645 [internal quotation marks omitted]).

Courts have viewed the term "writings" expansively in "recognition of the fact that evidentiary rules concerning the admissibility of originals should be fashioned with a breadth sufficient to encompass modern techniques for storing and retrieving data" (*id.* [internal quotation marks omitted]). For instance, in *Schozer*, the Court of Appeals applied the best evidence rule to an unproduced original X ray film (*see id.* at 645-647).

A number of cases in New York have addressed whether the best evidence rule applies to testimony regarding the contents of destroyed or lost video surveillance footage. In *People v Jimenez* (8 Misc 3d 803, 805 [Sup Ct, Bronx County 2005]), the court found that the unavailability of the subject videotape was sufficiently explained, but held that the People failed to meet "their 'heavy burden' of establishing that the witness was able to recount or recite, from personal knowledge, substantially and with reasonable accuracy all of its contents." Inasmuch as the witness would not have been able to recount or recite "the innumerable details of the literally thousands of images that constitute videotape footage," the court found that "the witness' testimony would be no more than a summary of his interpretation of what he had seen on the tape and not a reliable and

accurate portrayal of the original" (*id.*). Thus, the court concluded that the testimony was not admissible in the absence of the videotape (*see id*. at 806). In *People v Cyrus* (48 AD3d 159, 159 [1st Dept 2007], *lv denied* 10 NY3d 763 [2008]), the First Department stated that a police officer's testimony regarding a poor quality videotape depicting a theft at a Duane Reade store would "likely [be] inadmissible" because it would violate the best evidence rule. In *Lawton v Palmer* (126 AD3d 945, 946 [2d Dept 2015]), the Second Department held that the trial court did not improvidently exercise its discretion in precluding testimony about a surveillance tape and its contents pursuant to the best evidence rule or in finding that the defendants did not meet the " 'heavy burden' of establishing that the testimony was a reliable and accurate portrayal of the surveillance video" (*cf. People v Wright*, 160 AD3d 667, 669 [2d Dept 2018], *lv denied* 31 NY3d 1154 [2018], *reconsideration denied* 32 NY3d 1069 [2018]).

In this case, we initially conclude, consistent with the reasoning in the above-mentioned cases, that the testimony in question falls under the best evidence rule. However, we further conclude that, under the circumstances presented here, the People met their heavy burden of establishing that the testimony in question comes within the relevant exception to the best evidence rule and, thus, that the court did not err in admitting that testimony.

There is no dispute that the original, unaltered video surveillance footage of the incident would have been the best evidence for the jury to consider. However, the absence of the unpreserved footage was sufficiently explained by the People in their pretrial motion papers, and a proper foundation with respect to the loss of that footage was laid at trial through the APT leader's testimony. The store's customary practice was to delete video surveillance footage after 30 days, or less time for certain cameras, and only a portion of the footage was preserved by the APT leader (*cf. United States v Bennett*, 363 F3d 947, 954 [9th Cir 2004], *cert denied* 543 US 950 [2004]). The issue then becomes whether the APT leader was able to sufficiently recount the contents of the unpreserved footage with reasonable accuracy. At trial, the People laid a proper foundation establishing that he could do so. Specifically, the APT leader testified that he was a security professional whose duties included watching the store's surveillance footage on a regular basis. He testified as to the type of surveillance system utilized by the store and the different types of cameras within that system. He also testified, inter alia, as to his familiarity with the store and, in particular, the store's inventory of speakers. Lastly, the APT leader described by his testimony the events shown on the unpreserved footage with specificity and detail, and with enough accuracy that he was able to recognize defendant from viewing the footage. Under these circumstances, we conclude that, contrary to defendant's contention, the People met their burden of establishing that the APT leader's testimony regarding the unpreserved footage was a reliable and accurate portrayal of the contents of that footage (*see generally Schozer*, 84 NY2d at 645-646).

Defendant further contends that she was unduly prejudiced by the court's *Molineux* ruling. We reject that contention. Here, the court properly admitted evidence of certain alleged bad acts by defendant to demonstrate her identity (*see generally People v Molineux*, 168 NY 264, 293-294 [1901]; *People v Igbinosun*, 24 AD3d 1250, 1251 [4th Dept 2005]), and the probative value of that evidence was not outweighed by its prejudicial effect (*see Igbinosun*, 24 AD3d at 1251).

Defendant failed to preserve for our review her contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). 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 People v McGlotten*, 278 AD2d 936, 936 [4th Dept 2000], *lv denied* 96 NY2d 761 [2001]). Furthermore, 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's sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

625

CA 19-01799

PRESENT: SMITH, J.P., CARNI, NEMOYER, AND TROUTMAN, JJ.

JOANNA TRIPI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANK P. ALABISO, PH.D., DEFENDANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered August 9, 2019. The order denied the motion of plaintiff for recusal.

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

Memorandum: Plaintiff commenced this action seeking damages, based on various theories of liability, in connection with defendant's preparation of a custodial evaluation report that was submitted in a separate matrimonial action between plaintiff and her former husband. Plaintiff now appeals from an order denying her motion seeking recusal of the Supreme Court Justice assigned to this case due to the court's work on portions of the matrimonial action, which included ruling on the admissibility of the custodial evaluation report in that case. We affirm.

It is well settled that, "[a]bsent a legal disqualification . . . , a [j]udge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495 [1993]; *see* Judiciary Law § 14), and "the decision whether to recuse is committed to his or her discretion" (*Matter of Trinity E. [Robert E.]*, 144 AD3d 1680, 1681 [4th Dept 2016]; *see Murphy*, 82 NY2d at 495). Although "recusal is required where the 'impartiality [of the judge] might reasonably be questioned' (22 NYCRR 100.3 [E] [1]), a party's unsubstantiated allegations of bias are insufficient to require recusal" (*Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]; *see Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1628 [4th Dept 2016]; *cf. Trinity E.*, 144 AD3d at 1681).

Here, plaintiff correctly concedes that there is no legal disqualification under the definition set forth in section 14 of the

Judiciary Law, and we conclude that the court did not abuse its discretion in denying plaintiff's recusal motion (*see generally Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1316 [4th Dept 2013]). Contrary to plaintiff's contention, the court did not gain any information in connection with the custodial evaluation report produced in the matrimonial action that would require it to recuse itself in this case. The court stated that it had not read the report and, even assuming, arguendo, that the court gained some information concerning the contents of the report from the motion papers filed in the matrimonial action, we reject plaintiff's contention that recusal is warranted on that basis. "It is well settled that '[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case' " (*Board of Educ. of City Sch. Dist. of City of Buffalo v Pisa*, 55 AD2d 128, 136 [4th Dept 1976], quoting *United States v Grinnell Corp.*, 384 US 563, 583 [1966]; *see Affinity Elmwood Gateway Props. LLC v AJC Props. LLC*, 113 AD3d 1094, 1096 [4th Dept 2014]). Here, plaintiff "does not contend that the court's alleged bias stemmed from an extrajudicial source . . . , nor in any event would the record support such a contention" (*Matter of McDonald v Terry*, 100 AD3d 1531, 1531 [4th Dept 2012] [internal quotation marks omitted]). Moreover, although the court while presiding over the matrimonial action for a period of time denied plaintiff's motion in that case seeking to preclude certain evidence, including the custodial evaluation report, it is well settled that "the fact that a judge issues a ruling that is not to a party's liking does not demonstrate either bias or misconduct" (*Gonzalez v L'Oreal USA, Inc.*, 92 AD3d 1158, 1160 [3d Dept 2012], *lv dismissed* 19 NY3d 874 [2012]; *see Matter of Dale v Burns*, 103 AD3d 1243, 1244 [4th Dept 2013], *appeal dismissed* 21 NY3d 968 [2013]).

Plaintiff further contends that the court should have recused itself to avoid the appearance of impropriety. We reject that contention. "[W]hether a [j]udge should recuse himself [or herself], to avoid the appearance of impropriety, is a matter left to the personal conscience of the court" (*SSAC, Inc. v Infitec, Inc.*, 198 AD2d 903, 904 [4th Dept 1993] [internal quotation marks omitted]). Based on our review of the record, we conclude that none of the reasons proffered by plaintiff concerning the alleged appearance of impropriety, "either alone or in combination, suggested any judicial bias that would warrant recusal" (*Schwartzberg v Kingsbridge Hgts. Care Ctr., Inc.*, 28 AD3d 465, 466 [2d Dept 2006]; *cf. Concord Assoc., L.P. v EPT Concord, LLC*, 130 AD3d 1404, 1405-1406 [3d Dept 2015], *lv denied* 26 NY3d 912 [2015]). Indeed, "[a] judge has an obligation not to recuse himself or herself . . . unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance" (*Silber v Silber*, 84 AD3d 931, 932 [2d Dept 2011] [internal quotation marks omitted]) and, here, the court concluded that "it could be fair and impartial in weighing the matters of this case."

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

642

KA 16-01586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLON R. SCOTT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, BUFFALO (CAITLIN M. CONNELLY 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 (Judith A. Sinclair, J.), rendered April 12, 2016. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]). Defendant's conviction stems from an incident in which he struck the victim with the motor vehicle he was driving, breaking both of the victim's legs.

Defendant contends that Supreme Court abused its discretion in its *Sandoval* ruling, pursuant to which the prosecutor was permitted to question defendant about his 2008 conviction for robbery in the first degree. We reject that contention. Initially, we reject defendant's claim that the 2008 conviction was too remote in time to be probative. The admission of evidence of "prior convictions [that are] remote in time [is a] matter[] of substance that may properly be considered by the trial court," and the 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 Ellis*, 183 AD2d 534, 535 [1st Dept 1992], *affd* 81 NY2d 854 [1993]), particularly where, as here, "the basis of the court's decision may be inferred from the parties' arguments" (*Walker*, 83 NY2d at 459). Under the circumstances of this case, "the jury could have considered [the robbery conviction] as a manifestation of defendant's willingness to place his own interests above that of the community" (*People v Taylor*, 140 AD3d 1738, 1739 [4th Dept 2016]).

We also reject defendant's claim that the court's admission of the

prior conviction improperly deterred him from testifying in support of his justification defense. Defendant was not "the *only* available source of material testimony in support of his defense" (*People v Calderon*, 146 AD3d 967, 972 [2d Dept 2017], *lv denied* 29 NY3d 1076 [2017] [emphasis added]), and the absence of his testimony did not deprive the jury of "significant material evidence" (*People v Grant*, 7 NY3d 421, 424 [2006] [internal quotation marks omitted]), inasmuch as defendant's girlfriend, who was a passenger in defendant's vehicle when the incident occurred, was able to provide eyewitness testimony regarding the incident.

Defendant further contends that the court abused its discretion in its *Molineux* ruling, pursuant to which the victim was permitted to testify that defendant had asked him multiple times—including on the day of the incident—to participate in a cell phone distribution scheme. We conclude that defendant failed to preserve that contention for our review inasmuch as defense counsel objected only to the People's failure to provide notice that it planned to elicit such testimony (*see* CPL 470.05 [2]; *see generally People v Wiggins*, 11 AD3d 981, 981 [4th Dept 2004], *lv denied* 3 NY3d 761 [2004]). In any event, defendant's contention lacks merit. The victim's testimony did not "implicate defendant in the commission of any uncharged crime and thus it did not constitute *Molineux* evidence" (*People v Coppeta*, 125 AD3d 1304, 1304 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]). Further, the victim's testimony about the cell phone scheme was relevant as necessary "background material," which "complete[d] the narrative of the episode" (*People v Till*, 87 NY2d 835, 837 [1995] [internal quotation marks omitted]) and allowed the jury to understand the case in context (*see People v Resek*, 3 NY3d 385, 389 [2004]).

Defendant similarly failed to preserve for our review his related contention that the court erred in failing to issue a limiting instruction with respect to the victim's testimony about the cell phone scheme (*see People v Williams*, 107 AD3d 1516, 1516 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]). In any event, that contention also lacks merit (*see generally People v Carey*, 244 AD2d 952, 953 [4th Dept 1997], *lv denied* 92 NY2d 849 [1998]).

We reject defendant's further contention that the court erred in refusing to charge the jury on the defense of justification. Viewing the evidence in the light most favorable to defendant, as we must (*see People v Brown*, 169 AD3d 1488, 1488-1489 [4th Dept 2019], *lv denied* 35 NY3d 1064 [2020]), we conclude that there is no reasonable view of the evidence from which the jury could have found that defendant's actions were justified (*see generally id.*). Here, defendant was safely in his vehicle and the victim was walking away from the vehicle toward the curb when defendant drove into the victim, and there was only "equivocal evidence that [the victim] may have had a knife sometime during the dispute" that preceded the incident (*People v Benson*, 265 AD2d 814, 815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]; *cf. People v Arzu*, 7 AD3d 458, 459 [1st Dept 2004], *lv dismissed* 3 NY3d 670 [2004]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Defendant contends that, although the parties stipulated that the victim sustained a physical injury within the meaning of Penal Law § 120.05 (2), defense counsel was ineffective for failing to object when the prosecutor elicited testimony from the victim describing his injuries in detail and had the victim show his scars to the jury, and for failing to object when the prosecutor referenced the victim's testimony regarding his injuries on summation. Under the circumstances of this case, however, we conclude that, inasmuch as a victim's testimony regarding his or her injuries may be relevant to establish the defendant's intent (*see generally People v Jaber*, 172 AD3d 1227, 1229 [2d Dept 2019], *lv denied* 34 NY3d 933 [2019]), defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see generally People v Sampson*, 184 AD3d 1123, 1125 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]; *People v Williams*, 163 AD3d 1422, 1423 [4th Dept 2018]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

658.3

KA 16-01781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARIF D. PARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID O. IRVING OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 6, 2016. The judgment convicted defendant upon his plea of guilty of attempted strangulation 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 plea of guilty of attempted strangulation in the second degree (Penal Law §§ 110.00, 121.12). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (§ 215.51 [b] [ii]). In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of falsifying business records in the first degree (§ 175.10).

At the outset, we agree with defendant in all three appeals that his purported waivers of the right to appeal are "not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US — [2020]). During the oral colloquies, County Court "mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar to the taking of an appeal" (*id.* at 1229 [internal quotation marks omitted]; *see Thomas*, 34 NY3d at 565). Although ambiguities in a court's explanation may be cured by adequate clarifying language, which may be provided either in a written waiver or in the oral colloquy (*see Thomas*, 34 NY3d at 563 and n 5), we conclude for the reasons that follow that such language is absent from the record in the appeals before us (*see id.* at 564-566).

The written waivers do not establish valid waivers because they

were not executed until sentencing (*see People v Fox*, 173 AD3d 1680, 1681 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]; *People v Teta*, 165 AD3d 1635, 1635 [4th Dept 2018]) and, even assuming, arguendo, that the written waivers had been executed at the time of the pleas, the court "failed to confirm that [defendant] understood the contents of the written waivers" (*Thomas*, 34 NY3d at 566; *see People v Bradshaw*, 18 NY3d 257, 262 [2011]). In addition, the court did not specifically obtain any "assurances that [defendant] had ample opportunity to discuss with [defense] counsel the meaning of the waiver[s] and appellate rights he was surrendering" (*Thomas*, 34 NY3d at 564). Given the "muddled nature of the court's advisements," the absence of valid written waivers, and the lack of record support that defendant was counseled to understand that some appellate review survived, we conclude on this record that the mere inclusion in the court's colloquies of generic, fleeting statements of unnamed rights surviving the waiver is not adequate, under the totality of the circumstances, to allow us "to discern whether . . . defendant[] understood the import of the court's confused message about the important rights being waived" (*id.* at 566). Here, "[g]reater precision in the court[']s oral colloquies"—such as that found in the Model Colloquy for the waiver of the right to appeal, which "neatly synthesizes . . . the governing principles and provides a solid reference for a better practice"—was required to ensure that defendant's waivers were knowing, voluntary, and intelligent (*id.* at 567; *see* NY Model Colloquies, Waiver of Right to Appeal).

Nevertheless, we affirm in each appeal. Defendant contends in appeal No. 1 that the court abused its discretion in refusing to entertain, in the interest of justice and for good cause shown (*see* CPL 255.20 [3]), that part of his untimely omnibus motion seeking a *Huntley* hearing. We conclude, however, that defendant, by pleading guilty, forfeited appellate review of that contention. Initially, CPL 710.70 (2), which permits appellate review of "[a]n order finally denying a motion to suppress evidence . . . notwithstanding the fact that [the] judgment is entered upon a plea of guilty," is inapplicable. Here, the court's decision whether to entertain that part of the untimely omnibus motion seeking a *Huntley* hearing depended on a factual determination whether doing so would be "in the interest of justice" and upon "good cause shown" (CPL 255.20 [3]); "it did not involve consideration or denial of the merits of the constitutional contentions which defendant might later have asserted on [the] motion to suppress had [the hearing] been granted" (*People v Petgen*, 55 NY2d 529, 534 [1982], *rearg denied* 57 NY2d 674 [1982]). Inasmuch as the court's ruling "did not constitute a disposition on the merits of the motion to suppress," it "did not come within the preservative shelter of [CPL 710.70 (2)]" (*Petgen*, 55 NY2d at 534 n 2). More generally, the court's ruling "is not within that limited group of questions which survive a plea and may subsequently be raised on appeal" (*People v Di Donato*, 87 NY2d 992, 993 [1996]). Rather, the court's determination "was a discretionary ruling, addressing procedural timeliness, and defendant's ability to challenge it was forfeited by his plea" (*id.*, citing *Petgen*, 55 NY2d at 534; *see* CPL 255.20 [3]).

To the extent that defendant further contends in all three appeals that his first attorney's failure to file a timely omnibus motion constituted ineffective assistance of counsel, we conclude under these circumstances that defendant's contention likewise does not survive his guilty pleas. Here, "[t]here is no suggestion that, aside from the asserted default of the first attorney in failing to make a [timely] motion, the acceptance of the plea[s] was infected by any ineffective assistance of counsel" (*Petgen*, 55 NY2d at 534-535). "Defendant's replacement counsel, confronted with the fact that his application for [the court to entertain that part of the untimely omnibus motion seeking a *Huntley* hearing] had been denied, was fully aware of all the asserted derelictions of the first attorney and, by reason of his own unquestioned competence and experience as attorney for the defense, was fully qualified to make a seasoned assessment of defendant's claims in the circumstances and of the likelihood of their judicial acceptance" (*id.* at 535). Thus, it cannot be said here "that any ineffective assistance of counsel vitiated defendant's plea[s] of guilty premised as [they were] on advice of counsel (as to which there is now no suggestion of incompetency) comprehending, *inter alia*, the very claim[] of ineffective assistance of counsel that defendant now urges on us" (*id.*).

Finally, contrary to defendant's contention in all three appeals, the sentences are not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

658.4

KA 16-01825

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARIF D. PARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID O. IRVING OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 6, 2016. The judgment convicted defendant upon his plea of guilty of criminal contempt in the first degree.

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

Same memorandum as in *People v Parker* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

658.5

KA 16-01835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARIF D. PARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID O. IRVING OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 6, 2016. The judgment convicted defendant upon his plea of guilty of falsifying business records in the first degree.

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

Same memorandum as in *People v Parker* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

658

CA 20-00092

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

MARY ANN GREEN, ON BEHALF OF PLAINTIFF AND CLASSES DEFINED HEREIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NATIONAL INCOME LIFE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

EDELMAN, COMBS, LATTURNER & GOODWIN, LLC, CHICAGO, ILLINOIS (TIFFANY N. HARDY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (KYLE M. MEDLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered July 15, 2019. The order, among other things, granted defendant's motion to dismiss plaintiff's amended complaint.

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

Memorandum: Plaintiff is the beneficiary of an accident insurance policy issued by defendant to her late husband. Plaintiff's husband died in May 2017 after spending 33 days in the hospital. Plaintiff sought $40,000 under the policy's accidental death and dismemberment benefit (accidental death) provision and $18,800 under the hospital confinement benefit (hospital) and intensive care confinement benefit (intensive care) provisions. Defendant paid $40,000 under the accidental death provision, but refused to pay anything under the hospital and intensive care provisions. In doing so, defendant relied on the indemnity reduction clause within the accidental death provision, stating that "[t]he benefit payable under this provision is in lieu of or will be reduced by any other benefits paid under this policy." Plaintiff commenced this action asserting in an amended complaint two causes of action, one for breach of contract and another for violation of General Business Law § 349. Defendant moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7). Supreme Court, inter alia, granted defendant's motion, and we affirm.

Contrary to plaintiff's contention, the court properly dismissed the cause of action for violation of General Business Law § 349. "A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered

injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25-26 [1995]). Here, the court properly dismissed that cause of action pursuant to CPLR 3211 (a) (1) and (7) inasmuch as the policy itself conclusively refutes plaintiff's allegations that defendant committed a deceptive act and conclusively establishes that plaintiff has no such cause of action (*see Barrett v Grenda*, 154 AD3d 1275, 1278 [4th Dept 2017]; *cf. Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326-327 [2002]; *see also M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 [2009]). The only reasonable way to interpret the indemnity reduction clause is to determine that, under the policy, plaintiff's recovery is limited to $40,000 (*see generally Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 662 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010]). Contrary to plaintiff's contention, the indemnity reduction clause is not ambiguous, nor is it hidden in small print (*cf. Schlessinger v Valspar Corp.*, 21 NY3d 166, 173 [2013]). Indeed, that clause is clearly written and understandable, and it is compliant with Insurance Law § 3216 (c) (7). Thus, even accepting plaintiff's allegations as true, as we must in deciding defendant's motion to dismiss (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]; *Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017]), we conclude that defendant conclusively established that its policy and related promotional materials were not deceptive (*see generally Goldman*, 5 NY3d at 572; *Stutman*, 95 NY2d at 31; *Citipostal, Inc. v Unistar Leasing*, 283 AD2d 916, 918 [4th Dept 2001]). Furthermore, we conclude that the cause of action for violation of General Business Law § 349 was properly dismissed because the policy conclusively establishes that plaintiff has not suffered an injury (*see generally* CPLR 3211 [a] [1], [7]). Inasmuch as the indemnity reduction clause is enforceable, plaintiff has received all the benefits to which she is entitled (*see generally Stutman*, 95 NY2d at 29).

Contrary to plaintiff's further contention, the court also properly dismissed the breach of contract cause of action. Inasmuch as the policy permitted defendant to limit plaintiff's recovery to $40,000, the policy conclusively refutes plaintiff's allegations of breach of contract (*see* CPLR 3211 [a] [1]; *Barrett*, 154 AD3d at 1278) and conclusively establishes that plaintiff has no such cause of action (*see* CPLR 3211 [a] [7]; *Manchester Equip. Co. v Panasonic Indus. Co.*, 141 AD2d 616, 617-618 [2d Dept 1988], *appeal dismissed* 72 NY2d 954 [1988], *lv denied* 73 NY2d 703 [1988]; *see generally Stanford v National Grange Ins. Co.*, 64 F Supp 3d 649, 658 [ED Pa 2014]).

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

671

CA 19-01851

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

MICHAEL FORD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

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

PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (ANDREW STECKER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered June 6, 2019. The order denied the motion of plaintiff for partial summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the third cause of action and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that 7 NYCRR 254.6 (f) and 7 NYCRR 251-2.2 (d) are not inconsistent with Correction Law § 401 (3),

and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a state prisoner, commenced this action and sought, in the third cause of action, a declaration that 7 NYCRR 251-2.2 (d) and 7 NYCRR 254.6 (f) conflict with Correction Law § 401 (3). Supreme Court denied plaintiff's motion for partial summary judgment on the third cause of action and dismissed, inter alia, that cause of action. Plaintiff now appeals.

Contrary to plaintiff's contention, 7 NYCRR 254.6 (f) does not conflict with Correction Law § 401 (3). The challenged language in subdivision (f) authorizes a hearing officer to dismiss an inmate misbehavior charge if, "in light of the inmate's mental condition or intellectual capacity, the hearing officer believes that a penalty with regard to one or more of the charges would serve no useful purpose." That language, which applies to all inmate disciplinary charges, offers a different form of protection to inmates than does section 401 (3), which in relevant part creates a "presumption against

imposition and pursuit of disciplinary charges for self-harming behavior and threats of self-harming behavior, including related charges for the same behaviors, such as destruction of state property, except in exceptional circumstances." The statute and the regulation are complementary, operate in different spheres, and exist in complete harmony within the overall inmate disciplinary scheme. Contrary to plaintiff's assertion, no inconsistency arises from the regulation's failure to explicitly incorporate or reference section 401 (3) (*see generally Ostrer v Schenck*, 41 NY2d 782, 785-786 [1977]; *Matter of Adirondack Health-Uihlein Living Ctr. v Shah*, 125 AD3d 1366, 1367-1368 [4th Dept 2015], *appeal dismissed* 26 NY3d 1132 [2016]).

We reject plaintiff's further contention that 7 NYCRR 251-2.2 (d), which provides an additional layer of review to protect inmates charged with self-harm from improper discipline, conflicts with Correction Law § 401 (3). Instead of dismissing the third cause of action, however, the court should have declared that the challenged regulations do not conflict with section 401 (3) (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]). We therefore modify the order accordingly. Finally, plaintiff's contention that a particular circular letter and directive were improperly adopted is raised for the first time in his reply brief on appeal, and that argument thus is not properly before us (*see Scheer v Elam Sand & Gravel Corp.*, 177 AD3d 1290, 1292 [4th Dept 2019]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

675

CA 19-01271

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

SUSAN CONNERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LMAC MANAGEMENT LLC, AND GREATER NIAGARA MEDICAL GROUP, P.C., DEFENDANTS-RESPONDENTS.

SHAW & SHAW, P.C., HAMBURG (BLAKE ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (BETSY F. VISCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 6, 2019. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she allegedly sustained when she tripped and fell on a sidewalk on premises owned by defendant LMAC Management LLC. The sidewalk was outside of a building in which defendant Greater Niagara Medical Group, P.C. was a tenant. Supreme Court granted defendants' motion for summary judgment dismissing the complaint, and plaintiff now appeals. We affirm.

In a trip and fall case, "a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Doner v Camp*, 163 AD3d 1457, 1457 [4th Dept 2018] [internal quotation marks omitted]; *see Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]). "If a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation" (*Moiseyeva v New York City Hous. Auth.*, 175 AD3d 1527, 1528 [2d Dept 2019] [internal quotation marks omitted]; *see Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]). That "does not mean that a plaintiff must have personal knowledge of the cause of his or her fall" (*Moiseyeva*, 175 AD3d at 1529 [internal quotation marks omitted]). "It only means that a plaintiff's inability to establish the cause of his or her fall—whether by personal knowledge or by other admissible proof—is fatal to a cause of action based on negligence" (*id.* [internal

quotation marks omitted]).

We conclude that defendants met their initial burden on the motion by demonstrating that plaintiff could not identify the cause of her fall without engaging in speculation (*see Mallen v Dekalb Corp.*, 181 AD3d 669, 669-670 [2d Dept 2020]; *Ash*, 109 AD3d at 855-856; *cf. Moiseyeva*, 175 AD3d at 1529). In support of their motion, defendants submitted plaintiff's deposition testimony, in which she testified that she turned right when she exited the building and "felt a grab . . . [like her] foot [was] stuck on something." She could not recall which foot became stuck on "something," nor could she recall "exactly" where she tripped and fell. She testified that she believed that she tripped on "a crevice or a knob or something there" but also acknowledged that she could not "really explain the fall."

We further conclude that plaintiff's submissions in opposition to the motion failed to raise a triable issue of fact. Plaintiff's deposition testimony was inconclusive and speculative as to what actually caused her fall (*see generally Mallen*, 181 AD3d at 669). The affidavit of plaintiff's expert relied principally on plaintiff's deposition testimony and was thus similarly conjectural (*see id.* at 670). Inasmuch as plaintiff testified at her deposition that she did not see what caused her to fall on the day of the accident, "it would be speculative to assume that the alleged defect her expert identified in the sidewalk [many] years after the accident caused her fall" (*id.*; *see Burns v Linden St. Realty, LLC*, 165 AD3d 876, 877 [2d Dept 2018]). Thus, we conclude that the court properly granted defendants' motion.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

678

CA 19-01179

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

STEPHEN A. HILBRECHT AND MICHELLE HILBRECHT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOSEPH M. GRECO, M.D., AND WESTERN NEW YORK
UROLOGY ASSOCIATES, LLC, DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMPSEY & DEMPSEY, BUFFALO (TYLER GARVEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered April 23, 2019. The order denied 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.

Memorandum: Plaintiffs commenced this medical malpractice action alleging that Joseph M. Greco, M.D. (defendant) negligently performed two vasectomy procedures on Stephen A. Hilbrecht (plaintiff), causing him to sustain injuries, including chronic and severe testicular pain. Defendants appeal from an order that denied their motion for summary judgment dismissing the complaint. We affirm.

Defendants satisfied their initial burden on the motion by submitting an affidavit from defendant addressing "each of the specific factual claims of negligence raised in [plaintiffs'] bill of particulars" and opining that he complied with the accepted standard of care and did not cause any injury to plaintiff in performing the vasectomy procedures (*Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020] [internal quotation marks omitted]; *see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]).

In opposition, however, plaintiffs raised triable issues of fact with respect to defendant's compliance with the accepted standard of care and whether that departure was a proximate cause of the injury (*see Bubar*, 177 AD3d at 1359). Initially, we reject defendants' contention that plaintiffs' expert failed to offer an adequate foundation for his or her qualifications. Plaintiffs' anonymous

expert indicated that he or she was a physician licensed in the United States and was board certified in urology, was a fellow in the American College of Surgeons, and was a former Chief of Urology. The affidavit therefore established that "[t]he specialized skills of [the] expert as demonstrated through his [or her] board certifications, taken together with the nature of the medical subject matter of th[e] action, are sufficient to support the inference that [his or her] opinion regarding [the] treatment [at issue] was reliable" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1470-1471 [4th Dept 2020]; *Chipley v Stephenson*, 72 AD3d 1548, 1549 [4th Dept 2010]).

Plaintiffs' expert opined, in contradiction of defendant's affidavit, that the severe chronic testicular pain that followed the vasectomy procedures is not a recognized complication associated with normal vasectomies but is instead associated with negligent medical and surgical care (*see generally Santilli v CHP, Inc.*, 274 AD2d 905, 907-908 [3d Dept 2000]). In addition, based on a review of the medical records and deposition testimony, plaintiffs' expert raised an issue of fact with respect to causation by ruling out all other causes of the chronic pain except for negligence during the vasectomy procedures. The affidavits submitted by the parties thus presented a "classic battle of the experts" precluding summary judgment (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]; *see Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]).

We have reviewed defendants' remaining contention and conclude that it does not warrant reversal or modification of the order.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

680.1

CA 19-00661

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

IN THE MATTER OF TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, ASSERTING CLAIMS IN ITS OWN RIGHT, AND AS THE ASSIGNEE AND REAL PARTY IN INTEREST OF THE CLAIMS OF DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION, DEFENDANT-RESPONDENT-RESPONDENT.

CHIESA SHAHINIAN & GIANTOMASI PC, NEW YORK CITY (ADAM P. FRIEDMAN OF COUNSEL), FOR PLAINTIFF-PETITIONER-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM J. BRENNAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered September 18, 2018. The order, among other things, granted defendant-respondent's motion for partial summary judgment.

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

Memorandum: On a prior appeal in this breach of contract action, we concluded, among other things, that triable issues of fact existed concerning the authority of the president of defendant-respondent (defendant) to terminate a specific contract between DiPizio Construction Company, Inc. (DiPizio) and defendant in the absence of express authorization from defendant's Board of Directors (Board) (*DiPizio Const. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418, 1420 [4th Dept 2015]). The parties thereafter engaged in extensive further discovery, following which plaintiff-petitioner (plaintiff) moved for partial summary judgment as to liability on the ground that, inter alia, defendant's president lacked authority to terminate the contract. Defendant, asserting that its president had such authority, moved for partial summary judgment dismissing the fifth cause of action, which sought a judgment that the contract was improperly terminated without authority.

The new information before Supreme Court on those motions included, inter alia, plaintiff's substitution for DiPizio as the "real party in interest"; the unanimous resolution of defendant's

Board affirming the authority of defendant's president to manage defendant's contracts, including any provisions regarding the termination of such contracts; the affidavit of the Senior Counsel and Vice President of Capital Projects for Empire State Development (defendant's sole shareholder) asserting that "the relevant policies of defendant and [Empire State Development] expressly authorize [defendant's] president to terminate [defendant's] contracts"; and the applicable Procurement Guidelines adopted by both defendant and Empire State Development.

We now conclude, based on this expanded record, that defendant met its initial burden on its motion. Inasmuch as a corporate president has presumptive authority "to do any act which the directors could authorize or ratify," defendant's president was presumptively authorized to terminate the subject contract on defendant's behalf (*Hastings v Brooklyn Life Ins. Co.*, 138 NY 473, 479 [1893]; *see Hardin v Morgan Lithograph Co.*, 247 NY 332, 338-339 [1928]). Furthermore, defendant established both that the Board had imposed no "restrictions" on its president's power to terminate contracts (*Hardin*, 247 NY at 339; *cf. Hellman v Hellman*, 60 AD3d 1468, 1469 [4th Dept 2009]) and that defendant's president had terminated the subject contract in the "ordinary course of business" (*Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [4th Dept 1994]). In opposition, plaintiff failed to raise a triable issue of fact. The court therefore properly granted defendant's motion, denied plaintiff's motion, and dismissed the fifth cause of action and the first cause of action insofar as it alleged that defendant's president lacked authority to terminate the contract.

Separately, even if Justice Chimes erred in signing the order on appeal after having recused herself, plaintiff invited that ostensible error by joining defendant in drafting the proposed order for Justice Chimes's signature and thus cannot now be heard to challenge it (*see generally Freidus v Eisenberg*, 71 NY2d 981, 982 [1988]; *Wein v City of New York*, 36 NY2d 610, 620-621 [1975]; *Siemucha v Garrison*, 111 AD3d 1398, 1401 [4th Dept 2013]). Plaintiff's remaining contention is academic in light of our determination.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

690

CA 19-01698

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

JACK E. PRIEBE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF NEWARK POLICE OFFICER MATTHEW COLACINO, INDIVIDUALLY AND IN HIS CAPACITY AS A PATROLMAN/OFFICER OF VILLAGE OF NEWARK POLICE DEPARTMENT, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

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

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered January 28, 2019. The order granted the motion of defendant-respondent for summary judgment dismissing the complaint against him.

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

Memorandum: Plaintiff commenced this action asserting three causes of action, i.e., for false arrest and malicious prosecution, abuse of process, and intentional infliction of emotional distress. Supreme Court granted the motion of defendant-respondent (defendant) for summary judgment dismissing the complaint against him, and plaintiff appeals. We affirm.

As an initial matter, we note that plaintiff failed to present any argument on appeal with respect to his causes of action for abuse of process and intentional infliction of emotional distress. Consequently, we conclude that he has abandoned any challenge to the dismissal against defendant of those causes of action (*see Bratge v Simons*, 173 AD3d 1623, 1623-1624 [4th Dept 2019]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Thus, only plaintiff's first cause of action insofar as it asserts against defendant claims for false arrest and malicious prosecution is at issue on this appeal.

" 'The existence of probable cause constitutes a complete defense to causes of action alleging false arrest . . . and malicious

prosecution' " (*Harmon v City of Buffalo*, 187 AD3d 1644, 1644 [4th Dept 2020]; *see Britt v Monachino*, 73 AD3d 1462, 1462 [4th Dept 2010]; *see generally De Lourdes Torres v Jones*, 26 NY3d 742, 759-761 [2016]). "In the context of a false arrest or malicious prosecution claim, '[p]robable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe [the plaintiff] guilty' " (*Mahoney v State of New York*, 147 AD3d 1289, 1291 [3d Dept 2017], *lv denied* 30 NY3d 906 [2017], quoting *Colon v City of New York*, 60 NY2d 78, 82 [1983], *rearg denied* 61 NY2d 670 [1983]). Indeed, " '[p]robable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed' by the suspected individual, and probable cause must be judged under the totality of the circumstances" (*De Lourdes Torres*, 26 NY3d at 759).

Here, we conclude that, contrary to plaintiff's contention, the court properly granted defendant's motion with respect to the first cause of action. Defendant established his entitlement to summary judgment with respect to the claims asserted against him therein by submitting evidence demonstrating that he had probable cause to believe that plaintiff had committed harassment in the second degree (*see* Penal Law § 240.26 [1]; *see also Harmon*, 187 AD3d at 1645; *Broyles v Town of Evans*, 147 AD3d 1496, 1496-1497 [4th Dept 2017]), and plaintiff failed to raise an issue of fact in opposition.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

694

CA 19-01928

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

GREGORY D. STRYKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES T. CONNERS AND CONNERS AND CONNERS, INC., DEFENDANTS-APPELLANTS.

HAGELIN SPENCER LLC, BUFFALO (RICHARD J. PORTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (John J. Ark, J.), entered April 22, 2019. The order denied defendants' motion seeking to set aside the jury verdict in part and direct judgment in defendants' favor and, in the alternative, seeking leave to reargue their motion for a directed verdict.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was operating was rear-ended by a vehicle driven by defendant James T. Conners (defendant) and owned by defendant Conners and Conners, Inc. Following a jury trial, the jury determined that defendant was faced with a sudden condition that could not have been reasonably anticipated, but that his response to the emergency was not that of a reasonably prudent person. Defendants appeal from an order denying their posttrial motion seeking an order setting aside the verdict in part and directing a judgment in their favor pursuant to CPLR 4404 (a) or, in the alternative, granting leave to reargue their prior motion for a directed verdict pursuant to CPLR 4401. At the outset, we note that no appeal lies from an order denying a motion seeking leave to reargue, and thus that part of defendants' appeal must be dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Defendants contend that Supreme Court erred in refusing to set aside that part of the verdict that was not in their favor because the jury's finding with respect to the first question on the verdict sheet, i.e., that defendant was faced with a sudden condition that could not have been reasonably anticipated, precluded a finding of

negligence. Defendants further contend that, consequently, the second question on the verdict sheet, which asked whether defendant's response to the emergency was "that of a reasonably prudent person," should not have been submitted to the jury. Defendants failed to preserve those contentions for our review. Defendants did not object to the court's instructions to the jury concerning the emergency doctrine (*see Healey v Greco*, 174 AD2d 877, 878 [3d Dept 1991]), nor did they object to the court's use of the verdict sheet as given (*see Cavallaro v Somaskanda* [appeal No. 2], 280 AD2d 1002, 1003 [4th Dept 2001]; *Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828 [4th Dept 2000], *lv denied* 96 NY2d 710 [2001]).

We reject defendants' further contention that the verdict was inconsistent. The common-law emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance . . . , the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context . . . provided the actor has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [internal quotation marks omitted]; *see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011]; *Colangelo v Marriott*, 120 AD3d 985, 986-987 [4th Dept 2014]). A person facing an emergency is "not automatically absolve[d] . . . from liability" (*Gilkerson v Buck*, 174 AD3d 1282, 1284 [4th Dept 2019] [internal quotation marks omitted]). In determining whether the actions of a driver are reasonable in light of an emergency situation, the factfinder must consider "both the driver's awareness of the situation and his or her actions prior to the occurrence of the emergency" (*id.*). Thus, contrary to defendants' contention, a driver confronted with an emergency situation may still be found to be at fault for a resulting accident where, as here, his or her reaction is found to be unreasonable (*see Kizis v Nehring*, 27 AD3d 1106, 1108 [4th Dept 2006]; *Sossin v Lewis*, 9 AD3d 849, 851 [4th Dept 2004], *amended on other grounds* 11 AD3d 1045 [4th Dept 2004]).

We also reject defendants' contention that the court erred in refusing to set aside the verdict in part as against the weight of the evidence (*see* CPLR 4404 [a]). "[A] verdict may be set aside as against the weight of the evidence only if the evidence so preponderate[d] in favor of [defendants] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Killian v Captain Spicer's Gallery, LLC*, 170 AD3d 1587, 1588 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019] [internal quotation marks omitted]). Applying that principle here, we conclude that there is a fair interpretation of the evidence pursuant to which the jury could have found that defendant was negligent. The evidence established, inter alia, that defendant began to experience symptoms of illness two hours prior to the collision. His symptoms progressively worsened for two hours, and defendant became aware that he was in need of medical attention. Nevertheless, defendant continued to drive and suffered a stroke, which caused the vehicle he was driving to strike plaintiff's vehicle. Under the circumstances of this case, the evidence did not so greatly preponderate in favor of defendants that the jury's verdict could not have been reached on any fair interpretation of the evidence (*see generally McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept

2016]; *Herbst v Marshall*, 89 AD3d 1403, 1403 [4th Dept 2011]; *Petrovski v Fornes*, 125 AD2d 972, 973 [4th Dept 1986], *lv denied* 69 NY2d 608 [1987]).

Finally, we have reviewed defendants' remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

695

CA 19-02371

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF EILEEN BUCKLEY, DEREK LUSTIG, JERRY BUCKLEY, PARK HOUSE GENEVA, LLC, KAY ABRAHAM, JOANNE LABATE, JANE B. DONEGAN, GENA RANGEL, BETTY BAYER, HANS C. BUECHLER, SUSAN HENKING, JULIE O'MALLEY, BARBARA ROESCH ROKOW, WALTER GAGE, AND ANTHONY CONSTABLE, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF GENEVA, TRINITY EPISCOPAL CHURCH AND MCGROARTY INVESTMENTS, LLC, RESPONDENTS-RESPONDENTS.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (WENDY MARSH OF COUNSEL), FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF CITY OF GENEVA.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TRINITY EPISCOPAL CHURCH AND MCGROARTY INVESTMENTS, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered June 20, 2019 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended and supplemental petition.

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

Memorandum: Respondents Trinity Episcopal Church (TEC) and McGroarty Investments, LLC (McGroarty) proposed to renovate TEC's church and rectory by creating an inn with guest rooms, a restaurant, and a parking lot expansion (project). Specifically, under the proposal, the sanctuary would continue to be used for worship, but would also be used as an event space, while two wings of the church would be converted into a 21-room inn and a restaurant. The lower level of the church would be converted into offices, washrooms, a kitchen, and flex space, and the rectory would be converted into seven additional suites associated with the inn. The proposed inn, restaurant, and event space were not, however, permitted uses in the multifamily residential and historic district in which the church and

rectory are located. Thus, TEC and McGroarty submitted a use variance application to respondent Zoning Board of Appeals of City of Geneva (ZBA). Thereafter, the ZBA approved the use variance for the project and, as lead agency for purposes of the State Environmental Quality Review Act ([SEQRA] ECL art 8), issued a negative declaration. Petitioners then commenced this CPLR article 78 proceeding seeking to annul those determinations. Supreme Court, inter alia, granted respondents' respective motions to dismiss the amended and supplemental petition (amended petition) against them pursuant to CPLR 409 (b) and 7804 (f), and we now affirm.

Petitioners contend that the court erred in treating respondents' motions to dismiss as motions for summary judgment. In petitioners' view, the court was required to treat the allegations in the amended petition as true and accord petitioners every favorable inference. We reject petitioners' contention. It is well settled that "[a] CPLR article 78 proceeding is a special proceeding . . . and as such may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised . . . Thus, every hearing of a special proceeding is equivalent to the hearing of a motion for summary judgment and makes a formal motion for same unnecessary" (*Matter of Battaglia v Schuler*, 60 AD2d 759, 759-760 [4th Dept 1977] [internal quotation marks omitted]). Consequently, the court's consideration of respondents' motions "was [not] limited to the issue whether the petition contained a cognizable legal theory" (*Matter of Strobel v New York State Dept. of Envtl. Conservation*, 111 AD3d 1402, 1402 [4th Dept 2013]), and it could treat respondents' motions as summary judgment motions.

We also reject petitioners' contention that the determination to grant the use variance lacks a rational basis and is not supported by substantial evidence (*see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]). "[T]he ZBA is afforded 'broad discretion' in determining whether to grant the requested variance[] . . . , and judicial review is limited to whether the determination was illegal, arbitrary or an abuse of discretion" (*Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280 [4th Dept 2007]). "A reviewing court may not substitute its judgment for that of the ZBA, even if there is substantial evidence supporting a contrary determination" (*id.*). Where there is substantial evidence in the record to support the rationality of the ZBA's determination, the determination should be affirmed upon judicial review (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]). Here, upon our review of the record, we conclude that the determination of the ZBA is not illegal, arbitrary or capricious, or an abuse of discretion inasmuch as TEC and McGroarty established that "applicable zoning regulations and restrictions have caused unnecessary hardship," i.e., that they could not realize a reasonable return with respect to the property, that the hardship was unique, that the variance would not alter the essential character of the neighborhood, and that the hardship was not self-created (General City Law § 81-b [3] [b] [i]-[iv]; *see Matter of Abrams v City of Buffalo Zoning Bd. of Appeals*, 61 AD3d 1387, 1387-1388 [4th Dept 2009]).

We further conclude that, contrary to petitioners' contention, the ZBA complied with the substantive and procedural requirements of SEQRA in issuing a negative declaration, and its determination to issue the negative declaration was not in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion (*see Matter of Campaign for Buffalo History Architecture & Culture, Inc. v Zoning Bd. of Appeals of City of Buffalo*, 174 AD3d 1304, 1306 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020]). The ZBA properly "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 Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006] [internal quotation marks omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). Contrary to petitioners' further contention, it is well settled "that the 'designation as a [T]ype I action does not, per se, necessitate the filing of an environmental impact statement [(EIS)]' " (*Matter of Wooster v Queen City Landing, LLC*, 150 AD3d 1689, 1692 [4th Dept 2017]). "When the lead agency finds that there will be no adverse environmental impacts or that such impacts will be insignificant, it can issue a negative declaration without the necessity of an EIS," and it is not "[t]he court's role . . . to second-guess the [ZBA's] determination" (*Matter of Brunner v Town of Schodack Planning Bd.*, 178 AD3d 1181, 1182-1183 [3d Dept 2019]).

Petitioners further contend that they were denied due process and that, in particular, they were denied the right to participate in the public hearings before the ZBA, and the ZBA impermissibly allowed TEC and McGroarty to submit additional materials after the deadline for submissions had expired. We reject that contention. The ZBA, as the lead agency for purposes of SEQRA review, was required to "make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR[A] process" (6 NYCRR 617.3 [d]). Upon our review of the record, we conclude that petitioners were given notice of the hearings and an opportunity to be heard. They commented on the issues at the hearings and made written submissions. Furthermore, we conclude that the ZBA's consideration of the additional materials in question, which petitioners claim were submitted after the opportunity for public comment had closed, does not, under the circumstances of this case, mandate reversal (*see generally Brunner*, 178 AD3d at 1184).

We have considered petitioners' remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 16-01233

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAIN MALDONADO, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SHAIN MALDONADO, DEFENDANT-APPELLANT PRO SE.

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 29, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the first degree (§ 120.10 [1]). The conviction arises from an incident in which defendant, having earlier been asked to leave a gathering due to his behavior by the host and her boyfriend, returned a few hours later with an associate and initiated a melee on the porch and in front of the apartment during which the boyfriend was fatally stabbed and another guest sustained a serious physical injury from being stabbed. We affirm.

Defendant contends in his main and pro se supplemental briefs that Supreme Court erred in granting the People's request to charge the jury on manslaughter in the first degree as a lesser included offense of murder in the second degree (Penal Law § 125.25 [1]). We reject that contention inasmuch as there is "a reasonable view of the evidence to support a finding that . . . defendant committed the lesser offense but not the greater" (*People v Van Norstrand*, 85 NY2d 131, 135 [1995]; *see* CPL 300.50 [1]), i.e., that during the chaotic struggle between defendant and the boyfriend on the porch, defendant intended to cause serious physical injury to the boyfriend rather than to kill him (*see People v Velasco*, 160 AD2d 170, 170-171 [1st Dept 1990], *affd* 77 NY2d 469 [1991]; *People v Straker*, 301 AD2d 667, 668 [2d Dept 2003], *lv denied* 100 NY2d 587 [2003]).

Even assuming, arguendo, that defendant preserved for our review his contention in his main brief that the conviction of manslaughter in the first degree is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude with respect to defendant's principal liability for that crime that the evidence is legally sufficient to establish that defendant stabbed the boyfriend (*see People v McGhee*, 4 AD3d 485, 486 [2d Dept 2004], *lv denied* 2 NY3d 803 [2004]). We further conclude in that respect that the evidence is legally sufficient to establish that defendant intended to cause serious physical injury to the boyfriend (*see People v Collins*, 43 AD3d 1338, 1338 [4th Dept 2007], *lv denied* 9 NY3d 1005 [2007]; *see generally People v Ramos*, 19 NY3d 133, 136-137 [2012]). Contrary to defendant's contention, even if the proof had demonstrated that the associate stabbed the boyfriend during the melee, the evidence is legally sufficient to establish defendant's liability as an accessory. "There is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant and the [associate] shared a community of purpose to cause serious physical injury to the [boyfriend]" (*People v Bursey*, 155 AD3d 1513, 1514 [4th Dept 2017], *lv denied* 30 NY3d 1114 [2018]) and that defendant "solicited, requested, commanded, importuned or intentionally aided the [associate] in the commission of the crime" (*People v Bello*, 92 NY2d 523, 526 [1998]; *see* Penal Law § 20.00).

Although defendant correctly notes that there is no evidence that he stabbed the other guest to establish his liability as a principal for assault in the first degree, defendant did not preserve for our review his further contention that the evidence with respect to that crime is legally insufficient to establish his liability as an accomplice, including the requisite mental culpability, inasmuch as his motion for a trial order of dismissal was not specifically directed at the alleged error urged on appeal (*see People v Carncross*, 14 NY3d 319, 324 [2010]; *People v Grimes*, 174 AD3d 1341, 1341 [4th Dept 2019], *lv dismissed* 34 NY3d 932 [2019]). In any event, we reject that contention. The evidence established that defendant solicited or intentionally aided the associate in assaulting the people at the gathering, including interveners who would prevent the primary attack on the boyfriend (*see People v Haire*, 96 AD2d 1110, 1111 [3d Dept 1983]). Indeed, defendant brought the associate back to the apartment, and they jointly approached the apartment both armed with a knife and concealing their hands. After the host answered the door and stood in front of the boyfriend, defendant pushed the host, both defendant and the associate then grabbed the boyfriend pulling him through the doorway while dragging the host onto the porch as well, and both defendant and the associate engaged in a fight with the boyfriend before the guest intervened in the melee and was stabbed by the associate (*see id.*). There is also evidence from which the jury could reasonably find that defendant shared the associate's intent to cause serious physical injury to the guest (*see generally* Penal Law § 120.10 [1]). The jury could have reasonably inferred that defendant

was aware of the associate's possession of and intent to use a knife and that, upon the guest's intervention in an attempt to help the boyfriend, the associate's actions in preventing the guest from rendering such assistance and stabbing him "were not 'spontaneous' or unanticipated by [defendant], but that [defendant and the associate] together had a 'concerted or planned use of [their] weapon[s]' " against interveners such as the guest (*People v Cabassa*, 79 NY2d 722, 728 [1992], *cert denied* 506 US 1011 [1992]; *see Matter of Tatiana N.*, 73 AD3d 186, 191 [1st Dept 2010]).

Contrary to defendant's further contention in his main brief, 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]). The testimony of the People's witnesses was not "incredible as a matter of law, i.e., it was not impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]). " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence,' we must afford great deference to the fact-finder's opportunity to view the witnesses, hear their testimony and observe their demeanor" (*People v Friello*, 147 AD3d 1519, 1520 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]). We conclude that the jury properly considered the issues of credibility, including the inconsistencies in the witnesses' testimony, and there is no basis for disturbing its determinations (*see People v Rogers*, 70 AD3d 1340, 1340 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010]).

We reject defendant's contention in his main brief that the court committed reversible error by admitting certain evidence at trial. "Trial courts are accorded wide discretion in making evidentiary rulings and, absent an abuse of discretion, those rulings should not be disturbed on appeal" (*People v Carroll*, 95 NY2d 375, 385 [2000]). Here, the court's rulings did not constitute an abuse of discretion.

Defendant also contends in his main brief that he was denied a fair trial by prosecutorial misconduct. Defendant preserved that contention for our review with respect to only one alleged instance of prosecutorial misconduct and, in any event, we conclude that "[t]he prosecutor's comments on summation did not shift the burden of proof to defendant, and they constituted either fair comment on the evidence or a fair response to defense counsel's summation" (*People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]; *see People v Bailey*, 181 AD3d 1172, 1175 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Contrary to defendant's related contention in his main and pro se supplemental briefs, inasmuch as the prosecutor's comments on summation were not improper, defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel (*see People v Brooks*, 183 AD3d 1231, 1232 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]).

Defendant further contends in his main brief that he was deprived of effective assistance by defense counsel's failure to consult with him before declining to consent to the jury's request for written copies of the statutory text of certain crimes (*see* CPL 310.30). We reject that contention inasmuch as defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcoming[]" (*People v Benevento*, 91 NY2d 708, 712 [1998]).

Contrary to defendant's contention in his main brief, we conclude that the sentence is not unduly harsh or severe. Finally, we have considered the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

754

KA 18-02108

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUWAYNE MCFADDEN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered April 25, 2018. The judgment convicted defendant upon a jury verdict of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20), defendant contends that County Court abused its discretion in failing to impose a sanction related to the People's *Rosario* violation and that, on this appeal, this Court should apply the new discovery statutes (*see* CPL article 245) as opposed to the statutes that were in existence at the time of trial (*see* CPL former article 240). We reject defendant's contentions.

Addressing first the issue concerning which statutes should be applied, we conclude that we must review defendant's contention regarding the need for a sanction using the statutes that were in existence at the time of trial. "[W]hile procedural changes are, in the absence of words of exclusion, deemed applicable to '*subsequent* proceedings in pending actions' . . . , it takes 'a clear expression of the legislative purpose to justify' a retrospective application of even a procedural statute so as to affect proceedings *previously taken* in such actions" (*Simonson v International Bank*, 14 NY2d 281, 289 [1964]; *see also Charbonneau v State of New York*, 148 Misc 2d 891, 895 [Ct Cl 1990], *affd* 178 AD2d 815 [1991], *affd sub nom. Dreger v New York State Thruway Auth.*, 81 NY2d 721 [1992]). Indeed, "it would be particularly inappropriate for the courts now to undertake the formulation of new rules, and hold them applicable to cases instituted years ago" (*Simonson*, 14 NY2d at 288).

Here, applying the statutes that were in existence at the time of trial, we further conclude that the court properly refused to impose sanctions. In his omnibus motion, defendant sought, inter alia, disclosure of prior statements of witnesses as well as any audio recordings that contained prior statements of witnesses or any evidence related to discrepancies in identification. On the first day of trial, defense counsel noted that, although he had received *Rosario* material from the prosecution, it did not contain any radio transmissions of the officers expected to testify at trial. Upon investigation, the prosecutor learned that the recordings had been destroyed as a matter of routine procedure 90 days after the incident. It is undisputed that defendant's omnibus motion requesting such evidence was filed before expiration of that 90-day period. Defense counsel sought a mistrial or, in the alternative, preclusion of evidence or an adverse inference instruction. In opposition, the People argued that, inasmuch as there was a transcript of the radio transmissions that was made contemporaneously with the recording, defendant was not prejudiced by the destruction of the audio recordings. The court agreed and denied defendant's request for sanctions.

Although the People had an obligation to preserve the requested evidence (*see People v Martinez*, 71 NY2d 937, 940 [1988]; *see generally People v Kelly*, 62 NY2d 516, 520 [1984]), we conclude that sanctions were not warranted because defendant sustained no prejudice. The People correctly concede that the transcript of the radio transmissions cannot be considered a duplicative equivalent (*see People v Joseph*, 86 NY2d 565, 570 [1995]), but it "disclose[s] enough information to determine the general subject matter and approximate content of the missing materials, so as to enable this Court to fairly evaluate defendant's claim of prejudice" (*People v Smith*, 235 AD2d 639, 641 [3d Dept 1997], *lv denied* 89 NY2d 1041 [1997]).

It is well settled that "nonwillful, negligent loss or destruction of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice" (*People v Martinez*, 22 NY3d 551, 567 [2014]; *see Joseph*, 86 NY2d at 570-571; *Martinez*, 71 NY2d at 940). Under the circumstances of this case, we discern no prejudice from the destruction of the recordings of the radio transmissions between the officers (*see Smith*, 235 AD2d at 641; *People v Torres*, 179 AD2d 696, 697 [2d Dept 1992], *lv denied* 79 NY2d 1008 [1992]; *People v Hyde*, 172 AD2d 305, 306 [1st Dept 1991], *lv denied* 78 NY2d 1077 [1991]; *cf. People v Viruet*, 29 NY3d 527, 533 [2017]).

Defendant further contends that the identification testimony of two police officers should have been precluded because he received no CPL 710.30 notice related to their prior identification of him and the court granted his motion to preclude "identification . . . evidence of which the People failed to give notice." That contention is not preserved for our review "inasmuch as defendant did not object to the admission of that evidence on that ground during trial" (*People v King*, 166 AD3d 1562, 1563 [4th Dept 2018], *lv denied* 34 NY3d 1017 [2019]; *see People v Marvin*, 162 AD3d 1744, 1744 [4th Dept 2018], *lv denied* 32 NY3d 1066 [2018]; *see also People v Hunter*, 122 AD2d 166,

166 [2d Dept 1986], *lv denied* 68 NY2d 770 [1986]).

By making only a general motion for a trial order of dismissal, defendant "failed to preserve for our review his challenge to the legal sufficiency of the evidence" (*People v Alejandro*, 60 AD3d 1381, 1382 [4th Dept 2009], *lv denied* 12 NY3d 850 [2009]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495). We see no basis to disturb that determination.

Although defendant correctly concedes that any contention that he was penalized for asserting his right to a trial is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]), he nevertheless contends that the addition of one year to the maximum term of the indeterminate sentence offered under the plea was not justified by anything that was elicited during the trial and, as a result, the sentence is unduly harsh and severe. We reject that contention. Considering, among other things, that defendant was eligible to be sentenced as a persistent felony offender (*see* Penal Law § 70.10 [1] [a], [b]; [2]; *see also* § 70.00 [2] [a]; [3] [a] [i]), we conclude that his sentence of 3½ to 7 years of incarceration, i.e., the maximum sentence for a second felony offender (§ 70.06 [3] [d]; [4] [b]), is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

761

CA 20-00203

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

SHEILA (BAILEY) MILLER, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS J. MILLER, DECEASED, AND SHEILA (BAILEY) MILLER, INDIVIDUALLY, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA A. MILLER, AS EXECUTOR OF THE ESTATE OF MARK MENDY, DECEASED, DEFENDANT, AND MOOG INC., DEFENDANT-APPELLANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (PATRICK BARTON CURRAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered January 27, 2020. The order granted in part and denied in part the motion of defendant Moog Inc. for summary judgment dismissing the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it sought summary judgment dismissing the ninth cause of action, for breach of fiduciary duty, and as modified the order is affirmed without costs.

Memorandum: In this action, plaintiff seeks damages on behalf of herself and her late husband's estate for an alleged course of harassing conduct that was perpetrated against her and her late husband by Mark Mendy following plaintiff's termination of her relationship with Mendy in September 2006 and continuing through the commencement of plaintiff's relationship with and eventual marriage to her husband in 2008. Moog Inc. (defendant) employed both plaintiff's husband and Mendy for the majority of that time period.

As relevant here, the amended complaint asserted causes of action against defendant for negligent infliction of emotional distress, negligent supervision and retention, constructive discharge, and breach of fiduciary duty. Defendant moved for summary judgment dismissing the amended complaint against it and, alternatively, for dismissal of that complaint as a discovery sanction for spoliation. Defendant now appeals and plaintiff cross-appeals from an order

granting the motion with respect to the negligent infliction of emotional distress and constructive discharge causes of action, and otherwise denying the motion.

Regarding defendant's appeal, we reject defendant's contention that Supreme Court erred in denying the motion with respect to the negligent supervision and retention cause of action. "An employer may . . . be required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm" (*Detone v Bullit Courier Serv.*, 140 AD2d 278, 279 [1st Dept 1988], *lv denied* 73 NY2d 702 [1988]; *see Curtis v City of Utica*, 209 AD2d 1024, 1025 [4th Dept 1994]; *see generally Lamb v Stephen M. Baker, O.D., P.C.*, 152 AD3d 1230, 1231 [4th Dept 2017]). "The employer's negligence lies in . . . plac[ing] the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of [its] employees" (*Detone*, 140 AD2d at 279). Thus, there must be "a connection or nexus between the plaintiff's injuries and the defendant's malfeasance" (*Gonzalez v City of New York*, 133 AD3d 65, 70 [1st Dept 2015]) such that the "plaintiff has sustained damages that are proximately caused by the alleged misconduct" (*Alikes v Griffith*, 101 AD3d 1597, 1599 [4th Dept 2012]; *see Gray v Schenectady City School Dist.*, 86 AD3d 771, 773 [3d Dept 2011]).

Defendant contends that it was entitled to summary judgment dismissing the negligent supervision and retention cause of action because there is no evidence of a causal connection between defendant and the alleged acts of harassment committed by Mendy, specifically, that there is no evidence that the harassment was committed using defendant's premises or equipment (*see MS v Arlington Cent. Sch. Dist.*, 128 AD3d 918, 919 [2d Dept 2015]). Although defendant may be correct in contending that plaintiff cannot establish at trial that she or her husband sustained any actual damages as a result of defendant's negligence, "it is well settled that a party moving for summary judgment must affirmatively establish the merits of its cause of action or defense 'and does not meet its burden by noting gaps in its opponent's proof' " (*Great Lakes Motor Corp. v Johnson*, 132 AD3d 1390, 1391 [4th Dept 2015]; *see Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459, 1459-1460 [4th Dept 2010]). Here, defendant's reliance, for example, on the absence of evidence conclusively demonstrating the source of certain harassing hang-up calls or a lack of evidence that Mendy utilized defendant's network or equipment to send offending emails, is insufficient to establish its prima facie entitlement to summary judgment as a matter of law. The court therefore properly denied defendant's motion with respect to the negligent supervision and retention cause of action.

We agree with defendant on its appeal, however, that the court erred in denying the motion with respect to the breach of fiduciary duty cause of action. "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice

for the benefit of another upon matters within the scope of the relation" (*Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 21 [2008] [internal quotation marks omitted]; *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Although the existence of a fiduciary relationship is generally a fact-specific issue, "two essential elements of a fiduciary relation are . . . de facto control and dominance" (*Marmelstein*, 11 NY3d at 21 [internal quotation marks omitted]). Here, defendant met its initial burden on the motion by establishing that there was no relationship of dependence and trust between plaintiff and her husband, and defendant (*see generally EBC I, Inc.*, 5 NY3d at 19) and that it did not dominate or control the investigation into Mendy or the protection of plaintiff and her husband (*see generally Marmelstein*, 11 NY3d at 21). Further, the at-will employment relationship between plaintiff's husband and defendant did not create a fiduciary duty on defendant's part (*see Serow v Xerox Corp.*, 166 AD2d 917, 918 [4th Dept 1990]; *Budet v Tiffany & Co.*, 155 AD2d 408, 409 [2d Dept 1989]), and plaintiff left her employment with defendant before the complained-of harassment started.

In opposition, plaintiff failed to raise a triable issue of material fact with respect thereto. We reject plaintiff's contention that certain so-called "last chance" agreements between defendant and Mendy regarding Mendy's continued employment created an independent "legal and fiduciary duty" on the part of defendant to control Mendy or affirmatively protect plaintiff and her husband. In that regard, plaintiff argues that she and her husband were third-party beneficiaries of those agreements, which incorporated defendant's anti-harassment policy (*see Jackson v Guardsmark, Inc.*, 57 AD3d 1409, 1409-1410 [4th Dept 2008]) or, alternatively, that those agreements created a duty on defendant's part under *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]). Initially, even if we were to agree with plaintiff that those documents created a duty on the part of defendant, neither of those theories establish a valid basis for finding that a fiduciary relationship existed here. In any event, contrary to plaintiff's contention, the last chance agreements neither imposed an affirmative duty on defendant to control Mendy nor conferred on plaintiff and her husband the affirmative benefit of seeing to their personal safety (*cf. Jackson*, 57 AD3d at 1409-1410; *Kotchina v Luna Park Hous. Corp.*, 27 AD3d 696, 697 [2d Dept 2006]). Instead, those agreements detail only what actions Mendy was required to either take or abstain from taking in order to retain his employment with defendant. Thus, there is no legal basis for concluding that defendant assumed a duty of care, much less a fiduciary duty, to plaintiff and her husband by virtue of the last chance agreements (*see Espinal*, 98 NY2d at 140). We therefore modify the order by granting defendant's motion insofar as it sought summary judgment dismissing the ninth cause of action, for breach of fiduciary duty.

We reject defendant's contention on its appeal that the court erred in failing to determine that the exclusivity provisions of Workers' Compensation Law precluded, at least in part, the claims of

plaintiff's husband against defendant (*see Maas v Cornell Univ.*, 253 AD2d 1, 3 [3d Dept 1999], *affd* 94 NY2d 87 [1999]; *Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 275 [1st Dept 2005]). Defendant correctly concedes that it failed to assert the exclusivity provisions of the Workers' Compensation Law as an affirmative defense, and the record contains no evidence that defendant requested leave to amend its pleadings (*see Cole v Rappazzo Elec. Co.*, 267 AD2d 735, 738 [3d Dept 1999]).

We also reject defendant's contention on its appeal that it was entitled to summary judgment dismissing all of plaintiff's claims to the extent that they sought damages for purely emotional injuries. "A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred . . . when the mental injury is a direct, rather than a consequential, result of the breach . . . and when the claim possesses some guarantee of genuineness" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008] [internal quotation marks omitted]; *see Kennedy v McKesson Co.*, 58 NY2d 500, 504, 506 [1983]; *Cleveland v Perry*, 175 AD3d 1017, 1021 [4th Dept 2019]). Here, the duty of care owed by defendant to plaintiff and her husband is recognized in the tort cause of action of negligent supervision and retention, which, as discussed above, remains viable. Further, plaintiff is alleging that she and her husband were each directly harmed by defendant's negligent supervision and retention of Mendy. Thus, this is not a case where a plaintiff witnessed an injury to another or was negligently made a party to the injury of another (*see Kennedy*, 58 NY2d at 502-503, 506). Further, although it will be plaintiff's burden at trial to establish a causal connection between defendant's alleged negligence and any claimed emotional injury (*see generally Cleveland*, 175 AD3d at 1021; *Gonzalez*, 133 AD3d at 70; *Alikes*, 101 AD3d at 1599), as discussed above defendant has failed to meet its initial burden on the motion inasmuch as it has not established the absence of any such causal connection as a matter of law.

Contrary to defendant's further contention on its appeal, the court did not abuse its discretion by denying defendant's motion insofar as it sought dismissal of plaintiff's amended complaint as a sanction for spoliation of the evidence (*see generally Mahiques v County of Niagara*, 137 AD3d 1649, 1650-1651 [4th Dept 2016]). At issue is the delay in producing and the loss of certain electronically-stored information related to email accounts of plaintiff and her husband that had been preserved on two hard drives, one of which was later discovered to be inoperable.

The court has broad discretion in determining what, if any, sanction is warranted for spoliation of evidence, and a permissible sanction is " 'an order striking out pleadings or parts thereof' " (*id.* at 1651, quoting CPLR 3126 [3]). Although such an extreme sanction is generally limited to cases where the destruction of evidence was willful or contumacious, dismissal may be warranted where the moving party establishes that the negligent destruction of evidence " 'depriv[ed] the party seeking a sanction of the means of

proving his [or her] claim or defense. The gravamen of this burden is a showing of prejudice' " (*id.*; *see Giambrone v Niagara Mohawk Power Corp.*, 175 AD3d 1808, 1809 [4th Dept 2019]; *Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [4th Dept 2008]).

Initially, we reject defendant's assertion that there is evidence of willful destruction here. Although the relevant hard drives appear to have been negligently forgotten in a safe in the law firm of plaintiff's attorney for approximately seven years, there does not appear to be a dispute that the hard drives of plaintiff and her husband were imaged by a vendor for the purpose of preservation. There is no allegation or evidence that plaintiff or her counsel tampered with those hard drives. Further, defendant failed to offer any evidence to support its assertion that the absence of access to "native electronic files" due to the loss of information on the inoperable hard drive substantially prejudiced, much less precluded, its ability to mount a defense in this action. The court therefore did not abuse its discretion in refusing to dismiss the amended complaint as a spoliation sanction.

With respect to plaintiff's cross appeal, plaintiff first contends that the court erred in granting defendant's motion insofar as it sought summary judgment dismissing the cause of action for negligent infliction of emotional distress (NIED). The court granted the motion with respect to that separate cause of action on the ground that it was duplicative of the negligent supervision and retention, and breach of fiduciary duty causes of action. Plaintiff does not argue in her main brief on the cross appeal, however, that the separate NIED cause of action was not duplicative or was based on a fiduciary relationship or a duty other than the duty related to negligent supervision and retention. "[B]y failing to address the basis for the court's decision in [her] main brief, [plaintiff] cannot be heard on [her] other contention[] that w[as] not the dispositive basis for the court's decision, and [she] therefore ha[s] effectively abandoned any [contention that the relief sought was not duplicative]" (*Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017], citing *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject plaintiff's further contention that the court erred in granting the motion with respect to the constructive discharge cause of action asserted on behalf of her husband for the same reason. The court granted the motion to that extent because New York does not recognize a separate cause of action for constructive discharge and, even if it did, the facts did not establish that defendant deliberately rendered the working conditions of plaintiff's husband so unbearable that he was forced to leave. Plaintiff's arguments on her cross appeal address only the latter, alternative determination, and she has therefore effectively abandoned any contention that New York law does in fact recognize an independent cause of action for constructive discharge (*see id.*).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

765

CA 19-01397

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

YVETTE GUMAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT METRO SYSTEMS, INC.
AND NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 11, 2019, upon a jury verdict. The judgment awarded plaintiff the sum of $303,889.00 with interest as against defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained while disembarking from a bus owned by defendant Niagara Frontier Transportation Authority when the bus driver closed the bus doors on a portion of plaintiff's right arm. In appeal No. 1, defendants appeal from a judgment entered upon a jury verdict that, inter alia, awarded plaintiff damages. In appeal No. 2, defendants appeal from an order that denied their motion pursuant to, inter alia, CPLR 4404 (a) seeking to set aside the jury verdict.

Inasmuch as the appeal from the final judgment in appeal No. 1 brings up for review the propriety of the order in appeal No. 2, we conclude that appeal No. 2 must be dismissed (*see Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *see generally* CPLR 5501 [a]).

Defendants' contention that the evidence is legally insufficient with respect to the issue whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) is unpreserved for appellate review inasmuch as they failed to move for a directed verdict on that ground (*see Tomaszewski v Seewaldt* [appeal No. 1], 11 AD3d 995, 995 [4th Dept 2004]; *Smith v Woods Constr. Co.*, 309 AD2d

1155, 1157 [4th Dept 2003]; *see also Miller v Miller*, 68 NY2d 871, 873 [1986]).

Contrary to defendants' further contention, Supreme Court properly denied defendants' motion insofar as it sought to set aside the verdict as against the weight of the evidence on the issue whether plaintiff sustained a serious injury. A motion to set aside a jury verdict as against the weight of the evidence should not be granted unless "the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]). Upon our review of the record, we conclude that there was "conflicting medical expert testimony 'rais[ing] issues of credibility for the jury to determine' " (*Campo v Neary*, 52 AD3d 1194, 1198 [4th Dept 2008]), and the jury's finding that plaintiff sustained a serious injury is "one that reasonably could have been rendered upon the conflicting evidence adduced at trial" (*Ruddock v Happell*, 307 AD2d 719, 721 [4th Dept 2003]).

Defendants failed to preserve for appellate review their contentions regarding the court's failure to give a spoliation charge and the court's alleged misreading of the charge with respect to the relevant categories of serious injury (*see generally McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1310 [4th Dept 2012]). We reject defendants' additional contention that the court erred in omitting certain parts of the pattern jury instruction provided to the jury and in instructing the jury on defendants' internal operating rules. Although the court omitted two paragraphs of the relevant pattern jury instruction, the omitted portions were not as instructive as they were clarifying, and thus the instruction "adequately convey[ed] the sum and substance of the applicable law" (*Jackson v County of Sullivan*, 232 AD2d 954, 956 [3d Dept 1996]). Further, contrary to defendants' assertion, the court's instructions regarding defendants' internal rules did not impose a "standard higher than that otherwise set by law" (*Clarke v New York Tr. Auth.*, 174 AD2d 268, 275 [1st Dept 1992]).

To the extent that defendants contend that the court erred in granting plaintiff's motion for a directed verdict with respect to the issue of plaintiff's comparative negligence, we reject that contention. The determination " '[w]hether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases' " (*Yondt v Boulevard Mall Co.*, 306 AD2d 884, 884 [4th Dept 2003]). Here, "viewing the evidence presented in the light most favorable to [defendants]," we conclude that there was no rational process by which the jury could find that plaintiff was comparatively negligent (*DeAngelis v Protopopescu*, 37 AD3d 1178, 1178 [4th Dept 2007]; *see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Defendants' speculation that plaintiff might have done something to avoid the accident, such as warn the driver that she was not always quick to exit the bus, did not present an issue of fact concerning plaintiff's comparative fault for the jury to resolve (*see generally Gill v Braasch*, 100 AD3d 1415, 1416 [4th Dept 2012]). Further, after the bus driver closed the door on her arm, plaintiff simply struggled to free

it and, contrary to defendants' contention, such action did not contribute to the accident but rather was a reaction thereto.

We have considered defendants' remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

766

CA 19-01457

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

YVETTE GUMAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT METRO SYSTEMS, INC.
AND NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 1, 2019. The order denied defendants' motion to set aside the jury verdict.

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

Same memorandum as in *Gumas v Niagara Frontier Tr. Metro Sys., Inc.* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

771

KA 18-01804

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. BEARD, DEFENDANT-APPELLANT.

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

WEEDEN A. WETMORE, SPECIAL DISTRICT ATTORNEY, ELMIRA (SUSAN RIDER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered February 27, 2017. The judgment convicted defendant upon a jury verdict of murder in the first degree and murder in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of murder in the second degree and dismissing counts two and three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]) and two counts of murder in the second degree (§ 125.25 [1], [3]).

Defendant's conviction arises from the killing of the wife of Thomas Clayton. On the evening the victim was killed, Clayton returned home from a late-night poker game and found his wife dead on the kitchen floor, having been beaten with a blunt instrument (*see People v Clayton*, 175 AD3d 963, 963 [4th Dept 2019]). The police learned that Clayton made a suspicious call to defendant during the poker game. They interviewed defendant, who led them to where the murder weapon had been discarded. The weapon had the victim's blood on it. Defendant then confessed that he killed the victim at Clayton's behest in exchange for a payment of $10,000. Defendant told the police that Clayton provided him with a house key, and the plan was for defendant to bludgeon the victim to death with a maul handle and then burn the house down in order to make the death look accidental. Defendant confessed that he went through with the murder, but panicked and fled before setting the fire. During his testimony at trial, defendant retracted portions of his confession, admitting

only that Clayton offered him $10,000 to burn the house down. Defendant testified that, when he entered the house, he encountered the victim's lifeless body and a masked intruder, who handed defendant the murder weapon and ran away.

With respect to the count charging defendant with murder in the first degree, we reject defendant's contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of murder in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We agree with defendant, however, that count two of the indictment, charging him with intentional murder in the second degree (Penal Law § 125.25 [1]), must be dismissed as a lesser included count of murder in the first degree (*see* CPL 300.40 [3] [b]; *Clayton*, 175 AD3d at 967). We therefore modify the judgment accordingly.

In light of that determination, defendant's related contention that County Court erred in failing to charge counts one and two of the indictment in the alternative is academic.

Defendant further contends that the evidence is legally insufficient to support his conviction on count three of the indictment, charging him with felony murder in the second degree (Penal Law § 125.25 [3]). Specifically, defendant contends that there is insufficient evidence that he committed the predicate felony of burglary because the People failed to establish that he knowingly entered or remained unlawfully on the premises (*see* § 140.20; *People v Dale*, 224 AD2d 917, 917 [4th Dept 1995]). Although defendant failed to preserve his contention for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we agree with defendant. A person enters or remains in a building unlawfully when he or she is "not licensed or privileged to do so" (Penal Law § 140.00 [5]; *see Dale*, 224 AD2d at 917). Where the defendant has the "permission of [an] owner, he [or she] has 'license or privilege' to enter or remain on the premises" (*Dale*, 224 AD2d at 917, quoting *People v Graves*, 76 NY2d 16, 20 [1990]; *cf. People v Glanda*, 5 AD3d 945, 950 [3d Dept 2004], *lv denied* 3 NY3d 640 [2004], *reconsideration denied* 3 NY3d 674 [2004], *cert denied* 543 US 1093 [2005]). Here, it is undisputed that Clayton, an owner and occupant of the house, gave defendant permission to enter the house and a key to effect entry, and thus defendant did not enter the house unlawfully. Furthermore, "[t]he evidence failed to establish that defendant's license or privilege to be in the dwelling terminated, and therefore is legally insufficient to establish that defendant unlawfully remained therein" (*People v Wright*, 38 AD3d 1232, 1233 [4th Dept 2007], *lv denied* 9 NY3d 853 [2007], *reconsideration denied* 9 NY3d 884 [2007]; *see People v Konikov*, 160 AD2d 146, 152-153 [2d Dept 1990], *lv denied* 76 NY2d 941 [1990]). Because the evidence is

insufficient to support the predicate felony of burglary, the evidence is likewise insufficient to support the conviction of felony murder (*see People v Johnson*, 250 AD2d 1026, 1028 [3d Dept 1998], *lv denied* 92 NY2d 899 [1998]; *People v Parker*, 96 AD2d 1063, 1065 [2d Dept 1983]). We therefore further modify the judgment by reversing that part convicting him of felony murder in the second degree and by dismissing count three of the indictment.

Defendant failed to preserve for our review his contention that he was improperly restrained at trial by a stun belt (*see People v Schrock*, 73 AD3d 1429, 1431 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review his contention that the court erred in failing to charge the jury in accordance with CPL 60.50 (*see People v Higgins*, 123 AD3d 1143, 1144 [2d Dept 2014], *lv denied* 25 NY3d 1073 [2015]). In any event, that contention lacks merit. CPL 60.50 "does not mandate submission of independent evidence of every component of the crime charged . . . , but instead calls for 'some proof, of whatever weight, that a crime was committed by someone' " (*People v Chico*, 90 NY2d 585, 589 [1997]). Here, the People offered ample physical evidence that someone murdered the victim. Furthermore, we reject defendant's contention that counsel was ineffective for failing to request that charge (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Counsel is not ineffective for failing to make an argument that has " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

781

CA 20-00017

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

ANNA L. AMOS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SCHOOL 16 ASSOCIATES, L.P.,
DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE LLP, BUFFALO (KEITH N. BOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered December 16, 2019. 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.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when she tripped and fell on a crack in the sidewalk adjacent to property owned by defendant. As relevant to this appeal, defendant moved for summary judgment dismissing the complaint on the ground that the defect was trivial as a matter of law. Supreme Court denied the motion, and we affirm.

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; *see Tesak v Marine Midland Bank*, 254 AD2d 717, 717-718 [4th Dept 1998]). Where "a 'defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence,' and yet an accident occurs that is traceable to the defect, there is no liability" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 81 [2015], quoting *Beltz v City of Yonkers*, 148 NY 67, 70 [1895]). To establish that a defect is trivial, a defendant must show "that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*id.* at 79). Although a court determining whether a defect is trivial as a matter of law should consider the size of the defect, "a mechanistic disposition of a case based exclusively on the

dimension of the sidewalk defect is unacceptable" (*Trincere*, 90 NY2d at 977-978). Rather, the court must consider factors such as the dimensions of the alleged defect, its appearance and elevation, and "the time, place, and circumstance of the injury" (*Hutchinson*, 26 NY3d at 77 [internal quotation marks omitted]; *see Stein v Sarkisian Bros., Inc.*, 144 AD3d 1571, 1572 [4th Dept 2016]). The existence or nonexistence of a defect " 'is generally a question of fact for the jury' " (*Trincere*, 90 NY2d at 977).

Based on the record before us, we conclude that defendant failed to meet its burden of establishing as a matter of law that the alleged defect "was too trivial to constitute a dangerous or defective condition" (*Schaaf v Pork Chop, Inc.*, 24 AD3d 1277, 1278 [4th Dept 2005]; *see Stewart v 7-Eleven, Inc.*, 302 AD2d 881, 881 [4th Dept 2003]). The photographs and deposition testimony submitted by defendant in support of its motion established that plaintiff's right toe became caught in a sidewalk crack that had a height differential ranging from half an inch to one inch and which was located in the vicinity of several other cracks. Under these circumstances, we cannot say that defendant established that the defect was trivial as a matter of law (*see e.g. Lupa v City of Oswego*, 117 AD3d 1418, 1419 [4th Dept 2014]; *Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361, 1362 [4th Dept 2008]; *Tesak*, 254 AD2d at 717-718).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

782

CA 19-01839

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

DIANE M. GRAVES, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF MARTIN J. GRAVES, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

STANLEY MICHALSKI, M.D., ET AL., DEFENDANTS,
AND DAVID LILLIE, M.D., DEFENDANT-RESPONDENT.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-RESPONDENT AND DEFENDANTS ROBERT G. FUGITT, M.D. AND DAVID B. LILLIE, M.D., P.C., AND CCS MEDICAL, PLLC.

FELDMAN KIEFFER, LLP, BUFFALO (STEPHEN MANUELE OF COUNSEL), FOR DEFENDANT STANLEY MICHALSKI, M.D.

THE TARANTINO LAW FIRM, LLP, BUFFALO (BRIAN J. WEIDNER OF COUNSEL), FOR DEFENDANTS INVISION HEALTH, LLC AND BRAIN & SPINE MEDICAL SERVICES, PLLC.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 25, 2019. The order denied plaintiff's motion to compel the further deposition of defendant David Lillie, M.D.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 18, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

783

CA 20-00216

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

LYUBOV KLEPANCHUK, NADIA FEFILOV, HOA NGO, KASEY GHARET, WILLIAM HILL, JR., AND THE ESTATE OF LE NGO, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK DEPARTMENT OF TRANSPORTATION, DEFENDANT-RESPONDENT.
(CLAIM NO. 116726.)

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered July 23, 2019. The order, insofar as appealed from, granted defendant's motion for summary judgment dismissing claim No. 116726 and dismissed that claim.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendant's motion for summary judgment dismissing claim No. 116726 is denied, that claim is reinstated, and the matter is remitted to the Court of Claims for further proceedings in accordance with the following memorandum: On February 10, 2008, a multivehicle accident occurred during "white-out" conditions on Interstate 390 (I-390) near the Greater Rochester International Airport (airport). Claimants commenced this action against defendant seeking damages for the death of the decedent of claimant Estate of Le Ngo and for injuries sustained by the remaining claimants based on allegations that defendant was negligent and that such negligence was a proximate cause of the accident. Specifically, claimants alleged that defendant negligently failed to, inter alia, prevent or alleviate snow blowing from the land adjacent to I-390 or give adequate warnings thereof; take corrective measures despite having had received warnings from motorists and other persons of the dangerous conditions that existed on I-390 as a result of the blowing and/or drifting snow; and alleviate the dangerous conditions despite the fact that defendant knew or should have known of the recurring dangerous conditions of "white-outs" and snow blowing on I-390. Defendant moved for summary judgment dismissing the claim, and claimants cross-moved for partial summary judgment on the issue of liability. The Court of Claims granted defendant's motion and

dismissed the claim in its entirety on the grounds that defendant did not have notice of a recurring dangerous condition in the area of the accident and that the lack of a snow fence was not a proximate cause of the accident. Claimants appeal.

It is well established that state and local governments "have a duty to maintain their roads in a reasonably safe condition for motorists and must guard against contemplated and foreseeable risks" (*Drake v County of Herkimer*, 15 AD3d 834, 834 [4th Dept 2005]; *see Friedman v State of New York*, 67 NY2d 271, 283 [1986]). Of particular relevance here, a defendant "may be held liable in negligence where it failed to diligently remedy [a] dangerous condition[] once it was provided with actual or constructive notice or [where] it did not correct or warn of a recurrent dangerous condition of which it had notice" (*Frechette v State of New York*, 129 AD3d 1409, 1411 [3d Dept 2015] [internal quotation marks omitted]). Thus, "[a] defendant who has actual knowledge of a recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition" (*Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1402 [4th Dept 2018]).

Even assuming, arguendo, that defendant met its initial burden on the motion by establishing that it did not have actual or constructive notice of a recurring dangerous condition, we conclude that the claimants raised a triable issue of fact with respect to whether defendant had actual knowledge of "an ongoing and recurring dangerous condition in the area of the accident" (*Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958, 960 [3d Dept 2011]). Notably, claimants submitted a Highway Safety Investigation Report that was prepared by an employee of defendant in December 2008. The report states that it was written in response to the subject accident with the purpose of "evaluat[ing] the frequency and potential for similar accidents and evaluate potential countermeasures." The report compared the number and severity of the accidents on that portion of highway to those occurring elsewhere on I-390, and noted that, "[a]lthough the number of accidents in the study area was lower, the severity of the accidents was [greater]." The report also noted that "[s]everal factors exist which increase the degree of risk of poor visibility and drifting due to blowing snow in this section." Such factors included the large, flat airport property next to the highway, the "abrupt, topographic change due to the proximity of the airport runway and former Pennsylvania railroad embankment," and the section's slight reverse curve. The data thus suggested that "snow on the road [was] an issue to be addressed in this area" and that, although the number of accidents was not extraordinarily high, "their occurrence was sufficiently sensational, disquieting to the public, and disruptive to the traveling public and [defendant] to justify making more than ordinary efforts to prevent them." Furthermore, the deposition testimony of employees of defendant established that, for years prior to the accident, blowing and drifting snow had been an issue on that section of I-390.

We also agree with claimants that the court erred in determining that defendant established that the lack of a snow fence was not a

proximate cause of the accident. In reaching that conclusion, the court relied on the affidavit of defendant's meteorological expert, who opined that, under the meteorological conditions on the day of the accident, a snow fence would not have prevented the white-out conditions on I-390 that caused the accident. "Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]). Here, defendant's meteorological expert was not qualified to render an opinion regarding whether a snow fence would have prevented the white-out conditions on I-390 inasmuch as he provided no information "to establish any specialized knowledge, experience, training, or education with respect to the relevant subject matter" in this case, i.e., the adequacy of snow fencing to prevent snow blowing and drifting onto a highway (*Farnham v MIC Wholesale Ltd.*, 176 AD3d 1605, 1607 [4th Dept 2019] [internal quotation marks omitted]; *see Shattuck v Anain*, 174 AD3d 1339, 1340 [4th Dept 2019]; *Glazer v Choong-Hee Lee*, 51 AD3d 970, 971 [2d Dept 2008], *lv dismissed in part and denied in part* 11 NY3d 781 [2008]; *Geddes v Crown Equip. Corp.*, 273 AD2d 904, 905 [4th Dept 2000]). We therefore conclude that defendant failed to meet its initial burden on the issue of proximate cause.

Finally, we note that the court denied as moot claimants' cross motion for summary judgment on the issue of liability and the respective motion and the cross motions of claimant Hoa Ngo, claimant Kasey Gharet, and claimant William Hill, Jr. for summary judgment dismissing defendant's counterclaims against them. In view of our decision herein, those pending motions are no longer moot. Thus, we reverse the order insofar as appealed from, defendant's motion for summary judgment dismissing claim No. 116726 is denied and that claim is reinstated, and we remit the matter to the Court of Claims to determine the motion and cross motions that were denied as moot (*see generally Conklin v Laxen*, 180 AD3d 1358, 1362 [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

784

CA 19-01516

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

SADIE GARNER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF LUCILLE LOVING, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROSA COPLON JEWISH HOME AND INFIRMARY, ROSA COPLON JEWISH HOME AND INFIRMARY, INC., MENORAH CAMPUS ADULT HOME, INC., MENORAH CAMPUS, INC., MENORAH LICENSED HOME CARE AGENCY, THE HARRY AND JEANETTE WEINBERG CAMPUS, AND WEINBERG CAMPUS, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered February 28, 2019. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In these consolidated appeals arising from an action seeking damages for nursing home malpractice, plaintiff appeals, in appeal No. 1, from an order granting defendants' motion for summary judgment dismissing the complaint. In appeal No. 2, plaintiff appeals from a further order granting defendants' motion pursuant to CPLR 3211 (a) (5) to dismiss a subsequent complaint that made the same allegations as the complaint in the prior action, i.e., the action that was dismissed in appeal No. 1. Contrary to plaintiff's contention in appeal No. 1, Supreme Court properly granted defendants' motion. Defendants "ma[d]e a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Inasmuch as plaintiff's opposing papers were not timely submitted pursuant to the court's scheduling order, the court declined to consider them, and thus plaintiff failed to raise a triable issue of fact in opposition (*see generally id.*).

Contrary to plaintiff's contention, the court did not abuse its discretion in declining to consider the papers submitted in opposition to the motion. The court's scheduling order, with which defendants complied in making their motion, unequivocally stated that responding papers were to be served within 30 days of receipt of the moving papers. The motion papers reiterated that deadline. Plaintiff concedes that the responding papers were not filed within that time limit, but contends that they were timely pursuant to CPLR 2214 (b). We disagree. Plaintiff failed to seek leave of court to file after the deadline set forth in the scheduling order, and did not submit any reason for the delay other than a vague claim that amounts to law office failure, which the motion court found incredible. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]; *see Harrington v Palmer Mobile Homes, Inc.*, 71 AD3d 1274, 1275 [3d Dept 2010]; *see generally Brill v City of New York*, 2 NY3d 648, 652-653 [2004]). In light of plaintiff's failure to establish, or even allege, good cause for the delay, plaintiff's contentions concerning the lack of prejudice to defendants do not require a different result (*see generally Reeps v BMW of N. Am., LLC*, 94 AD3d 475, 476 [1st Dept 2012]; *Coty v County of Clinton*, 42 AD3d 612, 614 [3d Dept 2007]). An untimely response "is not permitted simply because it has merit and the adversary is not prejudiced" (*Tower Ins. Co. of N.Y. v Razy Assoc.*, 37 AD3d 702, 703 [2d Dept 2007]).

Contrary to plaintiff's contention in appeal No. 2, "CPLR 205 (a) . . . does not apply herein inasmuch as the prior action was dismissed on the merits" (*Moran v JRM Contr., Inc.*, 145 AD3d 1584, 1586 [4th Dept 2016], *lv denied* 29 NY3d 904 [2017]). Although the court struck the words "on the merits" from the ordering paragraph of the order in appeal No. 1, the order further indicated that the complaint was dismissed with prejudice, and "[a] dismissal 'with prejudice' generally signifies that the court intended to dismiss the action 'on the merits,' that is, to bring the action to a final conclusion against the plaintiff" (*Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999]; *see State of New York Mtge. Agency v Massarelli*, 167 AD3d 1296, 1296-1297 [3d Dept 2018]; *Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508, 509 [2d Dept 2004]). In addition, the order in appeal No. 1 indicated that the court granted defendants' motion, which sought "an Order granting Summary Judgment dismissing the Complaint and any and all claims against Defendants on the merits and with prejudice." Finally, that order further indicated that the court was granting summary judgment "for the reasons set forth in the attached transcript" of the bench decision, in which the court unequivocally concluded that defendants met their burden on the motion and plaintiff failed to raise a triable issue of fact in opposition. Thus, although the order conflicts with the decision, "[i]t is well settled that, '[w]here, as here, there is a conflict between an order and a decision, the decision controls' " (*Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546 [4th Dept 2014], *lv dismissed* 24 NY3d 998 [2014]; *see Matter of Coughlin v Coughlin*, 147 AD3d 1485, 1485 [4th Dept 2017]), and we therefore conclude that the complaint in appeal No. 1 was dismissed on the merits.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

785

CA 19-01524

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

SADIE GARNER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF LUCILLE LOVING, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROSA COPLON JEWISH HOME AND INFIRMARY, ROSA COPLON JEWISH HOME AND INFIRMARY, INC., MENORAH CAMPUS ADULT HOME, INC., MENORAH CAMPUS, INC., MENORAH LICENSED HOME CARE AGENCY, THE HARRY AND JEANETTE WEINBERG CAMPUS, AND WEINBERG CAMPUS, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered July 30, 2019. The order granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Same memorandum as in *Garner v Rosa Coplon Jewish Home and Infirmary* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

825

KA 17-00563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN L. WOODWARD, DEFENDANT-APPELLANT.

MICHAEL G. CIANFARANO, OSWEGO, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Oswego County Court (James K. Eby, A.J.), rendered September 21, 2016. Defendant was resentenced upon his conviction of sexual abuse in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: On a prior appeal (*People v Woodward*, 126 AD3d 1401, 1401 [4th Dept 2015], *lv denied* 26 NY3d 1152 [2016]), we affirmed the judgment convicting defendant following a jury trial of sexual abuse in the first degree (Penal Law § 130.65 [1]). Defendant now appeals from the resentence imposed on that conviction but raises a contention only with respect to a prior order that denied in part his motion seeking, as relevant here, to vacate the judgment of conviction pursuant to CPL 440.10 (1) (g). That contention, however, is "not properly before this Court on the appeal from the [resentence]" (*People v Burton*, 138 AD3d 882, 884 [2d Dept 2016]; *see* CPL 450.30; *see also People v Golb*, 126 AD3d 401, 402 [1st Dept 2015], *lv denied* 26 NY3d 929 [2015]; *see generally People v Syville*, 15 NY3d 391, 399 [2010]). Even assuming, arguendo, that defendant intended to appeal from the order denying the motion in part, we note that defendant did not seek leave to appeal from that order (*see* CPL 450.15 [1]). We therefore dismiss the appeal (*see generally People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

829

KA 16-01588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS SHANLEY, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI 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 April 12, 2016. The judgment convicted defendant upon his plea of guilty of petit larceny and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of petit larceny (Penal Law § 155.25) and criminal possession of stolen property in the fifth degree (§ 165.40). We affirm.

Contrary to defendant's contention, we conclude that County Court did not abuse its discretion in denying his request for a further adjournment of sentencing to afford him an opportunity to file a motion to withdraw his plea (*see People v Spears*, 24 NY3d 1057, 1058-1060 [2014]).

To the extent that defendant challenges the voluntariness of his plea, defendant failed to preserve that challenge for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). In *People v Lopez* (71 NY2d 662 [1988]), however, the Court of Appeals carved out a narrow exception to the preservation requirement for the "rare case" in which "the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," thereby imposing upon the trial court "a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" (*id.* at 666). "Where the court fails in this duty and accepts the plea without

further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal, notwithstanding that a formal postallocution motion was not made" (*id.*). Here, nothing defendant said during the plea colloquy itself required the court to inquire further before accepting the plea (*see People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Moreover, even assuming, arguendo, that the court's duty to inquire as contemplated by *Lopez* may be triggered by a defendant's statements at junctures subsequent to acceptance of the plea (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *see generally People v Delorbe*, 35 NY3d 112, 121 [2020]), and thus that the exception applies here due to the court's failure to inquire into statements made by defendant both during that part of the sentencing proceeding imposing jail terms and that part conducting the separate restitution hearing (*see Lopez*, 71 NY2d at 666), we nonetheless reject defendant's challenge to the voluntariness of his plea. To the extent that defendant suggested that he was pressured into accepting the plea by defense counsel, that suggestion was "belied by his statements during the plea proceeding[]" and, in addition, defendant's "conclusory and unsubstantiated claim[s] of innocence [were] belied by his admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]; *see People v Wilson*, 179 AD3d 1527, 1528 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *People v Lewandowski*, 82 AD3d 1602, 1602 [4th Dept 2011]).

Defendant also challenges the order of restitution issued by the court after it bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing. Initially, although defendant failed to appeal from the order of restitution (*see People v Briglin*, 125 AD3d 1518, 1519 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]; *see generally People v Connolly*, 100 AD3d 1419, 1419 [4th Dept 2012]), under the circumstances of this case we deem " ' the . . . restitution order[] here to be [an] amendment[] to the judgment of conviction, [and thus] our review of such order[] is appropriate' upon defendant's appeal from the judgment of conviction" (*People v Moore*, 124 AD3d 1386, 1387 [4th Dept 2015]). We nevertheless reject defendant's contention that the evidence at the restitution hearing was insufficient to support the amount of restitution ordered. The People met their burden of establishing the amount of restitution by the requisite preponderance of the evidence (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221-222 [2007]) through the victim's testimony, which the court implicitly found to be credible, and the receipt documenting the cost of the stolen items (*see People v Perez*, 130 AD3d 1496, 1497 [4th Dept 2015]; *People v Davis*, 114 AD3d 1287, 1288 [4th Dept 2014]; *People v Wilson*, 108 AD3d 1011, 1013 [4th Dept 2013]). Although defendant challenged the victim's recollection and presented his own conflicting testimony, we perceive "no basis in the record for us to substitute our credibility determinations for those of the court, which had 'the advantage of observing the witnesses and [was] in a better position to judge veracity than an appellate court' " (*Perez*, 130 AD3d at 1497).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

841

KA 17-00009

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMON L. SCOTT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD 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 August 25, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and driving while ability impaired.

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]) and driving while ability impaired (Vehicle and Traffic Law § 1192 [1]). Contrary to the contention of defendant, the police had probable cause to stop the vehicle that he was driving based upon his commission of a traffic violation, i.e., speeding (*see People v Robinson*, 97 NY2d 341, 348-349 [2001]; *People v Moore*, 38 AD3d 1313, 1313 [4th Dept 2007], *lv denied* 9 NY3d 848 [2007]). The officer who initiated the stop testified at the suppression hearing that he had training and experience in visually estimating the speed of vehicles, and further testified that he estimated defendant to be traveling 60 miles per hour on a street where the posted speed limit was 35 miles per hour. It is well settled "that opinion evidence with regard to the speed of moving vehicles is admissible provided that the witness who testifies first shows some experience in observing the rate of speed of moving objects or some other satisfactory reason or basis for his [or her] opinion" (*People v Olsen*, 22 NY2d 230, 231-232 [1968]). Based on the evidence at the suppression hearing, we conclude that the People met their burden of establishing that the officer's visual observations of the vehicle provided probable cause for the stop (*see People v Wyatt*, 153 AD3d 1371, 1373 [2d Dept 2017], *lv denied* 30 NY3d 1024 [2017]).

As defendant correctly concedes, he failed to preserve for our

review his challenge to the legal sufficiency of the evidence supporting his conviction. Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime and traffic infraction 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]). After the traffic stop, defendant told the arresting officer that his license had been suspended, and he was taken into custody for driving without a license. Defendant also told the arresting officer that he had consumed two beers, and the officer observed that defendant had "glassy eyes" and detected an odor of alcohol on defendant's breath. At police headquarters, defendant refused to submit to a chemical test and failed several field sobriety tests. During the course of the traffic stop, two civilian witnesses, i.e., a convenience store clerk and a newspaper deliveryman, observed an individual, later identified as defendant, discard something into a nearby garbage can, and the deliveryman testified that he believed the discarded object was a gun. Neither witness immediately informed the police of what he had seen and, although the arresting officer also thought that defendant had discarded something immediately prior to the arrest, the officer did not check the garbage can. After the police had left, however, the civilian witnesses checked the garbage can and discovered a gun in it, and the clerk informed the police of that fact. Inasmuch as there was a gap in time between the arrest and the discovery of the gun, and because there was no chemical test confirming defendant's intoxication, we agree with defendant that a different verdict would not have been unreasonable (*see generally id.*). Nevertheless, we further conclude that, upon weighing the " 'relative strength of conflicting inferences that may be drawn from the testimony,' " the jury did not fail to give the evidence the weight it should be accorded (*id.*).

Defendant further contends that Supreme Court erred in allowing the convenience store clerk to testify regarding what he had initially believed was a "joke" made to him by the deliveryman, i.e., that an individual had thrown away a gun in a parking lot trash can. We agree with defendant that the statement was admitted in error inasmuch as it did not show the clerk's state of mind and, in any event, the clerk's "state of mind was irrelevant to any issue developed at trial, and the People had no need to establish a foundation for the testimony concerning [his] subsequent actions" (*People v Barrieau*, 229 AD2d 664, 665 [3d Dept 1996]). Nevertheless, we conclude that the error is harmless (*see generally People v Williams*, 25 NY3d 185, 194 [2015]; *People v Maher*, 89 NY2d 456, 462 [1997]). Contrary to defendant's further contention, the court did not err in admitting in evidence the gun found in the garbage can and photographs of the gun, based on a gap in the chain of custody. " 'The People provided sufficient assurances of the identity and unchanged condition of the [gun] . . . , and any alleged gaps in the chain of custody went to the weight of the evidence and not its admissibility' " (*People v Jefferson*, 125 AD3d 1463, 1464 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]; *see People v Hawkins*, 11 NY3d 484, 494 [2008]; *People v Inman*, 134 AD3d 1434, 1435 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]).

We also reject defendant's contention that the court erred in failing to make an inquiry when he raised a complaint about defense counsel that he argues was "tantamount" to a request for replacement counsel. "Even assuming, arguendo, that defendant's complaint[] about defense counsel suggested a serious possibility of good cause for a substitution of counsel requiring a need for further inquiry," we conclude that "the court afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US — , 138 S Ct 1571 [2018]). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

864

KA 16-01157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS GRANT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL 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 (Dennis S. Cohen, J.), rendered June 9, 2016. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We affirm.

Defendant's contention that the evidence is legally insufficient to establish the value of the gold and silver bullion coins that he allegedly stole is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v McClusky*, 12 AD3d 1174, 1175 [4th Dept 2004], *lv denied* 4 NY3d 765 [2005]). We further reject defendant's contention that defense counsel was ineffective for failing to preserve that contention because it had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Sampson*, 184 AD3d 1123, 1125 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]).

Additionally, 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]; *People v Lostumbo*, 182 AD3d 1007, 1008 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Here, although a different verdict would not have been unreasonable, on this record we cannot conclude that the jury " 'failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see People v Edwards*, 159 AD3d 1425, 1426

[4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Specifically, there was ample evidence at trial for the jury to reasonably conclude that defendant stole the coins from the victim. The testimony established that defendant had a key to the victim's home and knew where the stolen coins were kept, and the victim testified that the coins were missing from her home. There was also testimony from the proprietor and employees of a pawn shop that defendant sold coins similar to those belonging to the victim to the pawn shop. A police officer testified that defendant admitted that he sold coins to the pawn shop and, although defendant told the officer that the coins had been given to him by his mother, defendant's sister testified that their mother did not have a coin collection, which undercut his explanation of the coins' provenance.

Defendant also contends that the jury's verdict with respect to the value of the stolen coins is against the weight of the evidence. We reject that contention. Grand larceny in the fourth degree requires that the value of the stolen property exceed $1,000 (*see* Penal Law § 155.30 [1]). The element of value is defined as the "market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (§ 155.20 [1]; *see People v Sheehy*, 274 AD2d 844, 845 [3d Dept 2000], *lv denied* 95 NY2d 938 [2000]). The People were not required to provide expert testimony establishing the value of the stolen property and, here, the People established the value of the coins by providing the testimony of a lay witness who had knowledge of and familiarity with the coins and their value (*see Sheehy*, 274 AD2d at 845; *People v Joy*, 107 AD2d 938, 938 [3d Dept 1985]; *cf. People v Cruz*, 130 AD3d 1538, 1539 [4th Dept 2015], *lv denied* 26 NY3d 1008 [2015]). The relevant witness testimony about the value of the coins was neither conclusory nor a "rough estimate[]" (*People v Loomis*, 56 AD3d 1046, 1047 [3d Dept 2008]).

Defendant's contention that the prosecutor's comments on summation constructively amended the indictment and thereby improperly changed the theory of the prosecution is not preserved for our review (*see People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014]; *People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]; *People v Osborne*, 63 AD3d 1707, 1708 [4th Dept 2009], *lv denied* 13 NY3d 748 [2009]), and we decline to exercise our power to review the issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we conclude that County Court's finding with respect to the amount of restitution is supported by the requisite preponderance of the evidence presented at the restitution hearing (*see* CPL 400.30 [4]). The court properly determined the value of the stolen coins based on, inter alia, estimates from the two largest coin retailers in the nation, and the parties' stipulation to determine the value of the coins by using the cost of replacement on a specific date (*see generally People v Jones*, 155 AD3d 1111, 1115 [3d Dept 2017], *lv denied* 31 NY3d 984 [2018]; *People v Davis*, 114 AD3d 1287, 1288 [4th

Dept 2014]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

880

CA 20-00172

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

CAROLYN BRISTOL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILEY DOUGLAS BUNN, JR., M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

NAPOLI SHKOLNIK, PLLC, MELVILLE (JOSEPH L. CIACCIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered December 9, 2019. The order, insofar as appealed from, denied in part the motion of defendant Wiley Douglas Bunn, Jr., M.D., seeking, inter alia, summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment dismissing the medical malpractice cause of action against defendant Wiley Douglas Bunn, Jr., M.D. except insofar as the complaint, as amplified by the bill of particulars, alleges that he failed to diagnose and treat the bowel perforation intraoperatively and failed to timely and properly treat the bowel perforation postoperatively, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action for, inter alia, medical malpractice against Wiley Douglas Bunn, Jr., M.D. (defendant) and others after defendant performed surgery on plaintiff consisting of a robotic-assisted laparoscopic lysis of adhesions and removal of bilateral ovarian remnants. Plaintiff alleged that she sustained a bowel perforation during the surgery, which went undetected. She was discharged from the hospital the following day but returned three days later with complaints of, inter alia, abdominal pain and nausea. CT scans were suggestive of a bowel perforation, which was confirmed during an exploratory laparotomy. Plaintiff alleged that defendant negligently caused the bowel perforation; failed to diagnose and treat the bowel perforation intraoperatively; and failed to timely and properly treat the bowel perforation postoperatively, both before and after plaintiff's discharge from the hospital. Defendant moved, inter alia, to dismiss the complaint against him, and defendant now appeals

from an order that granted the motion in part by dismissing the informed consent cause of action, but denied the motion with respect to the medical malpractice and vicarious liability causes of action.

As a preliminary matter, we reject defendant's contention that Supreme Court erred in considering the affidavit of plaintiff's expert in opposition to the motion. Plaintiff initially submitted an affidavit, which had not been notarized and was incorrectly titled an affirmation, of her expert, a physician duly licensed to practice medicine in the State of Virginia. Defendant objected on the ground that the expert was not licensed to practice in the State of New York and thus could not submit an expert affirmation (*see* CPLR 2106 [a]; *Sandoro v Andzel*, 307 AD2d 706, 707-708 [4th Dept 2003]). The court allowed plaintiff to cure the defect, and she thereafter submitted a notarized affidavit of the expert, which was again incorrectly titled an affirmation, along with a certificate of conformity (*see Sandoro*, 307 AD2d at 707-708; *see also* CPLR 2309 [c]). We reject defendant's contention that the certificate of conformity, which was an affirmation of plaintiff's attorney, was defective. The certificate "contain[ed] language attesting that the oath administered in the foreign state was taken in accordance with the laws of that jurisdiction" (*Midfirst Bank v Agho*, 121 AD3d 343, 348-349 [2d Dept 2014]).

With respect to the merits, "[i]t is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]). The defendant must address "each of the specific factual claims of negligence raised in [the] . . . bill of particulars" (*Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018] [internal quotation marks omitted]; *see Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). Once the defendant meets his or her burden, the burden " 'shifts to the plaintiff to demonstrate the existence of a triable issue of fact . . . only as to the elements on which the defendant met the prima facie burden' " (*Bubar*, 177 AD3d at 1359).

Here, as the court concluded and plaintiff correctly concedes, defendant satisfied his initial burden of establishing entitlement to judgment as a matter of law through, inter alia, the detailed affidavit of a qualified expert physician who opined that defendant did not depart from good and accepted medical practice and that no deviation from the standard of care caused plaintiff's injuries (*see Pasek*, 186 AD3d at 1036).

The affidavit of plaintiff's expert addressed defendant's conduct only with respect to the claims that he failed to diagnose and treat the bowel perforation intraoperatively and failed to timely and properly treat the bowel perforation postoperatively. Plaintiff's expert acknowledged that bowel perforation is a known complication

from this type of surgery. Thus, plaintiff failed to raise a triable issue of fact with respect to the claims that defendant negligently caused the bowel perforation (*see Groff*, 161 AD3d at 1521). We therefore conclude that the court erred in denying defendant's motion with respect to those claims, and we modify the order accordingly.

With respect to plaintiff's claims that defendant failed to diagnose and treat the bowel perforation intraoperatively and failed to timely and properly treat the bowel perforation postoperatively, the court properly determined that the affidavit of plaintiff's expert raised a triable issue of fact in opposition. Specifically, the expert opined that defendant breached the applicable standard of care by not " 'running the bowel' " to look for perforations and failed to recognize that plaintiff's postoperative symptoms were indicative of a gastrointestinal leak or perforation (*see Jeanette S. v Williot*, 179 AD3d 1479, 1480-1481 [4th Dept 2020]). The expert further opined that defendant's deviation from the standard of care in that regard was a proximate cause of the injuries plaintiff suffered (*see Kless v Paul T.S. Lee, M.D., P.C.*, 19 AD3d 1083, 1084 [4th Dept 2005]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

904

KA 18-00458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEVAS J. JOHNSON, DEFENDANT-APPELLANT.

MICHAEL JOS. WITMER, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered June 28, 2017. The judgment convicted defendant after a nonjury trial of criminal possession of a controlled substance in the third degree and attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and attempted criminal sale of a controlled substance in the third degree (§§ 110.00, 220.39 [1]), defendant contends that he had standing to challenge the stop of a vehicle in which he was a passenger, that County Court erred in refusing to hold a suppression hearing, and that the court applied the wrong standard when it analyzed the stop following the codefendant's suppression hearing. Inasmuch as defendant "withdrew his request for a suppression hearing," we conclude that he has waived his present contentions related to suppression (*People v Maynard*, 294 AD2d 866, 866 [4th Dept 2002], *lv denied* 98 NY2d 699 [2002]; *see People v Smikle*, 1 AD3d 883, 884 [4th Dept 2003], *lv denied* 1 NY3d 634 [2004]; *see also People v Quinney*, 305 AD2d 1044, 1046 [4th Dept 2003], *lv denied* 100 NY2d 586 [2003]).

Defendant further contends that the conviction is not based on legally sufficient evidence and that the verdict is against the weight of the evidence. Although some of defendant's challenges to the sufficiency of the evidence are not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]), we exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]) and we conclude that none of defendant's contentions has merit.

Addressing specifically defendant's contention that he did not have dominion or control over the heroin recovered from the codefendant, we conclude that "[t]he evidence of defendant's orchestration of the drug selling operation was legally sufficient to support a finding that he had constructive possession, i.e., dominion and control, of the drugs recovered from his [codefendant]" (*People v Shanks*, 207 AD2d 710, 710 [1st Dept 1994], *lv denied* 84 NY2d 1015 [1994]; *see People v Beard*, 100 AD3d 1508, 1509 [4th Dept 2012]; *cf. People v Hamilton*, 291 AD2d 411, 411-412 [2d Dept 2002], *lv denied* 98 NY2d 651 [2002]; *see generally People v Manini*, 79 NY2d 561, 573 [1992]).

Contrary to defendant's remaining contentions, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, 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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

917

CA 19-01745

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

HOME INSULATION & SUPPLY, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ISKALO 5000 MAIN, LLC, DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. LAVIN, P.C., BUFFALO (JOHN J. LAVIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered September 6, 2019. The order denied defendant's motion seeking leave to reargue and renew the court's previous denial of an award of attorney's fees to defendant.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Memorandum: Defendant appeals from an order denying its motion for leave to reargue and renew that part of its motion for summary judgment seeking attorney's fees. No appeal lies from an order denying a motion seeking leave to reargue, and thus that part of defendant's appeal must be dismissed (*see Matter of Rochester Genesee Regional Transp. Auth. v Stensrud*, 162 AD3d 1495, 1495 [4th Dept 2018], *lv dismissed* 35 NY3d 950 [2020]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Supreme Court properly denied that part of defendant's motion seeking leave to renew. "It is well settled that a motion for leave to renew must be 'based upon new facts not offered on the prior motion that would change the prior determination,' and 'shall contain reasonable justification for the failure to present such facts on the prior motion' " (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *see* CPLR 2221 [e] [2], [3]; *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170 [4th Dept 2008], *lv denied* 11 NY3d 825 [2008]). Here, the court denied that part of the motion for summary judgment seeking attorney's fees based on defendant's failure to provide documentation supporting an award of fees. Although defendant submitted itemized time records and billing information in support of its motion for leave to renew, defendant failed to provide a reasonable justification for its failure to submit those records in support of its request for

attorney's fees in the motion for summary judgment (*see Heltz*, 115 AD3d at 1299-1300; *Wright v State of New York*, 156 AD3d 1413, 1414-1415 [4th Dept 2017], *appeal dismissed* 31 NY3d 1001 [2018]). "[A] motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' " (*Heltz*, 115 AD3d at 1300).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

922

CA 19-00333

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

IN THE MATTER OF THE APPLICATION FOR THE DISCHARGE OF RICHARD R., CONSECUTIVE NO. 169300, 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.

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

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered October 3, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner in a secure treatment facility.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, petitioner appeals from an order directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). Petitioner has been in the custody of respondent New York State Office of Mental Health (OMH) since February 2008. In September 2016, OMH issued a determination that petitioner remained a dangerous sex offender requiring continued confinement. In April 2017, petitioner petitioned for discharge and requested an evidentiary hearing to determine whether he was a " '[d]angerous sex offender requiring confinement' " within the meaning of Mental Hygiene Law § 10.03 (e). Supreme Court originally scheduled the evidentiary hearing for August 2, 2017 but, in late July 2017, petitioner requested to proceed pro se despite the court's warning that such a request would cause a delay to the evidentiary hearing date. In October 2017, the court held a hearing on petitioner's request to proceed pro se, after which the court granted petitioner's request and rescheduled the evidentiary hearing for December 6, 2017.

At the evidentiary hearing, the court heard testimony from respondents' psychiatric expert and an independent psychiatric expert, and the court determined that petitioner was a dangerous sex offender requiring confinement.

Petitioner contends that he was denied his right to due process based on the cumulative effect of multiple violations of Mental Hygiene Law § 10.09. Even assuming, arguendo, that petitioner's contention with respect to each alleged violation of that statute is preserved for our review, we conclude that petitioner was not deprived of his right to due process. Specifically, we reject petitioner's contention that OMH and the court violated certain statutory deadlines. "Article 10 of the Mental Hygiene Law states repeatedly that failure to comply with various deadlines," including deadlines for when a hearing " 'shall' be commenced," "does not affect the validity of . . . the various actions subject to those deadlines" (*Matter of State of New York v Keith F.*, 149 AD3d 671, 671-672 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017], *appeal dismissed* 30 NY3d 1032 [2017]), inasmuch as "[t]ime periods specified by provisions [of Mental Hygiene Law article 10] for actions by state agencies are *goals* that the agencies shall try to meet" (§ 10.08 [f] [emphasis added]).

We also reject petitioner's contention that he was deprived of his right to due process because the court did not hold the evidentiary hearing until December 6, 2017, which was over six months after petitioner's request. The court originally scheduled the hearing for August 2, 2017 because of its congested calender, and petitioner is responsible for the remaining delay because he filed his request to proceed pro se two weeks before the originally scheduled evidentiary hearing date and he continued to pursue that request after the court explained to him that it would result in a delay of the evidentiary hearing. Under these circumstances, petitioner's due process rights were not violated by a "prolonged delay in holding [the evidentiary] hearing in this case" (*Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1134 [4th Dept 2020]; *see Keith F.*, 149 AD3d at 672-673).

Petitioner further contends that the court erred in allowing him to proceed pro se. An individual in a Mental Hygiene Law article 10 proceeding "can effectively waive his or her statutory right to counsel only after the court conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent" (*Matter of State of New York v Raul L.*, 120 AD3d 52, 63 [2d Dept 2014]). "[A] searching inquiry need not adhere to any rigid formula, litany, or catechism" (*id.* at 62). Here, the court held a hearing and asked petitioner about his "age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver" (*id.* [internal quotation marks omitted]). In our view, "the court's record inquiry . . . accomplish[ed] the goals of adequately warning [petitioner] of the risks inherent in proceeding pro se, and apprising [him] of the singular importance of the lawyer in the adversarial system of adjudication" (*id.* [internal quotation marks omitted]).

We reject petitioner's contention that respondents failed to establish by clear and convincing evidence that he is a dangerous sex offender requiring confinement within the meaning of Mental Hygiene Law § 10.03 (e). At the evidentiary hearing, respondents' psychiatric expert testified that she used a screening tool to determine that petitioner posed a high risk of recidivism. She also testified that she diagnosed petitioner with pedophilic disorder and personality disorder with "antisocial paranoid and narcissistic features," and she testified regarding petitioner's history of victimizing children on multiple occasions, his minimal participation in sex offender treatment, and his inadequate plan to prevent relapses. The independent psychiatric expert's testimony was consistent with the testimony of respondents' expert. Under these circumstances, respondents met their burden of establishing by clear and convincing evidence that he has a mental abnormality that predisposes him to commit sex offenses, and has such an inability to control his behavior that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility (*see Matter of State of New York v Jamie KK.*, 168 AD3d 1231, 1232-1233 [3d Dept 2019]; *Matter of Allan M. v State of New York*, 163 AD3d 1493, 1494-1495 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]).

Finally, we have considered petitioner's remaining contentions and conclude that they do not require modification or reversal of the order.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

973

KA 16-01475

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH RODRIGUEZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered July 1, 2016. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree (two counts).

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 two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]), defendant challenges Supreme Court's refusal to suppress the drugs and paraphernalia discovered inside a locked bedroom at his home. We affirm.

As the court correctly determined, defendant's statement to law enforcement to "do what you gotta do," paired with his additional statement to the effect of either "go ahead and open that door" or "you can go in there," constituted the requisite "unequivocal" consent to search the locked bedroom (*People v Gonzalez*, 39 NY2d 122, 128 [1976]; *see e.g. United States v Franklin*, 2006 WL 662016, *3 [D Mass, Mar. 15, 2006], *affd* 630 F3d 53 [1st Cir 2011], *cert denied* 563 US 998 [2011]; *see also United States v Broadnax*, 623 Fed Appx 335, 336 [9th Cir 2015], *cert denied* — US —, 136 S Ct 2038 [2016]; *United States v Antone-Herron*, 593 Fed Appx 960, 964 [11th Cir 2014]). Moreover, the testimony at the suppression hearing supports the court's determination that defendant's consent was voluntary under the circumstances (*see People v Favors*, 180 AD3d 1375, 1375 [4th Dept 2020], *lv denied* 35 NY3d 969 [2020]; *People v Gray*, 152 AD3d 1068, 1070 [3d Dept 2017], *lv denied* 30 NY3d 980 [2017]; *see generally Gonzalez*, 39 NY2d at 127-130). Contrary to defendant's contention, his consent was not rendered involuntary by the parole officer's

promise to seek judicial authorization for the search should defendant refuse consent (*see People v Storelli*, 216 AD2d 891, 891 [4th Dept 1995], *lv denied* 86 NY2d 803 [1995]).

Defendant's challenge to his own authority to authorize the search of the locked bedroom is unpreserved for appellate review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Walters*, 124 AD3d 1321, 1322 [4th Dept 2015], *lv denied* 25 NY3d 1209 [2015]). The parties' remaining arguments, which all relate to a potential alternative ground for affirmance, are academic in light of our determination.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

983

CA 19-02146

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

ROBIN HART, AS ADMINISTRATOR OF THE ESTATE
OF EAIN CLAYTON BROOKS, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered July 31, 2019. The order denied the motion of defendant County of Erie for summary judgment.

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: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

984

CA 19-02156

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

ROBIN HART, AS ADMINISTRATOR OF THE ESTATE
OF EAIN CLAYTON BROOKS, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered November 18, 2019. The order, insofar as appealed from, adhered to a prior order denying the motion of defendant County of Erie for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant County of Erie for summary judgment is granted, and the complaint is dismissed against that defendant.

Memorandum: At the age of five, plaintiff's decedent was brutally murdered by his mother's boyfriend (*see People v Kuzdzal*, 144 AD3d 1618, 1618-1619 [4th Dept 2016], *revd* 31 NY3d 478 [2018]). Plaintiff thereafter commenced this wrongful death action, alleging that the County of Erie (defendant), through its Child Protective Services office, had inadequately investigated multiple prior reports of child abuse and neglect concerning the decedent child. Defendant now appeals from that part of an order that, upon reargument, adhered to the prior decision denying defendant's motion for summary judgment dismissing the complaint against it.

As defendant correctly contends, "New York does not recognize a cause of action sounding in negligent investigation" of child abuse and neglect (*Hines v City of New York*, 142 AD3d 586, 587 [2d Dept 2016]; *see Maldovan v County of Erie*, 188 AD3d 1597, — [4th Dept 2020]). "Moreover, 'a claim for negligent training in investigative procedures is akin to a claim for negligent investigation or

prosecution, which is not actionable in New York' " (*Juerss v Millbrook Cent. Sch. Dist.*, 161 AD3d 967, 968 [2d Dept 2018], *lv denied* 32 NY3d 903 [2018]). We therefore reverse the order insofar as appealed from, grant defendant's motion for summary judgment, and dismiss the complaint against it. Defendant's remaining contentions are academic in light of our determination.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

986

CA 19-01976

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

TREMEL STONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND RON AMMERMAN,
DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MAEVE E. HUGGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 18, 2019. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking leave to amend the complaint to add Wendy Collier as a defendant.

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

Memorandum: Plaintiff commenced this action against defendants, the City of Buffalo (City) and Ron Ammerman, seeking monetary damages for assault and battery, negligence, and a violation of his civil rights pursuant to 42 USC § 1983. In his complaint, plaintiff alleged that Ammerman, a Buffalo Police Officer, and his partner, Officer Wendy Collier, arrived at a location where plaintiff was lawfully standing outside a store. Plaintiff alleged that he ran away, and Ammerman chased and shot him. In his bill of particulars, plaintiff also alleged that Ammerman planted a gun. Eight years after commencing this action, plaintiff moved, inter alia, for leave to amend the complaint to add Collier as a defendant explaining that, with the recent discovery that was provided, plaintiff realized that Collier was involved in the planting of evidence. Supreme Court granted the motion to that extent, and we now affirm.

It is well settled that leave to amend a pleading " 'shall be freely given,' " provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983], quoting CPLR 3025 [b]; *see Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]; *Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]), and the decision to permit an amendment is within the

sound discretion of the court (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). We conclude that the court did not abuse its discretion in granting that part of the motion seeking leave to amend the complaint. Although the statute of limitations had expired with respect to the proposed claims against Collier, plaintiff established that the relation back doctrine applied. " 'In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff[] must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that [the new defendant] will not be prejudiced in maintaining his [or her] defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff[] as to the identity of the proper parties, the action would have been brought against [the new defendant] as well' " (*May v Buffalo MRI Partners, L.P.* [appeal No. 2], 151 AD3d 1657, 1658 [4th Dept 2017]).

We reject defendants' contention that the three prongs of that test were not met here. The claims against defendants and Collier all arise out of the same conduct, transaction, or occurrence, namely the shooting of plaintiff after he fled from the police and his arrest (*see Headley v City of New York*, 115 AD3d 804, 806 [2d Dept 2014]; *Thomsen v Suffolk County Police Dept.*, 50 AD3d 1015, 1018 [2d Dept 2008]). Plaintiff further established that Collier is united in interest with the City by virtue of the City being vicariously liable for the claim of negligence against her in the absence of any allegation that Collier was acting outside of the scope of her employment (*see* General Municipal Law § 50-j [1]; *Krug v City of Buffalo*, 34 NY3d 1094, 1095 [2019]; *see generally Verizon N.Y., Inc. v LaBarge Bros. Co., Inc.*, 81 AD3d 1294, 1296 [4th Dept 2011]). Because Collier is united in interest with the City, she is charged with notice of the action such that she will not be prejudiced in maintaining a defense on the merits (*see Perillo v DiLamarter*, 151 AD3d 1710, 1711 [4th Dept 2017]). Finally, plaintiff established that Collier knew that, but for a mistake by plaintiff in not naming her as a defendant, the action would have been brought against her as well (*see Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193-1194 [4th Dept 2013]). Plaintiff's failure to name Collier as a defendant in the original complaint " 'was a mistake and not . . . the result of a strategy to obtain a tactical advantage' " (*May*, 151 AD3d at 1659).

We have considered defendants' remaining contentions and conclude that they are without merit.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1007

CA 19-01103

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

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

V MEMORANDUM AND ORDER

JOSEPH R., AN INMATE IN THE CUSTODY OF NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT UNDER ARTICLE 10 OF THE MENTAL HYGIENE LAW.

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

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

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered December 14, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and committing him to a secure treatment facility. We affirm.

Respondent contends that his due process rights were violated by delays in the proceedings. Even assuming, arguendo, that respondent preserved that contention for our review, we conclude that he received due process of law. The provision in Mental Hygiene Law § 10.07 (a) that there is a 60-day deadline for conducting a trial after a probable cause determination has been made is "not a 'strict time limit[]' " (*Matter of State of New York v Keith F.*, 149 AD3d 671, 671 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017], *appeal dismissed* 30 NY3d 1032 [2017]), and it is well settled that there is no due process violation where a delay in the proceeding is attributable to the respondent or otherwise beyond the control of the petitioner (*see Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1134 [4th Dept 2020]; *Matter of State of New York v Kerry K.*, 157 AD3d 172, 181-182 [2d Dept 2017]).

Here, the record establishes that the delay between the probable cause determination and respondent's trial to determine whether he is a detained sex offender who suffers from a mental abnormality was largely attributable to the motions and requests of respondent. Indeed, the record shows "that [respondent] consented to certain adjournments and was responsible for other delays, and thus the periods of time attributable thereto 'are not chargeable to' " petitioner (*Wayne J.*, 184 AD3d at 1134; *see Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]). We note that, even if the delay had operated to deny respondent due process of law, the proper remedy under the circumstances would not be the release of respondent (*see Keith F.*, 149 AD3d at 672; *see generally Jackson v Indiana*, 406 US 715, 738 [1972]).

We reject the further contention of respondent that he was denied effective assistance of counsel during the delay in the proceeding. Although respondent is entitled to meaningful representation in the context of this Mental Hygiene Law article 10 proceeding (*see Matter of State of New York v Campany*, 77 AD3d 92, 93, 98-99 [4th Dept 2010], *lv denied* 15 NY3d 713 [2010]), it is his burden on appeal to demonstrate the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies (*see Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1327 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]; *Matter of State of New York v Carter*, 100 AD3d 1438, 1439 [4th Dept 2012]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]), and respondent failed to meet that burden. Moreover, the record reflects that respondent's counsel filed appropriate motions on his behalf and that the delay was not attributable to inaction on the part of respondent's counsel.

Respondent contends that Supreme Court abused its discretion in denying his motion for a *Frye* hearing with respect to the diagnosis of paraphilia not otherwise specified, nonconsent. Respondent, however, did not request a *Frye* hearing with respect to that diagnosis. To the extent that respondent contends that the court erred in refusing to hold a *Frye* hearing with respect to the diagnosis of hebephilia, which respondent did request in his motion, we conclude that, even assuming, arguendo, that the court erred in denying that request, any such error is harmless (*see Matter of State of New York v Anthony B.*, 180 AD3d 688, 690 [2d Dept 2020], *lv denied* 35 NY3d 913 [2020]; *Matter of State of New York v James N.*, 171 AD3d 930, 931-932 [2d Dept 2019], *lv denied* 33 NY3d 913 [2019]). There is ample evidence in the record, aside from the diagnosis of hebephilia, to support the determination that respondent suffers from a mental abnormality, and we therefore conclude that there is no reasonable possibility that the exclusion of testimony regarding the hebephilia diagnosis would have resulted in a different verdict (*see generally Matter of State of New York v Charada T.*, 23 NY3d 355, 362 [2014]).

Respondent failed to preserve for our review his contentions that petitioner failed to establish that he had serious difficulty controlling his sexually offending behavior and that he is likely to

be a danger to others and to commit sex offenses if not confined to a secure treatment facility "inasmuch as he did not move for a directed verdict pursuant to CPLR 4401 or challenge the sufficiency of the evidence on those points in any other way" (*Matter of Vega v State of New York*, 140 AD3d 1608, 1609 [4th Dept 2016]). In any event, viewing the record in the light most favorable to petitioner (*see Matter of State of New York v Floyd Y.*, 30 NY3d 963, 964 [2017]), we conclude that the evidence is legally sufficient to support a determination that respondent has serious difficulty controlling his sexually offending behavior (*see Matter of Akgun v State of New York*, 148 AD3d 1613, 1614 [4th Dept 2017]; *Matter of Rene I. v State of New York*, 146 AD3d 1056, 1058 [3d Dept 2017]), and is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility (*see Matter of State of New York v Jedediah H.*, 184 AD3d 1132, 1132 [4th Dept 2020], *lv denied* 35 NY3d 918 [2020]; *Matter of Sincere M. v State of New York*, 156 AD3d 1427, 1427-1428 [4th Dept 2017]).

Finally, respondent contends that the court erred in permitting him to proceed pro se. Contrary to respondent's contention, an individual in a Mental Hygiene Law article 10 proceeding "can effectively waive his or her statutory right to counsel only after the court conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent" (*Matter of State of New York v Raul L.*, 120 AD3d 52, 63 [2d Dept 2014]; *see Matter of Richard R. v State of New York*, — AD3d —, — [Dec. 23, 2020] [4th Dept 2020]). Here, the court conducted the requisite searching inquiry to ensure that respondent's waiver was unequivocal, voluntary, and intelligent (*see Richard R.*, — AD3d at —; *cf. Raul L.*, 120 AD3d at 63-64).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1010

CA 19-01787

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

JULIE WISNIEWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERN JAEGER, DEFENDANT,
JOSEPH MARRA AND STEVENS DRIVING SCHOOL, LLC,
DEFENDANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, EDEN (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 25, 2019. The order granted the motion of defendants Joseph Marra and Stevens Driving School, LLC for summary judgment dismissing the complaint and all cross claims against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle in which she was a passenger, which was operated by defendant Gern Jaeger, rear-ended a vehicle operated by defendant Joseph Marra and owned by defendant Stevens Driving School, LLC (collectively, defendants). Contrary to plaintiff's contention, we conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint and all cross claims against them. Defendants established their entitlement to judgment as a matter of law by submitting evidence that Jaeger's vehicle rear-ended defendants' vehicle and that there was no explanation for the accident other than Jaeger's negligence (*see Barton v Youmans*, 13 AD3d 1151, 1152 [4th Dept 2004]; *see generally Ruzycki v Baker*, 301 AD2d 48, 50 [4th Dept 2002]). The burden thus shifted to plaintiff to raise an issue of fact, and she failed to do so.

Even if we assume, arguendo, that defendants' vehicle came to a " 'sudden and abrupt stop' " (*Johnson v Yarussi Constr., Inc.*, 74 AD3d 1772, 1773 [4th Dept 2010]), which in some circumstances is sufficient to raise an issue of fact with respect to the negligence of the driver of the lead vehicle in a rear-end collision, there is no dispute in this case that Marra stopped defendants' vehicle in the far right lane

in order to yield to an emergency vehicle (*see* Vehicle and Traffic Law § 1144 [a]; *Barton*, 13 AD3d at 1152; *DiPaola v Scherpich*, 239 AD2d 459, 460 [2d Dept 1997]; *Gladstone v Hachuel*, 225 AD2d 730, 730 [2d Dept 1996], *lv dismissed* 89 NY2d 982 [1997]). We thus conclude that plaintiff failed to raise an issue of fact whether Marra negligently operated defendants' vehicle.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1012

CA 20-00724

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF ARBITRATION BETWEEN CITY OF UTICA,
PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

LOCAL 32, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
AFL-CIO, C.L.C. UTICA PROFESSIONAL FIREFIGHTERS
ASSOCIATION, ON BEHALF OF RICHARD J. FORTE,
RESPONDENT-APPELLANT.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (RONALD G. DUNN OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN F. HARTNETT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 8, 2019 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, denied that part of the motion of Richard J. Forte seeking to vacate an arbitration award.

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

Memorandum: In this proceeding pursuant to CPLR article 75, Richard J. Forte (respondent) appeals from that part of an order that denied his motion to vacate an arbitration award. We affirm.

Respondent contends that the arbitrator improperly found him guilty of committing uncharged conduct, i.e., sexual harassment, and determined that termination was the appropriate penalty for that uncharged conduct. We reject that contention. Respondent was charged in the notice of disciplinary charges with, inter alia, conduct unbecoming a member of the Utica Fire Department "insofar as [he] knowingly and intentionally damage[d] property belonging to a fellow firefighter" by "intentionally, knowingly, and unlawfully, with the intent to damage property, deposit[ing] [his] semen onto the inside crotch area of a pair of pants belonging to" a fellow firefighter. The record establishes that the arbitrator determined that respondent was guilty of that charge, and concluded that termination was the appropriate penalty. Thus, contrary to respondent's contention, the arbitration award is based on a finding that he committed conduct that was alleged in the notice of disciplinary charges (*see generally*

Matter of Murray v Murphy, 24 NY2d 150, 157 [1969]; *Matter of Licciardi v City of Rochester*, 87 AD3d 1381, 1383 [4th Dept 2011]).

We have considered respondent's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1017

KA 15-01061

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP BECKTOFT, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (JOHN A. HERBOWY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 14, 2013. The judgment convicted defendant after a nonjury trial of possessing a sexual performance by a child (five 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 five counts of possessing a sexual performance by a child (Penal Law § 263.16). Defendant does not dispute that he possessed a sexual performance of a child with respect to each count. Rather, he contends that the evidence is legally insufficient to establish that he knowingly did so. Defendant failed to preserve that contention for our review because he presented evidence after County Court denied his motion for a trial order of dismissal at the close of the People's case, and he failed to renew his motion at the close of the proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Norman*, 183 AD3d 1240, 1242 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]). Nevertheless, we " 'necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Cartagena*, 149 AD3d 1518, 1518 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017], *reconsideration denied* 30 NY3d 1018 [2017]).

"To be found guilty of possessing a sexual performance by a child, the evidence must establish, as relevant here, that the defendant, 'knowing the character and content thereof, . . . knowingly has in his [or her] possession or control . . . any performance which includes sexual conduct by a child less than [16] years of age' " (*People v Henry*, 166 AD3d 1289, 1290 [3d Dept 2018], quoting Penal Law

§ 263.16). "In the case of digital images and videos found on an electronic device, knowing possession may be inferred from evidence establishing that the defendant exercised dominion or control over the material on the device" (*id.*; *see People v Kent*, 19 NY3d 290, 301 [2012]). To establish dominion or control, the People must prove an " 'affirmative act,' such as printing, saving or downloading" (*Henry*, 166 AD3d at 1290, quoting *Kent*, 19 NY3d at 303). The People may establish the requisite mens rea through circumstantial evidence, including evidence of the defendant's actions and the surrounding circumstances (*see People v Mitchell*, 94 AD3d 1252, 1254 [3d Dept 2012], *lv denied* 19 NY3d 964 [2012]; *see generally People v Feingold*, 7 NY3d 288, 296 [2006]).

Here, defendant testified that he used his computer to download pornography, and that he may have accidentally downloaded child pornography. Defendant further testified that he performed an Internet search using an acronym that a police investigator testified is used to search for child pornography, though defendant denied knowing what that acronym meant. In addition, a police forensics supervisor testified that he determined that defendant also searched for the terms "10 yo," "11 yo," and "kiddy porn XXX." Furthermore, several of the child pornography files that defendant downloaded had explicit titles, and defendant testified that, after downloading the files from the Internet, he affirmatively transferred them to an external hard drive. Viewing the evidence in light of the elements of the crime 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]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1019

KA 17-01906

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. RUISE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 5, 2017. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for resentencing.

Memorandum: On appeal 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]), defendant contends that Supreme Court failed to exercise its discretion at sentencing. Although we note that defendant waived his right to appeal, there is no reason for us to determine whether that waiver is valid inasmuch as defendant's contention on appeal would survive even a valid waiver of the right to appeal (*see People v Stith*, 30 AD3d 966, 966-967 [4th Dept 2006]; *People v Gathers*, 9 AD3d 912, 912 [4th Dept 2004], *lv denied* 3 NY3d 674 [2004]; *see also People v Seaberg*, 74 NY2d 1, 9 [1989]).

We agree with defendant that the court failed to exercise its discretion at sentencing. "[T]he sentencing discretion is a matter committed to the exercise of the *court's* discretion . . . made only after careful consideration of all facts available at the time of sentencing" (*People v Farrar*, 52 NY2d 302, 305 [1981]; *see People v Dowdell*, 35 AD3d 1278, 1280 [4th Dept 2006], *lv denied* 8 NY3d 921 [2007]). Due consideration should be "given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*Farrar*, 52 NY2d at 305;

see People v Dupont, 164 AD3d 1649, 1650 [4th Dept 2018]).

Here, the court initially imposed a sentence of interim probation and advised defendant that, if he violated the terms of interim probation, the court would impose a term of 4½ years' incarceration with 3 years' postrelease supervision. When defendant violated the terms of interim probation, the court informed defendant at sentencing that it would not consider a lesser sentence because "your word is your word. That was the deal. I don't think that would speak well for the program nor would it speak well of me . . . I'd lose confidence in myself." The court further stated that "[w]e made an agreement, we made a deal . . . I'm going to abide by that deal." The sentencing transcript is devoid of any indication that the court considered the crime charged, defendant's circumstances, or the purpose of the penal sanction (*see People v Knorr*, 186 AD3d 1090, 1091-1092 [4th Dept 2020]; *cf. People v Clause*, 167 AD3d 1532, 1532-1533 [4th Dept 2018]). Nor is there any indication that the court considered the presentence report, which was prepared after the plea. We conclude that "the sentencing transcript, read in its entirety, does not reflect that the court conducted the requisite discretionary analysis" (*Knorr*, 186 AD3d at 1091-1092). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1053

CA 20-00383

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, AND DEJOSEPH, JJ.

JOANNA TRIPI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANK P. ALABISO, PH.D., DEFENDANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered February 14, 2020. The order granted the motion of defendant to dismiss the complaint 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 under several legal theories, all arising from a psychological evaluation that defendant performed of plaintiff and her former husband for child custody purposes. The psychological evaluation was completed pursuant to a court order and upon the stipulation of the parties. Plaintiff appeals from an order granting defendant's motion to dismiss the complaint. We affirm.

Contrary to plaintiff's contention, Supreme Court properly concluded that plaintiff failed to "establish[ ] that additional discovery would disclose facts 'essential to justify opposition' to defendant's motion" (*Bouley v Bouley*, 19 AD3d 1049, 1051 [4th Dept 2005], quoting CPLR 3211 [d]; *see Gillies v National Fire Ins. Co. of Hartford*, 56 AD3d 1236, 1238 [4th Dept 2008], *lv denied* 12 NY3d 702 [2009]).

Contrary to plaintiff's further contention, the court properly dismissed the complaint based on the doctrine of judicial immunity. It is well settled that " *'neutrally positioned government officials, regardless of title, who are delegated judicial or quasi-judicial functions should . . . not be shackled with the fear of civil retribution for their acts'* " (*Mosher-Simons v County of Allegany*, 99 NY2d 214, 220 [2002]). " '[T]he common law provide[s] absolute immunity from subsequent damages liability for all

persons—governmental or otherwise—who [a]re integral parts of the judicial process' " (*id*., quoting *Briscoe v LaHue*, 460 US 325, 335 [1983]). We agree with the court here that "defendant has judicial immunity from suit regarding the work he performed as a court-appointed forensic psychiatric expert in connection with . . . plaintiff's child custody litigation" (*Hom v Reubins*, 268 AD2d 461, 461 [2d Dept 2000], *appeal dismissed* 95 NY2d 886 [2000]; *see Bridget M. v Billick*, 36 AD3d 489, 490 [1st Dept 2007]; *Deed v Condrell*, 150 Misc 2d 279, 280-282 [Sup Ct, Erie County 1991], *affd for reasons stated* 177 AD2d 1055 [4th Dept 1991]). Thus, plaintiff's contentions concerning the sufficiency of the allegations with respect to any of the particular causes of action do not require a different result.

We have considered plaintiff's remaining contention and conclude that it does not require modification or reversal of the order.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1059

KA 18-01796

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY J. GRAY, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sara Sheldon, A.J.), rendered June 11, 2018. The judgment convicted defendant, upon his plea of guilty, of 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 attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We affirm.

County Court properly denied defendant's motion to withdraw his plea. Defendant's current allegations of ineffective assistance of counsel and duress are unsupported by the record and are belied by the plea colloquy, during which defendant averred that he had sufficiently discussed the case with his lawyer, that he was satisfied with his lawyer's services, that he was not being "forced . . . , threatened . . . or coerced . . . into pleading guilty," and that he was pleading guilty "voluntarily and of [his] own free will" (*see People v Riley*, 182 AD3d 998, 999 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020]; *People v Gerena*, 174 AD3d 1428, 1429-1430 [4th Dept 2019], *lv denied* 34 NY3d 981 [2019]). Defendant's further contention that his plea was not knowing, intelligent, and voluntary because he did not understand that a guilty plea would terminate the discovery process is unpreserved for appellate review inasmuch as he did not raise that particular argument in his motion to withdraw the plea (*see People v Pittman*, 166 AD3d 1243, 1245 [3d Dept 2018], *lv denied* 32 NY3d 1176 [2019]). In any event, that unpreserved assertion is contradicted by the allegations in defendant's own pro se motion to withdraw his plea.

Finally, although we agree with defendant that he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 566-567

[2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Shantz*, 186 AD3d 1076, 1077 [4th Dept 2020]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1094

CA 19-01252

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

THE FITNESS INSTITUTE, INC., DOING BUSINESS AS
FITNESS INSTITUTE AND PILATES STUDIO,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ISMET HALLAC, DEFENDANT-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

TRONOLONE & SURGALLA, P.C., BUFFALO (JOHN B. SURGALLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 7, 2019. The order, among other things, denied defendant's cross motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this breach of contract action as Fitness Institute and Pilates Studio, Inc. and subsequently moved for leave to amend the caption of the summons and complaint to designate plaintiff by its correct corporate name, The Fitness Institute, Inc., doing business as Fitness Institute and Pilates Studio. Defendant appeals from an order that granted plaintiff's motion and denied defendant's cross motion for summary judgment dismissing the complaint, which was premised on the ground, inter alia, that plaintiff, as originally named in the action, was a non-existent entity that could not have privity of contract with defendant and therefore lacked standing and legal capacity to sue. We affirm.

We conclude that Supreme Court did not abuse its discretion in granting plaintiff's motion to the extent that it sought to correct a misnomer with respect to plaintiff's name (*see* CPLR 2001, 5019 [a]; *Glanz v Parkway Kosher Caterers*, 176 AD3d 686, 687-688 [2d Dept 2019]; *Covino v Alside Aluminum Supply Co.*, 42 AD2d 77, 81-82 [4th Dept 1973]; *see also Pronti v Hogan*, 278 AD2d 841, 841 [4th Dept 2000]). "Mistakes relating to the name of a party involving a misnomer or misdescription of the legal status of a party surely fall within the category of those irregularities which are subject to correction by amendment, particularly where the other party is not prejudiced and

should have been well aware from the outset that a misdescription was involved" (*Cutting Edge v Santora*, 4 AD3d 867, 868 [4th Dept 2004] [internal quotation marks omitted]; *see A. A. Sutain, Ltd. v Montgomery Ward & Co.*, 22 AD2d 607, 608-609 [1st Dept 1965], *affd* 17 NY2d 776 [1966]; *Covino*, 42 AD2d at 80). Permitting a plaintiff to correct such an error does "not constitute an improper substitution of a different plaintiff" but merely corrects the title (*Glanz*, 176 AD3d at 687; *see Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 977 [2d Dept 2017]).

Here, the court properly concluded that plaintiff should be permitted to correct the misnomer in the original complaint because such correction would not unduly surprise or prejudice defendant. At all relevant times, defendant was aware of the operative facts with respect to the underlying claim, and the correction would not deprive defendant of the opportunity to prepare a proper defense to said claim (*see generally Covino*, 42 AD2d at 80; *Farrington v Muchmore*, 52 App Div 247, 249 [2d Dept 1900]). In light of our determination, we conclude that the court properly denied defendant's cross motion.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1111

KA 16-00132

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN A. DILLARD, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered December 1, 2015. The judgment convicted defendant upon a nonjury verdict of arson in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of arson in the third degree (Penal Law § 150.10 [1]), defendant challenges the legal sufficiency and weight of the evidence. Contrary to the contention of the People, we conclude that, under the circumstances of this case, defendant did not waive his challenge to the legal sufficiency of the evidence of arson in the third degree. Here, prior to requesting that Supreme Court consider that lesser included offense, defendant unsuccessfully challenged the sufficiency of the evidence of defendant's intent to damage a building, an element of both arson in the second degree (§ 150.15), i.e., the crime for which defendant was indicted, and the lesser included offense (*cf. People v McDuffie*, 46 AD3d 1385, 1386 [4th Dept 2007], *lv denied* 10 NY3d 867 [2008]; *see generally People v Shaffer*, 66 NY2d 663, 664-665 [1985]). We nonetheless conclude that defendant's contention is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish that defendant intended to damage the building by starting a fire (*see People v Adams*, 43 AD3d 1423, 1424 [4th Dept 2007], *lv denied* 9 NY3d 1004 [2007]; *People v Utsey*, 182 AD2d 575, 575-576 [1st Dept 1992], *lv denied* 80 NY2d 839 [1992]; *People v Ames*, 159 AD2d 1008, 1009 [4th Dept 1990]). "Intent may be inferred from the act itself, from a defendant's conduct and statements, and from the surrounding circumstances" (*People v Hodges*, 66 AD3d 1228, 1230 [3d Dept 2009], *lv denied* 13 NY3d 939 [2010]). The evidence established that defendant splashed a small amount of

gasoline on the front steps of a house belonging to someone with whom he was angry, he threw a lighted match onto the stairs and watched it ignite, and he told the police that he did so to "make a statement" to the owner. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see People v Newton*, 164 AD3d 1636, 1636-1637 [4th Dept 2018]; *People v Dale*, 71 AD3d 1517, 1517 [4th Dept 2010], *lv denied* 15 NY3d 749 [2010], *reconsideration denied* 15 NY3d 803 [2010]; *Ames*, 159 AD2d at 1009; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1118

CA 19-00202

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND BANNISTER, JJ.

BONITA POWERS, AS ADMINISTRATOR OF THE
ESTATE OF JAMES POWERS, M.D., DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CANANDAIGUA MEDICAL GROUP, P.C.,
DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (DANIEL J. ALTIERI OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVETT CRISTO P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered October 30, 2018. The order denied in part defendant's motion for summary judgment.

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

Memorandum: James Powers, M.D. (decedent) commenced this action alleging that defendant undervalued the purchase price of his shares of stock in the professional corporation upon his retirement. The administrator of decedent's estate was substituted as the plaintiff after this appeal was perfected. Defendant appeals from an order insofar as it denied that part of its motion seeking summary judgment dismissing the breach of contract cause of action. We affirm.

Pursuant to the Stock Purchase Agreement at issue (Agreement), the purchase price for the shares of decedent's stock when he retired was "equal to the book value of each such Share . . . The price per Share herein described shall be determined by the independent accountant then employed by the Corporation in accordance with sound accounting principles consistent with past practice." In support of its motion, defendant met its initial burden of establishing that it did not breach the Agreement by submitting evidence that its independent accountant determined the stockholders' equity and that the calculation of the share prices was in accordance with sound accounting principles and consistent with its past practice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition to the motion, however, decedent raised a triable issue of

fact whether defendant breached the Agreement by submitting the affidavit of his accountant, who averred that defendant's calculation of the value of the shares was not in accordance with sound accounting principles, as required by the Agreement (*see generally Spadaccini v Ritacco*, 186 AD2d 792, 793 [2d Dept 1992]).

We reject defendant's further contention that decedent should have been estopped from contesting the valuation of his shares. "[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances" (*Mahuson v Ventraq, Inc.*, 118 AD3d 1267, 1269 [4th Dept 2014] [internal quotation marks omitted]), and " 'is ordinarily a question of fact for trial' " (*Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893 [4th Dept 2007]). Even assuming, arguendo, that defendant raised the issue of estoppel on its motion and met its initial burden on that issue, we conclude that decedent raised a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1120

CA 19-02024

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND BANNISTER, JJ.

L&M GROUP, LIMITED, JOSEPH LIPSITZ AND MAX LIPSITZ, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

AMY LIPSITZ, DEFENDANT-RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (VINCENT MIRANDA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 24, 2019. The order, insofar as appealed from, granted that part of the motion of defendant seeking summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion seeking summary judgment dismissing the complaint is denied, and the complaint is reinstated.

Memorandum: Plaintiffs commenced this breach of contract action alleging, inter alia, that defendant violated the non-solicitation and non-disparagement provisions of a purchase and separation agreement and general release, whereby defendant agreed to sell her book of business with respect to plaintiff L&M Group, Limited. Six months after the action was commenced and while plaintiffs' discovery demands and motions to compel discovery were pending, defendant moved for, among other things, summary judgment dismissing the complaint. Plaintiffs now appeal from an order insofar as it granted the motion to that extent. We reverse the order insofar as appealed from.

We agree with plaintiffs that the motion to the extent that it sought summary judgment dismissing the complaint is "premature because there has been no reasonable opportunity for discovery" (*Hager v Denny's, Inc.*, 281 AD2d 921, 921 [4th Dept 2001]; *see Urcan v Cocarelli*, 234 AD2d 537, 537 [2d Dept 1996]). In opposing defendant's motion as premature pursuant to CPLR 3212 (f), plaintiffs "made the requisite evidentiary showing to support the conclusion that facts essential to justify opposition may exist but could not then be stated" (*Beck v City of Niagara Falls*, 169 AD3d 1528, 1529 [4th Dept 2019], *amended on rearg on other grounds* 171 AD3d 1573 [4th Dept

2019]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1123

TP 20-00873

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF DAVID KEMPSTON, PETITIONER,

V ORDER

STATE OF NEW YORK OFFICE OF CHILDREN AND FAMILY SERVICES AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, RESPONDENTS.

FERON POLEON LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frank A. Sedita, III, J.], entered July 14, 2020) to review a determination of respondents. The determination found inadequate guardianship.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1126

KA 17-01693

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW J. HERRMANN, 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 (William F. Kocher, J.), rendered May 12, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal possession of marihuana in the third degree.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1130

KA 19-00088

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE DAVIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 7, 2018. The judgment convicted defendant, upon a plea of guilty, of resisting arrest and criminal contempt 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 resisting arrest (Penal Law § 205.30) and criminal contempt in the second degree (§ 215.50 [3]). Even assuming, arguendo, that defendant did not validly waive his right to appeal, we nevertheless conclude that the sentence is not unduly harsh or severe "to the extent that [he] remains subject to [it]" (*People v Adair*, 177 AD3d 1357, 1358 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1135

CAF 19-01972

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ASIA A. BRELAND,
PETITIONER-APPELLANT,

V ORDER

HAKIM S. HAMEED, RESPONDENT-RESPONDENT.

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

KAREN J. DOCTER, FAYETTEVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore A. Pavone, R.), entered September 23, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted respondent sole legal custody of the subject child.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1141

CA 19-01623

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF STATE OF NEW YORK, PLAINTIFF-RESPONDENT,

V ORDER

HARRIS ORIGINALS OF NY, INC., ET AL., DEFENDANTS-APPELLANTS.

VENABLE LLP, NEW YORK CITY (ALLYSON B. BAKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 12, 2019. The order, among other things, denied the motion of defendants to quash subpoenas.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1145

KA 19-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIRT D. NICE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 3, 2019. The judgment convicted defendant upon a plea of guilty of grand larceny in the fourth degree, criminal contempt in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree, reckless driving, and petit larceny.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, grand larceny in the fourth degree (Penal Law § 155.30 [8]), defendant contends that his waiver of the right to appeal is not valid and that the sentence is unduly harsh and severe. Defendant's challenge to the severity of the sentence is moot inasmuch as he has completed serving his sentence (*see People v Mackey*, 79 AD3d 1680, 1681 [4th Dept 2010], *lv denied* 16 NY3d 860 [2011]; *People v Werner*, 71 AD3d 1456, 1456-1457 [4th Dept 2010], *lv denied* 15 NY3d 758 [2010]; *People v Griffin*, 239 AD2d 936, 936 [4th Dept 1997]), and we therefore need not reach defendant's contention with respect to the alleged invalidity of the waiver of the right to appeal (*see People v Seppe*, — AD3d —, —, 2020 NY Slip Op 06888, *1 [4th Dept 2020]; *People v Bald*, 34 AD3d 1362, 1362 [4th Dept 2006]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1146

KA 18-02435

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN STEPHENS, 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 (James F. Bargnesi, J.), rendered November 19, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see Alls*, 187 AD3d at 1515), we conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1148

KA 18-01571

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GREER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 18, 2018. The judgment convicted defendant upon his plea of guilty of attempted robbery 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 robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). He contends that County Court abused its discretion in denying his motion to withdraw his plea of guilty, which was premised on allegations that he was actually innocent and that defense counsel coerced him into entering the plea. We affirm.

"[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]; *see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). In our view, because defendant did not tender any evidence to support his conclusory assertion of innocence, the court did not abuse its discretion in denying that part of defendant's motion (*see People v Allen*, 99 AD3d 1252, 1252 [4th Dept 2012]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]; *People v Dozier*, 12 AD3d 1176, 1177 [4th Dept 2004]).

With respect to defendant's claim that defense counsel coerced him into pleading guilty, we conclude here that "[t]he court was

presented with a credibility determination when defendant moved to withdraw his plea . . . , and it did not abuse its discretion in discrediting [that] claim[]" (*Sparcino*, 78 AD3d at 1509; *see People v Zimmerman*, 100 AD3d 1360, 1361-1362 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). In our view, "[f]ar from being coercive, defense counsel's advice . . . that the case could not be won, and" his realistic explanation of the benefits of accepting the plea offer under the circumstances, merely "fulfilled defense counsel's duty to warn his client of the risks of going to trial" (*People v Spinks*, 227 AD2d 310, 310 [1st Dept 1996], *lv denied* 88 NY2d 995 [1996]).

With respect to defendant's contention that, in light of defense counsel's comments about the significantly longer sentence he faced if he proceeded to trial rather than pleading guilty, defendant was left with no choice but to plead guilty, we note that "[d]efendant is not entitled to the plea bargain of his choosing, and defendant's fear that a harsher sentence would be imposed if defendant were convicted after trial does not constitute coercion" (*Zimmerman*, 100 AD3d at 1362 [internal quotation marks omitted]; *see People v Chimilio*, 83 AD3d 537, 538 [1st Dept 2011], *lv denied* 17 NY3d 814 [2011]; *People v Newman* [appeal No. 1], 231 AD2d 875, 875 [4th Dept 1996], *lv denied* 89 NY2d 944 [1997]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1149

KA 18-02047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN G. VIEHDEFFER, ALSO KNOWN AS KEVIN J. VIEHDEFFER, ALSO KNOWN AS KEVIN GEORGE VIEHDEFFER, ALSO KNOWN AS KEVIN VIEHDEFFER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered April 27, 2018. The judgment convicted defendant upon a plea of guilty of bail jumping 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 bail jumping in the second degree (Penal Law § 215.56). Contrary to defendant's initial contention, the Court of Appeals has rejected the assertion that waivers of the right to appeal should be invalid per se (*see People v Thomas*, 34 NY3d 545, 557-558, 558 n 1 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 8-9 [1989]). 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 Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1150

KA 18-02059

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CEDRIC TOWNES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 21, 2018. The judgment convicted defendant upon a plea of guilty of robbery in the first 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 plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). In appeal No. 2, he appeals from a judgment convicting him upon a plea of guilty of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). The two pleas were entered in a single plea proceeding. In both appeals, defendant contends that his waiver of the right to appeal is invalid and that the sentences are unduly harsh and severe. As the People correctly concede, defendant's waiver of the right to appeal was invalid because Supreme Court mischaracterized it as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Dozier*, 179 AD3d 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020]). We reiterate that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*Thomas*, 34 NY3d at 567, citing NY Model Colloquies, Waiver of Right to Appeal).

Nevertheless, contrary to defendant's contention in both appeals, the sentences are not unduly harsh or severe. We note, however, that the certificate of conviction in appeal No. 2 incorrectly reflects that the sentence in appeal No. 2 is to run concurrently with the sentence in appeal No. 1, and it therefore must be amended to reflect that the sentences are to run consecutively to one another (*see People v Brinson*, 155 AD3d 1598, 1599 [4th Dept 2017]; *see generally People v*

Lemon, 38 AD3d 1298, 1300 [4th Dept 2007], *lv denied* 9 NY3d 846 [2007], *reconsideration denied* 9 NY3d 962 [2007]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1151

KA 18-02060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CEDRIC TOWNES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 21, 2018. The judgment convicted defendant upon a plea of guilty of attempted burglary in the second degree.

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

Same memorandum as in *People v Townes* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1155

KA 15-02071

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERRY C. JOHNSON, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered October 22, 2015. The judgment convicted defendant upon a plea of guilty of robbery 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 his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). He contends that his waiver of the right to appeal is invalid and that the court erred in denying that part of his omnibus motion seeking to suppress physical evidence.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our consideration of his suppression contention (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]; *see generally People v Goodwin*, 147 AD3d 1352, 1352 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]), we conclude that the judgment should be affirmed. The evidence at the suppression hearing established that the testifying police officer learned from a dispatch broadcast over the police radio about a nearby gunpoint robbery resulting in the theft of a motor vehicle. The dispatch specifically described the stolen vehicle as "an older model, [a] black and red [Chevrolet] [S]uburban." Shortly after receiving the dispatch, the officer traveled toward the site of the robbery and passed a parked vehicle that matched the stolen vehicle's description. As the officer turned around to investigate, the other vehicle started to drive away. The officer followed the vehicle but did not yet activate his emergency lights or attempt to stop the vehicle. When the vehicle pulled over to the side of the road, the driver, i.e., defendant, exited and started to walk away. When the officer exited his vehicle and told defendant to stop, defendant started to run away. The

officer pursued defendant on foot and eventually caught up with him. He commanded defendant to get down on the ground, defendant complied, and the officer arrested him.

We conclude that the officer's conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). The officer had reasonable suspicion to briefly detain defendant based on his presence in a vehicle matching the description of the stolen vehicle provided by the dispatch, the proximity of the vehicle to the location of the reported robbery, and the fact that the stop occurred close in time to the robbery (*see People v Murray*, 170 AD3d 1650, 1651 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]; *People v Torres*, 167 AD3d 665, 666 [2d Dept 2018], *lv denied* 32 NY3d 1210 [2019]; *People v Young*, 68 AD3d 1761, 1761 [4th Dept 2009], *lv denied* 15 NY3d 780 [2010]).

Even assuming, arguendo, that the officer possessed no more than a founded suspicion that criminal activity was afoot at the time he initially encountered defendant and instructed him to stop (*see De Bour*, 40 NY2d at 223; *People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; *People v Brown*, 67 AD3d 1439, 1439-1440 [4th Dept 2009], *lv denied* 14 NY3d 798 [2010]), we conclude that the officer developed "the requisite reasonable suspicion to pursue and detain [defendant] based on the combination of the abovementioned specific circumstances indicating that defendant may have been engaged in criminal activity and his [immediate] flight in response to the approach by the officer[]" (*Atkinson*, 185 AD3d at 1439; *see People v Parker*, 32 NY3d 49, 56-57 [2018]; *People v Harmon*, 170 AD3d 1674, 1675 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1158

CAF 19-00853

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

IN THE MATTER OF ANTHONY PAPINEAU,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AIMEE SANFORD, RESPONDENT-APPELLANT.

IN THE MATTER OF AIMEE SANFORD,
PETITIONER-APPELLANT,

V

ANTHONY PAPINEAU, RESPONDENT-RESPONDENT.

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

THEODORE W. STENUF, MINOA, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Karen J. Stanislaus, R.), entered February 15, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole legal and physical custody of the subject child to petitioner-respondent Anthony Papineau.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, awarded sole legal and physical custody of the subject child to petitioner-respondent father and visitation to the mother. On appeal, the mother contends that Family Court's custody determination lacked a sound and substantial basis in the record. We affirm.

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] [internal quotation marks omitted]). A court's custody determination, including its evaluation of the child's best interests, is entitled to great deference and will not be disturbed as long as it is supported by a sound and substantial basis in the record (*see Cunningham v Cunningham*, 137 AD3d 1704, 1705 [4th Dept 2016]; *Sheridan*, 129 AD3d at 1568; *see also Matter of Cross v Caswell*, 113 AD3d 1107, 1107 [4th Dept 2014]).

We conclude that the evidence in the record, including the testimony obtained during the *Lincoln* hearing (*see generally Matter of Aikens v Nell*, 91 AD3d 1308, 1308-1309 [4th Dept 2012]), provided a sound and substantial basis for the court's custody determination. The testimony at the custody hearing, as credited by the court, established that the father and the child engaged in various activities together, that the father supported the child's schooling, and that the father sought appropriate counseling for the child. The father owned the home that he lived in with his wife, whereas the mother lived with the child's maternal grandmother. Further, the record established that, when the child was living with her, the mother allowed the child to be in the presence of and supervised by her partner, who was a registered sex offender. The father also testified that he worried for the child's safety when the child was in the mother's care, described multiple instances in which the mother behaved inappropriately toward the child, and stated that he observed a hand mark on the child and a bruise on his face while the child was in the mother's care.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1160

CAF 19-01586

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

IN THE MATTER OF STACY L. SAWYER,
PETITIONER-APPELLANT,

V ORDER

MATTHEW J. DOYLE, RESPONDENT-RESPONDENT.

RYAN JAMES MULDOON, AUBURN, FOR PETITIONER-APPELLANT.

ROBERT A. DINIERI, CLYDE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered July 26, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent shall maintain custody and primary physical placement of the subject child and granted petitioner visitation on alternating Wednesdays.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1161

CAF 19-00692

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

IN THE MATTER OF DANTE S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T. AND TIMOTHY S.,
RESPONDENTS-APPELLANTS.

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

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT TIMOTHY S.

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Chautauqua County (Michael F. Griffith, A.J.), entered March 26, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject child.

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

Memorandum: Respondent mother and respondent father each appeal from an order that, inter alia, terminated their parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. Contrary to respondents' contentions, petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between respondents and the child (*see* Social Services Law § 384-b [7] [a]). The evidence adduced at the fact-finding hearing established that petitioner, inter alia, developed a service plan; helped respondents obtain public assistance recertification and mental health treatment, including attachment therapy; provided referrals for domestic violence services, parenting classes, housing, and employment; provided transportation and parenting instruction; and facilitated supervised and unsupervised visitation (*see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1305-1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]). We reject respondents' contentions that petitioner did not prove that they permanently neglected the child (*see Matter of Valentina M.S. [Darrell W.]*, 154 AD3d 1309, 1311 [4th Dept 2017]). Petitioner established

that, despite its efforts, respondents failed to plan appropriately for the child's future (*see Soraya S.*, 158 AD3d at 1306; *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1500-1501 [4th Dept 2015]).

The mother failed to preserve for our review her contention that Family Court abused its discretion in not imposing a suspended judgment (*see Burke H.*, 134 AD3d at 1502). In any event, a suspended judgment was not warranted under the circumstances inasmuch as " 'any progress made by the [mother] prior to the dispositional determination was insufficient to warrant any further prolongation of the [child's] unsettled familial status' " (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]).

We have considered respondents' remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1164

CA 19-01200

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

DINA CAMPBELL, AS EXECUTRIX OF THE ESTATE OF
DIANE GOSPODARSKI, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN BELL-THOMSON, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered April 15, 2019. The order denied the motion of defendant John Bell-Thomson, M.D., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed against defendant John Bell-Thomson, M.D.

Memorandum: In this medical malpractice action seeking damages for injuries decedent allegedly sustained as the result of intraoperative damage to her phrenic nerve during mitral valve replacement surgery, John Bell-Thomson, M.D. (defendant) appeals from an order denying his motion for summary judgment dismissing the complaint against him. We reverse.

On his or her motion for summary judgment, a defendant in a medical malpractice action bears the initial "burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]). A defendant physician may submit his or her own affidavit to meet that burden provided that the affidavit is "detailed, specific and factual in nature" and addresses plaintiff's specific factual claim of negligence (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015] [internal quotation marks omitted]). We agree with defendant, and plaintiff on appeal does not dispute, that he met his initial burden on the motion by establishing the absence of a deviation from the applicable standard of care. Here, defendant submitted his own

affidavit, in which he explained that he began the surgery with a minimally invasive approach but converted to an open procedure after discovering that decedent's right lung was adherent to her heart and mediastinum. Defendant described how he removed the lung from the scar tissue and dissected the lung off the hilum, mediastinum, and heart. Defendant stated that he did not cut the phrenic nerve but did use traction sutures to expose access to the left atrium in order to complete the mitral valve replacement. He further stated that potential stretching of the phrenic nerve is an accepted and unavoidable consequence of the procedure that, in this case, did not indicate a deviation from the standard of care.

We further agree with defendant that plaintiff failed to raise a triable issue of fact in opposition (*see Bubar*, 177 AD3d at 1359). Although plaintiff submitted a physician's affidavit in opposition to defendant's motion, "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Where "the expert's ultimate assertions are . . . unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *see Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). Here, plaintiff's expert did not rebut the opinion in defendant's affidavit that defendant's surgical technique was appropriate to the situation in light of the fact that decedent's lung was adherent to the heart, nor did plaintiff's expert rebut defendant's opinion that any possible phrenic nerve damage was the result of stretching caused by traction sutures and did not constitute a deviation from the standard of care.

In light of our determination, we do not reach defendant's contention insofar as it pertains to the element of causation.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1174

KA 19-01867

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAHR TENGBEH, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered August 2, 2019. The judgment convicted defendant upon his plea of guilty of aggravated unlicensed operation of a motor vehicle 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 his plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]). Assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) or does not encompass his contentions on appeal (*see generally People v Butler*, 151 AD3d 1959, 1959-1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]; *People v Lynn*, 144 AD3d 1491, 1492-1493 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]; *People v Rodas*, 131 AD3d 1181, 1181-1182 [2d Dept 2015], *lv denied* 26 NY3d 1111 [2016]), we conclude that defendant's contentions lack merit. Contrary to defendant's contention, County Court did not abuse its discretion in denying defendant's request for an adjournment. "[T]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court . . . , and [t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Atkins*, 162 AD3d 1729, 1730 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018] [internal quotation marks omitted]; *see People v Micolo*, 171 AD3d 1484, 1485 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]). Defendant made no such showing here.

Defendant relies on the procedures set forth in CPL 410.70 for his contention that the court erred in determining that he violated the conditions of his interim probation, but we note that CPL 400.10, not CPL 410.70, applies to the revocation of defendant's interim probation prior to sentencing (*see People v Rollins*, 50 AD3d 1535,

1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]). Contrary to defendant's contention, the court did not err in determining that defendant violated the conditions of interim probation inasmuch as the "summary hearing conducted by the court was sufficient pursuant to CPL 400.10 (3) to enable the court to assure itself that the information upon which it was basing its determination . . . was reliable and accurate" (*Lynn*, 144 AD3d at 1493 [internal quotation marks omitted]; *see Butler*, 151 AD3d at 1960).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1178

KA 19-01784

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. LOPEZ, DEFENDANT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 31, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his guilty plea was the result of undue coercion by the court. Defendant failed to raise that contention in County Court and he therefore failed to move to withdraw the plea or vacate the judgment of conviction on that ground. Thus, he failed to preserve that contention for our review (*see People v Ingram*, 188 AD3d 1650, 1650 [4th Dept 2020]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's further contention that he was denied effective assistance of counsel does not survive his plea of guilty because he "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that he entered the plea because of his attorney['s] allegedly poor performance" (*Ingram*, 188 AD3d at 1650 [internal quotation marks omitted]). To the extent that defendant's contention survives the plea, it concerns matters outside the record that must be raised by way of a motion pursuant to CPL article 440 (*see People v Culver*, 94 AD3d 1427, 1428 [4th Dept 2012], *lv denied* 19 NY3d 1025 [2012]*; People v Dimmick*, 53 AD3d 1113, 1114 [4th Dept 2008], *lv denied* 11 NY3d 831 [2008]).

We reject defendant's final contention, that the court erred in refusing to suppress physical evidence obtained following a traffic

stop. The officer who stopped the vehicle in which defendant was a passenger was justified in doing so in order to execute a valid arrest warrant for defendant (*see generally People v Bushey*, 29 NY3d 158, 164 [2017]) and, furthermore, the stop was justified because the officer observed the driver throw a cigarette butt out of the window in violation of the Vehicle and Traffic Law (*see* § 1220 [a]; *People v Robinson*, 97 NY2d 341, 349 [2001]; *People v Hightower*, 186 AD3d 926, 928-929 [3d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Wallace*, 153 AD3d 1632, 1633 [4th Dept 2017]). The police lawfully searched the vehicle after receiving the owner's voluntary consent (*see People v Tantao*, 178 AD3d 1391, 1393 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]; *People v Rivera*, 83 AD3d 1370, 1372 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1181

KA 13-01552

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, 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 (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered January 8, 2010. 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 reversed on the law and the matter is remitted to Supreme Court, Monroe County, for resentencing.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, robbery in the second degree (Penal Law § 160.10 [2] [b]) and attempted robbery in the third degree (§§ 110.00, 160.05; *People v Caswell*, 56 AD3d 1300, 1301 [4th Dept 2008], *lv denied* 11 NY3d 923 [2009], *reconsideration denied* 12 NY3d 781 [2009], *cert denied* 556 US 1286 [2009]), and he now appeals from a resentence with respect to the count of attempted robbery in the third degree.

We agree with defendant's contention in his main and pro se supplemental briefs, as the People correctly concede, that he was deprived of his right to counsel when Supreme Court permitted defendant to represent himself at the resentencing proceeding without properly ruling on defendant's multiple requests for assignment of counsel (*see generally People v Wardlaw*, 6 NY3d 556, 559 [2006]; *People v Allen*, 99 AD3d 1252, 1253 [4th Dept 2012]). Denial of the right to counsel during a particular proceeding does not invariably require remittal for a repetition of the tainted proceeding, or any other remedy, inasmuch as "the remedy to which a defendant is entitled ordinarily depends on what impact, if any, the tainted proceeding had on the case as a whole" (*Wardlaw*, 6 NY3d at 559). Here, however, the court's failure to consider defendant's motion for assigned counsel had an adverse impact on the resentencing proceeding because the

absence of counsel prevented defendant from, inter alia, adequately contesting his adjudication as a second felony offender and arguing against the imposition of the maximum sentence permissible under the law. We therefore reverse the resentence and remit the matter to Supreme Court for resentencing, and we direct the court to ensure that defendant is afforded his right to counsel (*see People v Grueiro*, 74 AD3d 1232, 1233 [2d Dept 2010], *lv denied* 15 NY3d 852 [2010]; *cf. People v Johnson*, 94 AD3d 1496, 1497 [4th Dept 2012], *affd* 20 NY3d 990 [2013]; *People v Adams*, 52 AD3d 243, 243-244 [1st Dept 2008], *lv denied* 11 NY3d 829 [2008]).

In light of our determination, defendant's remaining contentions in his main brief are academic.

Finally, defendant's contentions in his pro se supplemental brief with respect to his motion to set aside the sentence pursuant to CPL 440.20 are not properly before us on appeal from the resentence (*see People v Morris*, 94 AD3d 1450, 1451-1452 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *People v Moore*, 81 AD3d 1325, 1325 [4th Dept 2011], *lv denied* 16 NY3d 897 [2011]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1182

KAH 19-01800

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WILLIAM MCCOY, PETITIONER-APPELLANT,

V ORDER

THE PEOPLE OF THE STATE OF NEW YORK, ELIZABETH
O'MEARA, SUPERINTENDENT, WATERTOWN CORRECTIONAL
FACILITY AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

RYAN JAMES MULDOON, AUBURN, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered April 5, 2019 in a habeas corpus proceeding. The judgment denied 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: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1186

CA 20-00755

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

FIRST CITIZENS COMMUNITY BANK,
PLAINTIFF-RESPONDENT,

V ORDER

DAVID L. FLEET AND TRACY L. FLEET,
DEFENDANTS-APPELLANTS.

ROTHENBERG LAW, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (JEFFREY D. COREN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 5, 2020. The order and judgment granted the motion of plaintiff for leave to reargue and, upon reargument, denied the cross motion of defendants for summary judgment and granted the motion of plaintiff for summary judgment.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1191

TP 20-00876

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

IN THE MATTER OF J-BON, LLC, TOM VOUMARD AND ROBERT SMITH, PETITIONERS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, CITY OF SYRACUSE POLICE DEPARTMENT AND KENTON T. BUCKNER, CHIEF OF POLICE, RESPONDENTS.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR PETITIONERS.

KRISTEN E. SMITH, CORPORATION COUNSEL, SYRACUSE (SARAH A. BARTELS OF COUNSEL), FOR RESPONDENTS.

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, Onondaga County [Anthony J. Paris, J.], entered July 13, 2020) to review a determination of respondents. The determination, among other things, declared the subject property to be a public nuisance and ordered the property closed for a period of 12 months.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul a determination, following a hearing, finding that a public nuisance existed on petitioners' rental property and ordering closure of the property for a period of 12 months pursuant to the Syracuse Nuisance Abatement Ordinance (Revised General Ordinances of City of Syracuse [City Ordinance]) § 45-4 (c). The finding that a public nuisance as defined by City Ordinance § 45-2 existed on the property was based on the evidence that, within a 24-month period, the police made five arrests for controlled substance and marihuana offenses under Penal Law articles 220 and 221. We confirm the determination.

Initially, inasmuch as petitioners "failed to include in their brief numerous issues raised in their petition, those issues are deemed abandoned" (*Matter of Brenda H. v Johnson*, 269 AD2d 787, 787 [4th Dept 2000], *appeal dismissed* 95 NY2d 790 [2000], *cert denied* 531 US 935 [2000]; *see Matter of Sarkis v Monroe County Dept. of Human Servs.*, 133 AD3d 1344, 1344 [4th Dept 2015]). Contrary to

petitioners' contention, upon our review of the record, we conclude that there is substantial evidence to support the determination that closing the premises for a period of 12 months was necessary to abate the public nuisance (*see* City Ordinance § 45-4 [c]; *Matter of Johnson v Police Dept. of City of N.Y.*, 178 AD2d 643, 643-644 [2d Dept 1991]). Finally, inasmuch as petitioners failed to raise their present constitutional challenge in the petition, that challenge is not properly before us (*see Matter of Bottom v Annucci*, 26 NY3d 983, 985 [2015]; *Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008]; *see also Matter of Allocca v Kelly*, 44 AD3d 308, 309 [1st Dept 2007]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1193

KA 18-00448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARY NEVERETT, DEFENDANT-APPELLANT.

HAYDEN 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 (Dennis S. Cohen, J.), rendered November 30, 2017. 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.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1202

CAF 19-01317

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

IN THE MATTER OF APRIL ASHE,
PETITIONER-RESPONDENT,

V ORDER

WILLIAM WATTS, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Allison J. Nelson, A.J.), entered May 7, 2019 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1211

KA 19-00758

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RODNEY DAVIS, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara Sheldon, J.), entered February 14, 2019. The order, insofar as appealed from, denied the motion of defendant insofar as it sought forensic DNA testing.

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1213

KA 16-01116

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. DIROMA, DEFENDANT-APPELLANT.

KRAMER LEVIN NAFTALIS & FRANKEL LLP, NEW YORK CITY (HARRY MORGENTHAU OF COUNSEL), AND TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 26, 2016. The judgment convicted defendant upon a jury verdict of tampering with a witness in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of tampering with a witness in the third degree (Penal Law § 215.11 [1]), defendant contends that the conviction is based upon legally insufficient evidence. We agree. Although the evidence established that defendant assaulted the victim in violation of an order of protection and a few days later left the victim voicemails threatening her with violence if she pressed charges against him, defendant had not yet been arrested or charged with a crime in connection with the violation of the order of protection at the time he left the voicemails. Thus, at that time, the victim was not "about to be called as a witness in a criminal proceeding" (§ 215.11; *see People v Hollenquest*, 173 AD2d 560, 560 [2d Dept 1991]; *cf.* § 215.15). Therefore, the judgment must be reversed and the indictment dismissed (*see Hollenquest*, 173 AD2d at 560).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1214

KA 15-02118

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK R. WILLIAMS, JR., DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO 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 (Spencer J. Ludington, A.J.), rendered November 19, 2015. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We agree with defendant that his waiver of the right to appeal is not valid inasmuch as County Court conflated the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Hawkins*, 94 AD3d 1439, 1439-1440 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). Thus, the record fails to establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bradshaw*, 18 NY3d 257, 264 [2011]). Further, the court's oral colloquy "utterly 'mischaracterized the nature of the right [to appeal that] . . . defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US — , 140 S Ct 2634 [2020]), inasmuch as "the court's advisement as to the rights relinquished [by defendant] was incorrect and irredeemable under the circumstances" (*id*. at 562).

To the extent that defendant challenges the voluntariness of his plea and insofar as his brief may be read as challenging the factual sufficiency of his plea allocution, those challenges are unpreserved for our review because defendant withdrew his motion to withdraw his guilty plea at sentencing (*see People v Cantey*, 161 AD3d 1449, 1450 [3d Dept 2018], *lv denied* 32 NY3d 935 [2018]). Further, this case

does not fall within the rare exception to the preservation requirement (*see People v Toxey*, 86 NY2d 725, 726 [1995], *rearg denied* 86 NY2d 839 [1995]), and we decline to exercise our power to address defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1216

KA 14-00640

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. PERKINS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 31, 2013. The judgment convicted defendant upon a jury verdict of murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see generally Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495). Defendant failed to preserve for our review his further contention that the prosecutor improperly elicited hearsay testimony to establish an alleged motive for defendant shooting the two victims and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We also reject defendant's contention that the sentence is unduly harsh and severe. Finally, we have reviewed defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1218

KA 16-00760

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLY T. DAVIS, DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 14, 2016. The judgment convicted defendant upon his plea of guilty of 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 sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that his waiver of the right to appeal was confusing and inaccurate and thus invalid. We agree. We conclude on this record that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*id.* at 567, citing NY Model Colloquies, Waiver of Right to Appeal).

Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1221

CA 20-00281

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

BRUCE D. KING, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KEITH D. HORTON, JR., DECEASED, PLAINTIFF-APPELLANT,

V ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER, ST. JOSEPH'S HOSPITAL HEALTHCARE CENTER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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

GALE, GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 14, 2020. The order, among other things, granted the motion of defendants St. Joseph's Hospital Health Center and St. Joseph's Hospital Healthcare Center for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 23, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1226

KA 20-00056

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEANA A. MARINO, DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered December 5, 2019. The judgment convicted defendant upon her plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). We agree with defendant that her waiver of the right to appeal is invalid. County Court "mischaracterized the nature of the right that defendant was being asked to cede by portraying the waiver as an absolute bar to defendant taking an appeal, and there is no clarifying language in . . . the oral . . . waiver indicating that appellate review remained available for certain issues" (*People v Wasyl*, 186 AD3d 1071, 1071 [4th Dept 2020]; *see People v Thomas*, 34 NY3d 545, 564-565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1228

KA 16-01154

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH P. GANT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 12, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree (three counts) and 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, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and three counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]). We affirm.

Defendant initially contends that he was convicted of three counts of what he characterizes as the "non-existent crime" of "transferred intent attempted murder." Although exempt from the preservation requirement (*see People v Martinez*, 81 NY2d 810, 812 [1993]), defendant's argument was expressly rejected by the Court of Appeals in *People v Fernandez* (88 NY2d 777, 782-783 [1996]; *see also People v Wells*, 7 NY3d 51, 55-57 [2006]).

Contrary to defendant's further contention, the evidence is legally sufficient to support the conviction of murder in the second degree and attempted murder in the second degree, and the verdict on those crimes is not against the weight of the evidence when viewed in light of the elements of the crimes and the justification instruction as given to the jury (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, the trial evidence overwhelmingly disproved defendant's justification defense (*see People v Cruz*, 175 AD3d 1060, 1060-1061 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Newland*, 83 AD3d 1202, 1204-

1205 [3d Dept 2011], *lv denied* 17 NY3d 798 [2011]), and an acquittal on justification grounds would have been unreasonable on this record (*see People v Durand*, 188 AD2d 747, 747 [3d Dept 1992], *lv denied* 81 NY2d 884 [1993]). We note, however, that the People's brief incorrectly asserts that reversal on weight of the evidence grounds "is warranted only where the verdict is 'plainly unjustified by the evidence' " (*see People v Sanchez*, 32 NY3d 1021, 1022-1023 [2018]). The proper standard for conducting weight of the evidence review is set forth in *People v Delamota* (18 NY3d 107, 116-117 [2011]) and *Danielson* (9 NY3d at 349).

Defendant waived his challenge to the jury instructions concerning mens rea by expressly consenting to the subject charge (*see People v Capella*, 180 AD3d 498, 499 [1st Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Speed*, 226 AD2d 1090, 1091 [4th Dept 1996], *lv denied* 88 NY2d 969 [1996]). Defendant's related claim of ineffective assistance is raised for the first time in his reply brief and thus is not properly before us (*see People v Jones*, 300 AD2d 1119, 1120 [4th Dept 2002], *lv denied* 2 NY3d 801 [2004]). The sentence is not unduly harsh or severe. Defendant's remaining contention does not warrant modification or reversal of the judgment.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1229

KA 18-01631

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

Z.H., DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, SPECIAL PROSECUTOR, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 20, 2018. 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 reversed as a matter of discretion in the interest of justice, the conviction is deemed vacated and replaced by a youthful offender finding, and the matter is remitted to Onondaga County Court for sentencing.

Opinion by TROUTMAN, J.:

On appeal from a judgment convicting her upon her plea of guilty of assault in the second degree (Penal Law § 120.05 [4]), defendant contends that she should be afforded youthful offender status. We agree.

I

This case arose from a fight in a high school that defendant attended as a student. Two days before the fight, another student began threatening defendant in person and over social media. Defendant avoided school the day after the threats began. The next day, the other student found defendant in the hallway of the school and struck her in the face. Defendant assumed a defensive posture, putting her head down and turning away, but the other student continued to strike defendant's head and face. Within seconds, a substitute teacher (victim) intervened, positioning his body between the fighting students. Defendant, sensing only that another person had jumped into the fray, lashed out at her perceived second attacker with a knife that she had concealed in her clothing. She struck the victim twice, causing a minor but permanent injury to his hand.

Defendant was arrested and indicted. She entered a plea of guilty, and County Court agreed to consider youthful offender treatment at sentencing.

The record contains extensive presentencing materials, including a presentence report prepared by the probation department, a forensic psychological evaluation, and sentencing memoranda submitted by the defense. A letter from defendant to the victim contains what everyone agrees to be a genuine apology. In addition, the victim met with defendant in person while she was in jail and they spoke for 2½ hours in the presence of the prosecutor. The victim wrote an eloquent and detailed letter asking the court to afford defendant youthful offender status. The probation officer recommended youthful offender treatment. The prosecutor joined in that recommendation and spoke on defendant's behalf at sentencing. Nevertheless, the court denied defendant's request for youthful offender status. The court based its determination in part on the fact that felony charges were pending against defendant at the time of the fight and also considered whether she had received unduly favorable treatment as a result of her gender.

II

As a threshold matter, the court did not explicitly determine whether defendant is an eligible youth (*see* CPL 720.10 [2]). Because defendant was convicted of an armed felony, i.e., a violent felony that includes as an element "causing serious physical injury by means of a deadly weapon" (CPL 1.20 [41] [a]; *see* Penal Law §§ 70.02 [1] [c]; 120.05 [4]), she is not an eligible youth unless (i) "mitigating circumstances . . . bear directly upon the manner in which the crime was committed" or (ii) she "was not the sole participant in the crime" and her "participation was relatively minor although not so minor as to constitute a defense to the prosecution" (CPL 720.10 [3]). We conclude that the court implicitly resolved the issue in defendant's favor and that it properly did so because there are "mitigating circumstances" rendering her eligible for youthful offender treatment (*id.*; *see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]).

III

Although "a valid waiver of the right to appeal . . . forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status once a court has considered such treatment" (*People v Pacherille*, 25 NY3d 1021, 1024 [2015]), we agree with defendant that we may review the court's determination not to afford her youthful offender status inasmuch as she did not waive her right to appeal. The court referred to a waiver of the right to appeal during the plea proceeding, but no oral waiver was elicited from defendant (*see People v Norton*, 96 AD3d 1651, 1651-1652 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]). We note that the better approach is to use the Model Colloquy, which "neatly synthesizes . . . the governing principles and provides a solid reference for a better practice" (*People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US — 140 S Ct 2634 [2020], citing NY Model Colloquies, Waiver of Right to Appeal).

IV

Defendant contends that the sentencing court abused its discretion in refusing, contrary to the universal recommendation, to afford her youthful offender status and, alternatively, asks us to exercise our own discretion to grant her such status. The People respond that the court's determination was not an abuse of discretion; in response to defendant's alternative contention, however, the People note that, at sentencing, they joined in defendant's request for youthful offender treatment. Although we do not conclude that the court abused its discretion in denying defendant youthful offender status, we choose to exercise our discretion in the interest of justice to determine that defendant is a youthful offender. Accordingly, we conclude that the judgment should be reversed and the conviction deemed vacated and replaced by a youthful offender finding, and we remit the matter to County Court for sentencing on the finding (*see Keith B.J.*, 158 AD3d at 1161).

The youthful offender laws "emanate from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals" (*People v Drayton*, 39 NY2d 580, 584 [1976], *rearg denied* 39 NY2d 1058 [1976]; *see People v Amir W.*, 107 AD3d 1639, 1640 [4th Dept 2013]). The central question is whether a defendant should be afforded an "opportunity for a fresh start, without a criminal record" because such an "opportunity is likely to turn the young offender into a law-abiding, productive member of society" (*People v Rudolph*, 21 NY3d 497, 501 [2013]; *see People v Francis*, 30 NY3d 737, 741 [2018]). The factors to be considered include the nine *Cruickshank* factors, i.e., "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" (*People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *see Keith B.J.*, 158 AD3d at 1160; *Amir W.*, 107 AD3d at 1640). As discussed below, we conclude that all nine factors favor defendant.

(1) Gravity of the crime and manner in which it was committed

Although the crime is certainly a serious one, the gravity of the crime is mitigated to a great degree by the manner in which it was committed. Video of the event establishes the undisputed fact that defendant was not the aggressor in the fight. After being struck, defendant lowered her head and body into a defensive position. She was carrying a knife because she had been subjected to physical assaults and recent threats of assault, and she used the knife in self-defense. Her use of a knife, to be sure, was reckless and disproportionate to the attack that she was forced to endure, but it is equally clear that she did not intend to harm a school teacher. It

would have been better, as the court stated, for defendant to have told an adult about the bullying than for her to carry a knife. However, the adults in defendant's life had never been a source of protection: her mother had cognitive disabilities that rendered her ineffectual in this regard, her father was absent from her life, and other family members abused her. Faced with the threat of a violent attack in her school, defendant had few options—none of them good—and, although her decision to carry a knife in order to protect herself was without a doubt the wrong choice, we conclude that her use of the knife was a "hasty or thoughtless" act that cannot be seen as the serious deed of a "hardened criminal[]" (*Drayton*, 39 NY2d at 584).

(2) Mitigating circumstances

The court properly weighed that factor in defendant's favor. In addition to the mitigating factors discussed above, defendant took full advantage of the available educational opportunities while she was incarcerated, obtaining her diploma, participating in vocational programs, earning the certificates related to those programs, making frequent use of the jail's library, and earning acceptance into a college that she wished to attend upon her release.

(3) Defendant's prior criminal record

Defendant had no prior criminal convictions. Although she had been charged in prior felonies related to shoplifting incidents, those charges were dismissed in satisfaction of the guilty plea and thus were not part of her prior criminal record.

(4) Prior acts of violence

The most important evidence in the record concerning defendant's tendency towards violence is contained in the evaluation of the forensic psychologist: "Her vulnerability seemingly was heightened by her lack of aggressiveness and her unwillingness to fight others." It was precisely defendant's avoidance of violence that caused her to become a target of violence. There is only one alleged prior act of violence documented in the record. Specifically, defendant fought a store clerk who tried to stop her from shoplifting. Although that act was characterized, likely by the prosecution, as defendant having "punched" the store clerk and "slammed" her head into the ground, that characterization is called into question by the fact that the clerk was uninjured and defendant was not charged with assault. In our view, that unproved and uncharged act should be given limited weight. Such an act, according to the evaluation by the forensic psychologist, is out of character for defendant. At worst, the incident is an isolated act that does not warrant denial of youthful offender status.

(5) Recommendations in the presentence reports

Youthful offender treatment was recommended in the presentence report, by the People, and in a letter from the victim.

(6) Defendant's reputation

The court made no finding with respect to defendant's reputation, but there is plenty of information in the record. In addition to the forensic psychologist's assessment of defendant's reputation for avoiding violence, which made her a target of violence, we note the following unrefuted story about the reputation that defendant developed while in jail:

> [S]hortly before her 18th birthday, there were only two girls left on the pod. [Defendant's] mother had given her the tragically false hope that she could post her bail. Knowing what it was like to endure de facto solitary confinement, [defendant] asked that her mother be given the message to wait until the other girl's court date, when she was expected to be released, so [the other girl] would not be left alone.

We conclude that the reputation factor strongly favors defendant.

(7) Level of cooperation with authorities

The court properly found that the factor favors defendant inasmuch as she pleaded guilty and took responsibility for her actions and had already been performing community service to atone for the pending charges.

(8) Defendant's attitude toward society and respect for the law

The court appeared to weigh that factor in defendant's favor, and properly did so, upon its finding that defendant "now" has respect for the law. However, the court also noted that it did not believe that defendant had respect for the law "before." A youthful offender determination requires a forward-looking analysis. As noted above, the court must ask whether the defendant is the kind of person who deserves an "opportunity for a fresh start, without a criminal record" because such an "opportunity is likely to turn the young offender into a law-abiding, productive member of society" (*Rudolph*, 21 NY3d at 501). In other words, the court must consider the defendant's present and likely future attitude, not the attitude that the defendant displayed during the commission of the underlying crime. In our view, that factor unequivocally favors defendant because the record supports the court's finding that defendant "now" displays respect for the law.

(9) Prospects for rehabilitation and hope for a future constructive life

That factor more than any other lies at the heart of the matter, and the court properly weighed it in defendant's favor. The general consensus here is that defendant was successfully rehabilitated by the day of her sentencing.

V

In addition to the *Cruickshank* factors, the parties raised and the court considered additional matters related to equity and discrimination. We reject defendant's contention that the court abused its discretion in considering matters outside the *Cruickshank* factors. The applicable precedent states that the factors that must be considered "include" those nine factors (*Cruickshank*, 105 AD2d at 334; *see also Amir W.*, 107 AD3d at 1640), and thus, as a matter of logic, those factors were never meant to be an exhaustive list of considerations. We conclude that matters of equity and discrimination are appropriate for sentencing courts to consider. Although we do not conclude that the court abused its discretion, we urge future courts to consider whether a defendant may be facing discrimination based on protected characteristics such as race or gender and to take an intersectional approach by considering the combined effect of the defendant's specific characteristics and any bias that may arise therefrom.[1] Here, the prosecutor employed appropriate and effective restorative justice techniques and advocated for the result he believed just. We note that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Huntsman*, 96 AD3d 1387, 1388 [4th Dept 2012], *lv denied* 20 NY3d 1099 [2013], quoting *People v Santorelli*, 95 NY2d 412, 421 [2000]), and this prosecutor deserves to be commended for discharging those responsibilities here.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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[1] For example, prosecutors are far less likely to exercise their discretion to dismiss in cases against black girls, such as defendant, than they are in cases against white girls (*see* Samantha Ehrmann et al., *Girls in the Juvenile Justice System* at 13, Juvenile Justice Statistics, National Report Series Bulletin [April 2019], Office of Juvenile Justice and Delinquency Prevention, available at https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf [accessed Dec. 8, 2019]; Kim Taylor-Thompson, *Girl Talk–Examining Racial and Gender Lines in Juvenile Justice*, 6 Nev LJ 1137, 1137 [2006] ["Prosecutors dismiss seven out of every ten cases involving white girls as opposed to three out of every ten cases for African American girls"]).

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

1230

KA 18-02416

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH MCDONALD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEITH MCDONALD, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered September 22, 2015. The judgment convicted defendant upon a jury verdict of attempted murder in the first degree, attempted murder in the second degree, assault in the first degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted murder in the second degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [vii]; [b]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), attempted robbery in the first degree (§§ 110.00, 160.15 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends in his main brief that the evidence is not legally sufficient to support the conviction. Defendant failed to move for a trial order of dismissal on the ground that the evidence concerning his intent to kill was legally insufficient, and thus he failed to preserve that part of his contention for our review (*see People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). Although defendant preserved for our review his contention that the evidence with respect to his identity as the shooter was not legally sufficient, we conclude that the evidence with respect thereto, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495

[1987]). The evidence at trial established that defendant's DNA was the major contributor to DNA profiles generated from the clothing and the gun discovered near the crime scene soon after the crime, and the victim identified the items as those used by the perpetrator (*see People v Pandajis*, 147 AD3d 1469, 1470-1471 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]). 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 further contention in his main brief that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

As defendant correctly concedes, his contention in his main brief that he was denied a fair trial by prosecutorial misconduct during summation is, for the most part, unpreserved for our review because he failed to object to most of the alleged instances of misconduct (*see* CPL 470.05 [2]; *People v Davis*, 155 AD3d 1527, 1530 [4th Dept 2017], *lv denied* 31 NY3d 1012 [2018]). In any event, we conclude that the comments made by the prosecutor about the DNA evidence and other matters on summation were a fair response to defense counsel's summation and "did not exceed the bounds of legitimate advocacy" (*People v Melendez*, 11 AD3d 983, 984 [4th Dept 2004], *lv denied* 4 NY3d 888 [2005]). We reject defendant's further contention in his main brief that the sentence is unduly harsh and severe. We note, however, that the part of the judgment convicting defendant of attempted murder in the second degree must be reversed and count two of the indictment dismissed because attempted murder in the second degree is an inclusory concurrent count of attempted murder in the first degree (*see People v Fermin*, 150 AD3d 876, 880 [2d Dept 2017], *lv denied* 30 NY3d 1060 [2017]; *People v Jackson*, 41 AD3d 1268, 1270 [4th Dept 2007], *lv denied* 10 NY3d 812 [2008], *reconsideration denied* 11 NY3d 789 [2008]; *see generally People v Miller*, 6 NY3d 295, 300-301 [2006]). We therefore modify the judgment accordingly. We have considered defendant's remaining contentions in his main brief and his pro se supplemental brief and conclude that none warrants further modification or reversal of the judgment.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1231

KA 19-00971

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN MEJIA, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered April 18, 2019. The judgment convicted defendant upon his plea of guilty of burglary 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 his plea of guilty of burglary in the first degree (Penal Law § 140.30 [1]). We agree with defendant that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020]; *People v Brown*, 180 AD3d 1341, 1341 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]), and we note that the better practice is for County Court "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). We reject defendant's contention that the court abused its discretion in declining to grant him youthful offender status (*see People v Johnson*, 182 AD3d 1036, 1036 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]), and we decline defendant's request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Nicorvo* [appeal No. 2], 177 AD3d 1408, 1409 [4th Dept 2019]). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1238

CA 20-00336

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

FREDERICK SQUICCIARINI, AS ADMINISTRATOR OF THE ESTATE OF STEPHANIE A. SQUICCIARINI, DECEASED, AND FREDERICK SQUICCIARINI, INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V ORDER

PERINTON HILLS, LLC, DEFENDANT-RESPONDENT, AND DDS CONTRACTORS, LLC, DEFENDANT-APPELLANT.

VAHEY GETZ LLP, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LACY KATZEN, LLP, ROCHESTER (JACQUELINE M. THOMAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SUGARMAN LAW FIRM, LLP, BUFFALO (MARINA MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered December 9, 2019. The amended order, insofar as appealed from, denied in part the cross motion of defendant DDS Contractors, LLC, to compel certain discovery from defendant Perinton Hills, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 30, August 13, and September 16, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1246

KA 18-01218

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON J. LEE, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered April 16, 2018. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), arising from two separate incidents in which defendant sold crack cocaine to a confidential informant. Defendant contends that the verdict is against the weight of the evidence. 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 that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition to the testimony of the confidential informant who purchased the crack cocaine from defendant on both occasions, the People presented audio recordings of the transactions, text messages between the informant and defendant, the testimony of two law enforcement officers who supervised the informant and monitored those transactions, a video surveillance recording of one of the transactions, and evidence from an expert in the field of forensic chemistry who tested the substance sold on each occasion and confirmed that those substances contained cocaine (*see People v Reid*, 173 AD3d 1663, 1664-1665 [4th Dept 2019]). Thus, to the extent that the informant's credibility was a significant factor in the jury's determination of the counts of conviction, "[t]he credibility determination is a task within the province of the jury and its judgment should not be lightly disturbed" (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]; *see People v Coleman*, 278 AD2d 891, 891 [4th Dept 2000], *lv denied* 96 NY2d 798 [2001]). Furthermore, in light of the overwhelming evidence of

defendant's guilt, any error in Supreme Court's refusal to suppress defendant's statements is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1248

KA 18-00591

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASEAN L. SHANNON, ALSO KNOWN AS KASEAN SHANNON,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 17, 2015. The judgment convicted defendant upon his plea of guilty of sexual abuse in the first 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 plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted rape in the first degree (§§ 110.00, 130.35 [2]) and incest in the third degree (§ 255.25). As a preliminary matter, we note that the People correctly concede in both appeals that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 553-556, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Contrary to defendant's contention in both appeals, County Court did not abuse its discretion in failing to order sua sponte a competency hearing pursuant to CPL 730.30 (1) during the sentencing proceeding. The fact that the presentence report reflected defendant's history of mental illness did not by itself call into question defendant's competence (*see People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Duffy*, 119 AD3d 1231, 1233 [3d Dept 2014], *lv denied* 24 NY3d 1043 [2014], citing *People v Tortorici*, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]). Here, the court did not receive any "information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted [it] to the possibility that defendant could neither understand the proceedings or appreciate their

significance, nor rationally aid his attorney in [the] defense" (*People v Winebrenner*, 96 AD3d 1615, 1616 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012] [internal quotation marks omitted]). The court therefore did not have " 'reasonable ground[s] . . . to believe that the defendant was an incapacitated person,' " and so it was "under no obligation to issue an order of examination" (*People v Morgan*, 87 NY2d 878, 880 [1995]).

Finally, we conclude that the sentence in each appeal is not unduly harsh or severe, particularly given that the court imposed concurrent sentences of incarceration, four of which were imposed for sexual crimes against four separate victims on four separate dates. Thus, we conclude that "[t]he mitigating factors that defendant proffers in his brief are unexceptional, and they are more than fully accounted for by the agreed-upon, midrange sentence imposed" by the court (*People v Wellington*, 158 AD3d 1269, 1269 [4th Dept 2018], *lv denied* 31 NY3d 1018 [2018]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1249

KA 18-00594

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASEAN L. SHANNON, ALSO KNOWN AS KASEAN SHANNON,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 17, 2015. The judgment convicted defendant upon his plea of guilty of attempted rape in the first degree, sexual abuse in the first degree, incest in the third degree and criminal contempt in the first degree.

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

Same memorandum as in *People v Shannon* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1250

CAF 19-01536

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF JOHN F. MCINTOSH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN A. MCINTOSH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered June 21, 2019 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the authority of the Referee to hear and determine the matter, and the order is affirmed without costs.

Memorandum: Respondent appeals in appeal No. 1 from an order of protection, entered on his default, requiring him, inter alia, to remain at least 500 feet away from petitioner and to refrain from any communication with petitioner. Respondent appeals in appeal No. 2 from an order denying his motion to vacate the order of protection.

As a preliminary matter, with respect to appeal No. 2, "[t]he notice of appeal was filed prior to the entry of the order, thus rendering the notice of appeal premature" (*Consumer Solutions Reo, LLC v Giglio*, 78 AD3d 1609, 1609-1610 [4th Dept 2010]). Although we may treat the premature notice of appeal as valid as a matter of discretion in the interest of justice (*see* CPLR 5520 [c]), we decline to do so here (*see Thornton v City of Rochester*, 160 AD3d 1446, 1446 [4th Dept 2018]; *Matter of Justeen T.*, 17 AD3d 1148, 1148 [4th Dept 2005]).

With respect to appeal No. 1, respondent contends that the record does not establish that he consented to having the Referee hear and determine the matter. Initially, "[w]here, as here, the order of protection was issued upon the appellant's default, review is limited to matters which were the subject of contest below" (*Matter of Mary C. v Anthony C.*, 61 AD3d 682, 682 [2d Dept 2009] [internal quotation marks omitted]; *see James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg*

denied 19 NY2d 862 [1967]). Inasmuch as the Referee's authority to hear and determine the case was a subject of contest prior to respondent's later default, that issue is subject to review in appeal No. 1 (*see Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080-1081 [4th Dept 2019]; *Mary C.*, 61 AD3d at 682-683). Nonetheless, even assuming, arguendo, that appeal No. 1 is not moot despite the expiration of the order of protection (*see Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 670-673 [2015]; *Matter of Eric R. v Henry R.*, 179 AD3d 554, 554 [1st Dept 2020]), we reject respondent's contention. Based on our review of the record, we conclude that the order of protection "do[es] not lack the essential jurisdictional predicate of [respondent's] consent to have the matter[] heard and decided by the Referee" (*Matter of Mattice v Palmisano*, 159 AD3d 1407, 1408 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018] [internal quotation marks omitted]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1251

CAF 20-00923

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF JOHN F. MCINTOSH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN A. MCINTOSH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered September 19, 2019 in a proceeding pursuant to Family Court Act article 8. The order, among other things, denied respondent's motion to vacate a default order of protection.

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

Same memorandum as in *Matter of McIntosh v McIntosh* ([appeal No. 1] — AD3d — [Dec. 23, 2020] [4th Dept 2020]).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1252

CA 19-01354

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

KIMBERLY COLE, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF MARK COLE, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAFETY-KLEEN SYSTEMS, INC., ET AL., DEFENDANTS,
AND BRENNTAG NORTHEAST, LLC, DEFENDANT-APPELLANT.

MONTGOMERY MCCRACKEN WALKER & RHOADS LLP, PHILADELPHIA, PENNSYLVANIA (ALBERT L. PICCERILLI, OF THE PENNSYLVANIA AND NEW JERSEY BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOCKS LAW FIRM PLLC, NEW YORK CITY (JANET C. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 24, 2019. The order denied the motion of defendant Brenntag Northeast, LLC, to dismiss the third amended complaint against it.

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

Memorandum: Brenntag Northeast, LLC (defendant) appeals from an order denying its motion to dismiss the third amended complaint against it for lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). Defendant's sole contention is that the New York courts cannot constitutionally exercise personal jurisdiction over it because the tortious act allegedly occurred outside New York. We reject that contention. CPLR 302 (a) (3) authorizes personal jurisdiction under certain circumstances in which the tortious act occurs outside New York, and defendant does not dispute plaintiff's assertion that CPLR 302 (a) (3) (ii) applies here. Moreover, it is well established that exercising personal jurisdiction under CPLR 302 (a) (3) will contravene the Federal Constitution only in " 'rare' " cases (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 300 [2017], quoting *Rushaid v Pictet & Cie*, 28 NY3d 316, 331 [2016], *rearg denied* 28 NY3d 1161 [2017]; *see Williams v Beemiller, Inc.*, 33 NY3d 523, 535 [2019, Feinman, J., concurring]), and defendant does not argue that it lacks the minimum contacts with New York necessary to satisfy the demands of the Federal Constitution (*cf. Williams*, 33 NY3d

at 527-531).

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

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

1260

CA 20-00783

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF MAUREEN ANNE MCMASTER BURMESTER, PETITIONER-RESPONDENT,

V ORDER

CHESTER ANTHONY MCMASTER AND RAYMOND DALE MCMASTER, AS SUCCESSOR TRUSTEES OF THE REVOCABLE TRUST OF GLORIA BUGNI MCMASTER JUHN, DECEASED, RESPONDENTS-APPELLANTS.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Livingston County (Robert B. Wiggins, S.), entered December 27, 2019. The order granted the motion of petitioner for a judicial accounting.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 20, 2020,

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

Entered: December 23, 2020

Mark W. Bennett
Clerk of the Court

MOTION NO. (87/02) KA 00-02959. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EVERTON HIBBERT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (699/06) KA 05-01283. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARVIN D. VASSAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (788/06) KA 04-02067. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL GAFFNEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (1235/19) KA 01-01201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DENNIS TIMMONS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND WINSLOW, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (1299/19) CA 18-02343. -- FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, V CLAUDE TORTORA, ALSO KNOWN AS CLAUDE TOTORA, ALSO KNOWN AS CLAUDE T. TORTORA, DEFENDANT-RESPONDENT, ET

AL., DEFENDANTS. (ACTION NO. 1.) CLAUDE TORTORA, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF JACQUELINE SQUITIERI, DECEASED, PLAINTIFF-RESPONDENT, V FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT. (ACTION NO. 2.) (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (40/20) CA 19-00675. -- LAUREN D. DZIWULSKI, PLAINTIFF-RESPONDENT, V LISA TOLLINI-REICHERT, M.D., DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., CURRAN, WINSLOW, AND DEJOSEPH, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (189/20) CA 18-02000. -- STEPHANIE L. AND PETER L., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF M.L., AN INFANT, PLAINTIFFS-RESPONDENTS, V HOUSE OF THE GOOD SHEPHERD AND COUNTY OF ONEIDA, DEFENDANTS-APPELLANTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (199/20) CA 19-01912. -- CHRISTA CONSTRUCTION, LLC, PLAINTIFF-RESPONDENT, V VANGUARD LIGHT GAUGE STEEL BUILDINGS, A DIVISION OR SUBSIDIARY OF SHELTER2HOME, LLC, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (355/20) CA 19-01778. -- JEFFREY D. CONRAD AND KATHERINE M. CONRAD, PLAINTIFFS-RESPONDENTS, V HOLIDAY VALLEY, INC., AND WIN-SUM SKI CORP., DOING BUSINESS AS HOLIDAY VALLEY RESORT, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (389/20) CA 18-01429. -- BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT, V AGOSTINHA R. LANDO, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (412/20) CA 19-01975. -- IN THE MATTER OF EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. LYNN M. STOCK, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JAMES G. STOCK, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V AIR & LIQUID SYSTEMS CORP., AS SUCCESSOR BY MERGER TO BUFFALO PUMPS, INC., ET AL., DEFENDANTS, AND JENKINS BROS., DEFENDANT-APPELLANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (815/20) CA 19-02189. -- GEOFFREY DUBEY, PLAINTIFF-APPELLANT, V RONEN ZOUR AND ROC CITY PARTNERS, LLC, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 23, 2020.)

MOTION NO. (832/20) CA 19-01813. -- BRYAN G. BROCKWAY, PLAINTIFF-RESPONDENT, V COUNTY OF CHAUTAUQUA, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

KA 17-01724. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES GRAHAM, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of manslaughter in the first degree (Penal Law § 125.20 [1]), and was sentenced to a determinate term of imprisonment of seventeen years and five years of postrelease supervision. Defendant’s assigned appellate counsel

has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38 [4th Dept 1979]). However, a nonfrivolous issue exists as to whether defendant's waiver of the right to appeal was valid. Therefore, we relieve counsel of her assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Monroe County Court, Victoria M. Argento, J. - Manslaughter, 1st Degree). PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)

KA 13-01965. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDRE J. PORTIS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of attempted criminal possession of a forged instrument in the first degree (Penal Law §§ 110.00, 170.30), and was sentenced to an indeterminate term of imprisonment of two to four years. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38 [4th Dept 1979]). However, upon a review of the record we conclude that nonfrivolous issues exist with respect to whether defendant's plea was knowing, voluntary and intelligent, whether the court providently exercised its discretion in denying defendant's requests to vacate his plea and for the appointment of new counsel, and whether defendant's waiver of the right to appeal was valid. Therefore, we relieve counsel of her assignment and assign new counsel to brief these issues, as

well as any other issues that counsel’s review of the record may disclose. (Appeal from Judgment of Monroe County Court, Melchor E. Castro, A.J. - Attempted Criminal Possession Forged Instrument, 1st Degree). PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ. (Filed Dec. 23, 2020.)