SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 9, 2021

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

DECISIONS FILED JULY 9, 2021

_____	1064	CA 20 00103	DOMINICA P. In the Matter of
_____	1147	KA 18 00338	PEOPLE V MICHAEL ROMANOWSKI
_____	1154	KA 17 01652	PEOPLE V MICHAEL ROMANOWSKI
_____	1166	CA 20 00495	BILLIE JOE WHEELER V AARON P. GIBBONS
_____	1203	CA 19 02247	JOHN HARPER V LOUIS M.
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_____	497	KA 21 00170	PEOPLE V MICHAEL F. DASKIEWICH
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_____	654	KA 19 00734	PEOPLE V JAMES D. MCELWEE
_____	656	KA 17 02112	PEOPLE V TERRY B. MINTER
_____	659	KA 19 00952	PEOPLE V HOWARD JAMES, JR.

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

1064

CA 20-00103

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

IN THE MATTER OF EDWARD C. ROBINSON, ESQ.,
AS TEMPORARY GUARDIAN OF THE PROPERTY OF
JOSEPHINE T.B., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATHLEEN B., RESPONDENT-APPELLANT,
AND CARMEN B., RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (TESSA R. SCOTT OF COUNSEL), FOR RESPONDENT-APPELLANT.

DOMINICA P., RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered July 8, 2019. The order denied the motion of respondent-appellant Kathleen B. to vacate, inter alia, a prior order and judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by substituting Dominica P., as executrix of the estate of Josephine T.B., for Edward C. Robinson, Esq., as temporary guardian of the property of Josephine T.B., as the petitioner in this proceeding, and as modified the order is affirmed without costs.

Memorandum: While serving as the temporary property guardian for Josephine T.B., petitioner (hereafter, guardian) filed a turnover petition that sought, inter alia, to compel respondents to return a sum of money that allegedly belonged to Josephine (*see* Mental Hygiene Law § 81.43). Following a hearing at which respondents did not appear, Supreme Court granted the petition, directed respondents to deliver $100,760.12 to the guardian, and entered judgment jointly and severally against both respondents for that sum. Respondent Kathleen B. subsequently moved to vacate, inter alia, the court's order and judgment against her for lack of personal jurisdiction (*see* CPLR 5015 [a] [4]). The court denied Kathleen's motion to vacate, and she now appeals from that order.

We note at the outset that, in the order appealed from, the court erroneously used the caption from a prior proceeding concerning the appointment of Josephine's guardian, and we therefore amend the caption to reflect the names of the parties and the nature of this proceeding at its inception (*see generally Boyd v Town of N. Elba*, 28 AD3d 929, 930 n [3d Dept 2006], *lv dismissed* 7 NY3d 783 [2006]; *Nappi*

v Nappi, 181 AD2d 1067, 1068 [4th Dept 1992]).

We must next address another minor technical issue that the parties did not raise either in the motion court or on appeal. Josephine died at some point before the entry of the order on appeal, and the executrix of her estate, Dominica P., was never formally substituted as the petitioner in this proceeding. There is no dispute, however, that Dominica was properly served with Kathleen's motion to vacate, and Dominica never objected to adjudicating Kathleen's motion in the absence of a formal substitution order. To the contrary, Dominica—acting in her capacity as the executrix of Josephine's estate—appeared and successfully opposed Kathleen's motion on the merits. Dominica likewise appeared in this Court to oppose Kathleen's appeal. Because Dominica appeared and actively litigated Kathleen's motion on the merits, it is well established that any "defect in failing to first effect substitution was a mere irregularity" (*Wichlenski v Wichlenski*, 67 AD2d 944, 946 [2d Dept 1979]; *see Matter of Panchame v Staples, Inc.*, 178 AD3d 1174, 1176 n [3d Dept 2019]; *Aziz v City of New York*, 130 AD3d 451, 452 [1st Dept 2015]*; Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1422, 1423 [4th Dept 2011]). Moreover, to formally correct this irregularity, we now modify the order by substituting Dominica as the petitioner in this proceeding (*see* CPLR 2001; *Matter of Barone v Dufficy*, 186 AD3d 1358, 1359-1360 [2d Dept 2020]; *Durrant v Kelly*, 186 AD2d 237, 237-238 [2d Dept 1992], *appeal dismissed* 81 NY2d 758 [1992]; *Wichlenski*, 67 AD2d at 946; *see also Aziz*, 130 AD3d at 452).

Our dissenting colleagues would dismiss the appeal under these circumstances. We respectfully disagree. It is true, as the dissent notes, that a legal ruling made after the death of a party and without proper substitution "will *generally* be deemed a nullity" (*Vapnersh v Tabak*, 131 AD3d 472, 473 [2d Dept 2015] [emphasis added and internal quotation marks omitted]). As we noted above, however, all four Departments of the Appellate Division have recognized that the "general[]" rule articulated in *Vapnersh* does not apply when, as here, the decedent's proper successor appears and actively litigates on behalf of the decedent's interests (*see Panchame*, 178 AD3d at 1176 n; *Aziz*, 130 AD3d at 452; *Sills*, 81 AD3d at 1423; *Wichlenski*, 67 AD2d at 946). The foregoing exception—which fits this case perfectly—allows a court to acknowledge and ratify a de facto substitution that already occurred. Notably, the cases upon which the dissent relies did not feature active litigation by the decedent's proper successor, and the dissent does not explain its unwillingness to apply the de facto substitution exception here.

As to the merits of this appeal, we agree with Kathleen that all three of the court's rationales for denying her motion to vacate were erroneous. First, contrary to the court's determination, the substantive merit of the guardian's turnover petition could not, standing alone, confer personal jurisdiction over Kathleen. As the United States Supreme Court once observed, "[t]he question of jurisdiction *of course* precedes any inquiry into the merits" (*Oregon v Hitchcock*, 202 US 60, 68 [1906] [emphasis added]).

Second, even if a person could theoretically consent to personal jurisdiction by the mere act of sending a letter about the case to opposing counsel (*compare Matter of Kimball*, 155 NY 62, 69-71 [1898] *with Cohen v Ryan*, 34 AD2d 789, 789-790 [2d Dept 1970]), it is well established that such a letter will not be deemed to consent to personal jurisdiction so long as it makes such a jurisdictional objection among its points (*see Matter of Katz*, 81 AD2d 145, 147-149 [2d Dept 1981], *affd for reasons stated* 55 NY2d 904 [1982]; *Matter of Sessa v Board of Assessors of Town of N. Elba*, 46 AD3d 1163, 1166 [3d Dept 2007]; *Matter of Hauger v Hauger*, 275 AD2d 953, 954 [4th Dept 2000]). Thus, contrary to the court's determination, Kathleen's pre-hearing letter to the guardian did not consent to personal jurisdiction because the letter explicitly objected to exercising personal jurisdiction over her in this proceeding (*see Katz*, 81 AD2d at 149).

Third, and contrary to the court's final determination, Kathleen's alleged appearance in a separate criminal action arising from the same underlying facts is irrelevant to the existence of personal jurisdiction over her in this Mental Hygiene Law § 81.43 turnover proceeding. It is well established that a party's "position in a different case, in a different forum, with different [opponents] . . . has no bearing on whether personal jurisdiction exists over [that party] in this case" (*Dumler v Wright Med. Tech., Inc.*, 2018 WL 576848, *8 [ND Iowa, Jan. 26, 2018, No. C71-2033-LTS]; *see Klinghoffer v S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F2d 44, 50 n 5 [2d Cir 1991]; *Pinto-Thomaz v Cusi*, 2015 WL 7571833, *6 [SD NY, Nov. 24, 2015, 15-cv-1993 (PKC)]). Indeed, we "know[] of no authority for the assertion that personal jurisdiction over a [party] in one case confers personal jurisdiction over the [party] in a separate case" (*Kim v Magnotta*, 49 Conn App 203, 210, 714 A2d 38, 42 [1998], *revd on other grounds* 249 Conn 94, 733 A2d 809 [1999]).

Despite the court's erroneous analysis, the denial of Kathleen's motion to vacate was nevertheless proper because it lacked merit (*see generally PNC Bank, N.A. v Steinhardt*, 159 AD3d 999, 1000 [2d Dept 2018]; *Caracaus v Conifer Cent. Sq. Assoc.*, 158 AD3d 63, 74 [4th Dept 2017]). First, Kathleen argues that the court lacked jurisdiction over her in the turnover proceeding because the notice of petition and petition did not name her as a respondent thereto. That contention is factually incorrect; Kathleen was explicitly named as a respondent to the proceeding within the body of both the notice of petition and the petition (*cf. Matter of Loretta I.*, 34 AD3d 480, 482 [2d Dept 2006]). Although Kathleen's name was not included in the caption of either pleading, that omission was a mere irregularity that did not prejudice her (*see* CPLR 2001; *Weiss v Markel*, 110 AD3d 869, 871 [2d Dept 2013]; *Matter of Theresa BB. v Ryan DD.*, 64 AD3d 977, 977 n [3d Dept 2009], *lv denied* 13 NY3d 707 [2009]; *see also Martin v Witkowski*, 158 AD3d 131, 139 [4th Dept 2017]; *see generally Matter of Great E. Mall v Condon*, 36 NY2d 544, 549 [1975]).

Second, Kathleen contends that the court lacked personal

jurisdiction over her in the turnover proceeding because she was never served with the underlying notice of petition and petition. Kathleen's affidavit in support of her motion to vacate, however, did not deny service of those pleadings. Although Kathleen's attorney asserted in various submissions that Kathleen had not been served, the attorney's claim was not made on personal knowledge and was therefore inadmissible (*see e.g. Dae Hyun Chung v Google, Inc.*, 153 AD3d 494, 495 [2d Dept 2017]). Given Kathleen's failure to "submit an affidavit from one with personal knowledge denying receipt of the [notice of petition] and [petition]," she is not entitled to vacatur of the resulting order and judgment on that ground (*State of New York v Mappa*, 78 AD3d 926, 927 [2d Dept 2010]; *see Selene Fin. LP v Okojie*, 57 Misc 3d 1214[A], 2017 NY Slip Op 51430[U], *3 [Sup Ct, Suffolk County 2017]; *see also Simonds v Grobman*, 277 AD2d 369, 369 [2d Dept 2000]; *see generally Matter of Jean G.S.*, 59 AD3d 998, 998-999 [4th Dept 2009]).

Third, Kathleen contends that the New York courts lacked personal jurisdiction over her in the turnover proceeding because she was a Nevada resident when the proceeding was commenced. We reject that contention. New York courts may "exercise personal jurisdiction over a non-domiciliary [where] two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process" (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]), and Kathleen does not argue that exercising personal jurisdiction over her would contravene either CPLR 302 or due process. Thus, the mere fact that Kathleen was a Nevada resident when the proceeding was commenced does not relieve her from the resulting order and judgment (*see generally Cole v Safety-Kleen Sys., Inc.*, 189 AD3d 2168, 2169 [4th Dept 2020]).

All concur except PERADOTTO, J.P., and CARNI, J., who dissent and vote to dismiss the appeal in the following memorandum: We dissent and would dismiss this appeal because, in our view, the failure to substitute Josephine T.B.'s estate as the petitioner prior to entry of the order appealed from requires us to dismiss the appeal without reaching its merits. "The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015 (a). Moreover, any determination rendered without such substitution will generally be deemed a nullity" (*Vapnersh v Tabak*, 131 AD3d 472, 473 [2d Dept 2015] [internal quotation marks omitted]; *see Vicari v Kleinwaks*, 157 AD3d 975, 976 [2d Dept 2018]; *Giroux v Dunlop Tire Corp.*, 16 AD3d 1068, 1069 [4th Dept 2005]). Here, Supreme Court's decision underlying the order appealed from indicates that Josephine died prior to the entry of that order. Thus, at the time of her death and without substitution, "[the court] lacked jurisdiction to act, its order is a nullity, and this Court lacks jurisdiction to consider . . . the appeal[] from that order" (*Pavone v Walters*, 214 AD2d 1052, 1052 [4th Dept 1995]). Although the majority holds that there is an exception to the rule that "fits this case perfectly," it cites no decision from this Department overlooking such a defect where a party has died before the court below reached its decision, where substitution was never sought at any time prior to entry of the order or judgment below or prior to

the matter being submitted to this Court on appeal, and where no party addressed the substitution issue either below or on appeal. Under such circumstances, we would not overlook the failure to substitute, and would dismiss the appeal so that any motion for substitution could be resolved by the court below. To that end, because the parties have not themselves addressed the issue of substitution, it is unclear on this record whether the party who the majority would substitute is in fact still the executrix of the estate of Josephine T.B. Indeed, it is unclear whether that estate is still open.

Finally, we note that the captions on the order appealed from, Kathleen B.'s underlying notice of motion to vacate the prior order and judgment, and the prior order and judgment itself were as follows:

> In the matter of the application of
>
> DOMINICA [P.],
>
> *Petitioner*,
>
> Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Person and Property of
>
> JOSEPHINE T. [B.],
>
> *A person alleged to be incapacitated.*

Although the majority submits that it is merely amending the caption to, inter alia, "reflect the names of the parties," no prior caption in the proceeding to vacate the order and judgment or in the proceeding that resulted in the order and judgment listed Edward C. Robinson, Esq., Carmen B., or Kathleen B. as a party, and, indeed, throughout the order appealed from the court explicitly referred to Kathleen B. as "nonparty Kathleen [B.]" While the majority cites to authority allowing this Court to amend a caption erroneously reflecting the capacity in which a named party is being sued (*see Nappi v Nappi*, 181 AD2d 1067, 1068 [4th Dept 1992]) or where "the parties are in agreement that" another person has replaced a named party as the proper party in interest (*Boyd v Town of N. Elba*, 28 AD3d 929, 930 n [3d Dept 2006], *lv dismissed* 7 NY3d 783 [2006]), this is not such a case. Instead, here, the majority is sua sponte amending a caption to include as a party a person never so named in any caption, that even the court below identified as a nonparty, and whom herself contended was not a party. We also note that, although the majority states that "in the order appealed from, the court erroneously used the caption from a prior proceeding concerning the appointment of Josephine's guardian," the court below used the same caption as appears on the order and judgment that Kathleen B. sought to vacate.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1147

KA 18-00338

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROMANOWSKI, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered October 11, 2017. The judgment convicted defendant, upon his plea of guilty, 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, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Preliminarily, we agree with defendant that he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Powell*, 140 AD3d 401, 401 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]).

Defendant contends that County Court improperly denied his purported request to represent himself. Even assuming, arguendo, that defendant's contention survives his guilty plea (*see People v Best*, 186 AD3d 845, 846 [2d Dept 2020], *appeal dismissed* 36 NY3d 926 [2020]), we reject it on the merits because he did not " 'clearly and unconditionally' " seek to proceed pro se (*People v LaValle*, 3 NY3d 88, 106 [2004]; *see People v Ramos*, 35 AD3d 247, 247 [1st Dept 2006], *lv denied* 8 NY3d 926 [2007]). Rather, defendant merely noted the existence of his right to represent himself. Noting the existence of a right is not equivalent to invoking that right, and given that defendant never actually invoked his right to represent himself, the court had no obligation to conduct "a full inquiry . . . as to whether it should permit him to proceed pro se" (*People v Richards*, 118 AD3d 599, 600 [1st Dept 2014], *lv denied* 24 NY3d 1088 [2014]; *see People v Johnson*, 55 AD3d 328, 328 [1st Dept 2008], *lv denied* 11 NY3d 926 [2009]).

Defendant further contends that defense counsel was ineffective for failing to craft a successful motion to dismiss the indictment under CPL 190.50 (5). To the extent it survives the guilty plea, we reject defendant's contention because he "failed to establish that a successful motion [on that basis] could have been made under these circumstances" (*People v Simpson*, 173 AD3d 1617, 1620 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]; *see People v Larkins*, 153 AD3d 1584, 1586 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]).

To the extent that consecutive sentencing was not mandated by Penal Law § 70.25 (2-a), we reject defendant's argument that his statutory minimum sentence is unduly harsh or severe insofar as it runs consecutively to his prior undischarged sentence or sentences (*see People v Nunez*, 160 AD3d 1225, 1227 [3d Dept 2018]). Finally, defendant's claim that his sentence constitutes cruel and unusual punishment is unpreserved and, in any event, is without merit (*see People v Verbitsky*, 90 AD3d 1516, 1516 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1154

KA 17-01652

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROMANOWSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 16, 2016. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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 his plea of guilty, of two counts of grand larceny in the third degree (Penal Law § 155.35 [1]) under counts 9 and 10 of the indictment. Preliminarily, we agree with defendant that his 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]; *People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020]).

Relying on *People v Lopez* (71 NY2d 662, 666 [1988]), defendant contends that County Court erred in accepting his guilty plea to count 10 because, during the plea colloquy, the *prosecutor* purportedly negated a statutory element of the crime charged. Defendant's contention is unpreserved for appellate review (*see* CPL 470.05 [2]) and, in any event, it lacks merit for the following two independent reasons.

First, as the Court of Appeals repeatedly underscored in *Lopez*, only where the *"defendant's* factual recitation" negates, inter alia, a statutory element of the pleaded-to offense is the court barred from "accept[ing] the plea without making further inquiry" (71 NY2d at 666 [emphasis added]). Consequently, a guilty "plea will not be vacated where . . . *the defendant* does not negate an element of the pleaded-to offense during the colloquy" (*People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017] [emphasis added]). Here, it is undisputed that *defendant himself* said nothing during the

plea colloquy to negate a statutory element of the crime charged. Rather, the purported negation came only from the *prosecutor*. The *Lopez* rubric is thus categorically inapplicable (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *People v Seeber*, 4 NY3d 780, 781 [2005]).

Second, the prosecutor did not actually negate a statutory element of the crime to which defendant was pleading guilty under count 10, i.e., grand larceny in the third degree. Among the statutorily delineated elements of that crime is an intent to effect a permanent or quasi-permanent deprivation or appropriation of the victim's property at the time of its taking (*see* Penal Law §§ 155.00 [3], [4]; 155.05 [1]; *People v Jennings*, 69 NY2d 103, 118-119 [1986]; *Wilson v People*, 39 NY 459, 461 [1868]), and it is well established that a defendant's voluntary and prompt return of stolen property could potentially undermine that element (*see Jennings*, 69 NY2d at 116-119; *People v Camelo*, 48 AD3d 1303, 1304-1305 [4th Dept 2008]; *People v O'Reilly*, 125 AD2d 979, 979 [4th Dept 1986]). Here, however, the prosecutor never said that *defendant* returned the stolen property to the victim, much less that he did so under circumstances suggesting that he had not intended to effect a permanent or quasi-permanent deprivation or appropriation thereof. Rather, the prosecutor said only that the victim "did get the [stolen property] back," without identifying who returned the property or how that return was accomplished. Under the literal terms of the prosecutor's statement, the police could have returned the stolen property after seizing it from defendant, or defendant could have returned the stolen property in a post-arrest effort to secure leniency. Neither scenario would negate an intent to effect a permanent or quasi-permanent deprivation or appropriation of the victim's property at the time of its taking (*see e.g. People v Brooks*, 79 NY2d 1043, 1045 [1992], *cert denied* 506 US 899 [1992]). Thus, even had the prosecutor's statement been made by defendant, no "further inquiry" would have been necessary before the court accepted defendant's guilty plea to count 10 (*Lopez*, 71 NY2d at 666; *see People v Ollman*, 147 AD3d 1452, 1453 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017]; *cf. People v Burroughs*, 106 AD3d 1512, 1512 [4th Dept 2013]).

Defendant further argues that his lawyer was ineffective for failing to seek a change of venue and for failing to seek the trial judge's recusal. Defendant's argument, to the extent it survives his guilty plea (*see People v Barnes*, 32 AD3d 1250, 1251 [4th Dept 2006]), implicates matters outside the record and must therefore be raised, if at all, pursuant to CPL 440.10 (*see People v Williams*, 41 AD3d 1252, 1254 [4th Dept 2007]; *People v Harry*, 130 AD2d 591, 592 [2d Dept 1987]).

The sentence is not unduly harsh or severe. Defendant's related contention that his sentence constitutes cruel and unusual punishment is unpreserved and, in any event, is without merit (*see People v Verbitsky*, 90 AD3d 1516, 1516 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]).

Finally, the record of conviction incorrectly indicates that defendant was convicted of, and sentenced on, only one count of grand larceny in the third degree. The record of conviction must therefore be amended to reflect defendant's conviction of two counts of grand larceny in the third degree under counts 9 and 10 of the indictment as well as the corresponding consecutive sentences imposed thereon (*see generally People v Raghnal*, 185 AD3d 1411, 1414 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1166

CA 20-00495

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

BILLIE JOE WHEELER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AARON P. GIBBONS, ET AL., DEFENDANTS,
AND LARRY G. PEARSALL, DEFENDANT-APPELLANT.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (RYAN J. MILLS 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, Chautauqua County (James H. Dillon, J.), entered January 15, 2020. The order denied the motion of defendant Larry G. Pearsall 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 Larry G. Pearsall.

Memorandum: Plaintiff commenced this premises liability action to recover for injuries she sustained while riding an all-terrain vehicle (ATV) across land owned and used as a vineyard by Larry G. Pearsall (defendant). On the night in question, plaintiff was thrown from the ATV when it fell into a five-foot-deep culvert in the vineyard after the driver missed the grassy 12-foot-long crossing (bridge) that spanned the culvert. Defendant moved for summary judgment dismissing the complaint against him on the ground that he was immune from liability pursuant to General Obligations Law § 9-103. Supreme Court denied the motion, and defendant appeals. We reverse.

In determining whether defendant is entitled to immunity under General Obligations Law § 9-103, the sole issue before us is whether the vineyard where the bridge was located was "suitable" for recreational use (*see generally Cummings v Manville*, 153 AD3d 58, 60-61 [4th Dept 2017], *lv dismissed* 30 NY3d 959 [2017]). Case law has imposed the suitability requirement to limit the reach of section 9-103 to situations in which its public purpose would be served (*see Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 550-551 [1994]; *Morales v Coram Materials Corp.*, 51 AD3d 86, 91 [2d Dept 2008]). In that regard, the Court of Appeals has noted that "[t]he premise underlying section 9-103 is simple enough: outdoor recreation is good; New Yorkers need suitable places to engage in outdoor

recreation; more places will be made available if property owners do not have to worry about liability when recreationists come onto their land" (*Bragg*, 84 NY2d at 550).

To determine the suitability of a property for a recreational use, a court must ascertain whether the premises are the type of property that is both physically conducive to the particular activity or sport and appropriate for public use in pursuing the activity as recreation (*see Albright v Metz*, 88 NY2d 656, 662 [1996]; *Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45 [1989]). "A substantial indicator that property is 'physically conducive to the particular activity' is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it" (*Albright*, 88 NY2d at 662, quoting *Iannotti*, 74 NY2d at 46-47).

Here, "defendant, as the party seeking summary judgment, ha[d] the burden of establishing as a matter of law that he is immune from liability pursuant to the statute" (*Cummings*, 153 AD3d at 60). We conclude that defendant met his initial burden on the motion of establishing that the site where the accident occurred was suitable for recreational use (*see Iannotti*, 74 NY2d at 46-47; *Cummings*, 153 AD3d at 60-61). The evidence defendant submitted on the motion showed that the vineyard's dirt and grass-covered roads, as well as the bridge where the accident occurred, were physically conducive to ATV riding. Additionally, defendant established that the vineyard's roads and the bridge were appropriate for public use for recreational ATV riding based on the uncontradicted testimony of defendant Aaron P. Gibbons, an adjoining property owner, that, over a significant period of time, he and his wife had frequently driven ATVs on the vineyard's roads and the bridge and had often observed others doing the same. Defendant's testimony that he observed only one other ATV rider in the vineyard is not dispositive because, unlike the Gibbonses, he did not live near the vineyard.

We reject plaintiff's argument that our decision in *Cummings* compels denial of defendant's motion. Plaintiff equates the bridge in this case to the private road at issue in *Cummings*, in which we concluded that the defendant did not meet his burden of showing that the road was suitable for recreational use (153 AD3d at 63-64). The nature and use of the road in *Cummings*, however, was very different from that of the bridge at issue here. Specifically, the road in *Cummings* was used by three homes as their sole access to the public roadway. It was also used for residential purposes, including access by school buses. Further, in *Cummings*, a resident of one of the homes served by the road submitted an affidavit establishing that, in the 14 years he lived there, the only person he saw using an ATV on the road was the defendant in that action (153 AD3d at 63). Here, in contrast, defendant submitted evidence that the bridge was located in the vineyard and was not used merely as a means of access. He also showed that the bridge and the surrounding area had, over the course of almost two decades, been frequently used for recreation with ATVs.

Plaintiff argues that General Obligations Law § 9-103 applies

only to "undeveloped land" and therefore, because the premises were used for farming and commercial purposes, they cannot be considered suitable for recreational use. We reject plaintiff's argument because *Cummings* does not hold that premises can have only one categorization (*see* 153 AD3d at 62-64). Indeed, the Court of Appeals has expressly rejected such an approach and, therefore, we conclude that the premises here may both support commercial and farming activities and be suitable for recreational use, entitling a defendant to immunity under section 9-103 (*see Iannotti*, 74 NY2d at 42-44).

Inasmuch as plaintiff did not raise a triable issue of material fact with respect to the suitability requirement, we reverse the order, grant defendant's motion, and dismiss the complaint against him (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1203

CA 19-02247

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

IN THE MATTER OF THE APPLICATION OF JOHN HARPER, SUPERINTENDENT, AND ERIN MOSHER, MENTAL HEALTH UNIT CHIEF OF WALSH REGIONAL MEDICAL UNIT AT MOHAWK CORRECTIONAL FACILITY, PETITIONERS-RESPONDENTS,

V ORDER

LOUIS M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

KEVIN D. WILSON, ACTING DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (STEVEN J. HUNTZINGER OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered October 23, 2019 in a proceeding pursuant to Mental Hygiene Law § 33.03. The order, among other things, authorized the administration of medication to respondent over his objection for a period of up to 24 months.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1204

CA 19-02248

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

IN THE MATTER OF THE APPLICATION OF JOHN HARPER, SUPERINTENDENT, AND ERIN MOSHER, MENTAL HEALTH UNIT CHIEF OF WALSH REGIONAL MEDICAL UNIT AT MOHAWK CORRECTIONAL FACILITY, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

LOUIS M., RESPONDENT-APPELLANT. (APPEAL NO. 2.)

KEVIN D. WILSON, ACTING DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (STEVEN J. HUNTZINGER OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an amended order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered November 4, 2019 in a proceeding pursuant to Mental Hygiene Law § 33.03. The amended order, among other things, authorized the administration of medication to respondent over his objection for a period of up to 24 months.

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

Memorandum: Petitioners commenced this proceeding seeking authorization for the continued administration of a course of treatment to respondent over his objection pursuant to the parens patriae power of the State of New York (*see Matter of Sawyer [R.G.]*, 68 AD3d 1734, 1734-1735 [4th Dept 2009]; *see generally Rivers v Katz*, 67 NY2d 485, 496-498 [1986], *rearg denied* 68 NY2d 808 [1986]). Respondent is an inmate serving an 18-year sentence of imprisonment for his conviction of manslaughter in the first degree, and he suffers from schizophrenia and antisocial personality disorder. Respondent now appeals from an amended order (treatment order) that, following a hearing, authorized the continued administration, over his objection, of a regimen of the medication Haldol Decanoate, and also authorized certain alternative medication regimens, for a period of up to 24 months from the date of the treatment order. We affirm.

It is well settled that “the State may administer a course of medical treatment against a patient’s will if it establishes, by clear and convincing evidence, that the patient lacks the capacity to make a

reasoned decision with respect to proposed treatment . . . , and that 'the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments' " (*Matter of Samuel D. [Mid-Hudson Forensic Psychiatric Ctr.]*, 171 AD3d 1172, 1173 [2d Dept 2019], *appeal dismissed* 33 NY3d 1117 [2019], quoting *Rivers*, 67 NY2d at 497-498).

Here, respondent does not dispute that he lacks the capacity to make a reasoned decision with respect to his treatment. Rather, he contends that petitioners failed to establish by clear and convincing evidence that the treatment order, with respect to both the 24-month duration and the inclusion of the alternative medication regimens, was "narrowly tailored to give substantive effect to [his] liberty interest" (*Rivers*, 67 NY2d at 497). We reject respondent's contentions. With respect to the duration of the treatment order, petitioners presented, inter alia, the testimony of respondent's treating psychiatrist, who noted that respondent would be assigned to a new treating psychiatrist and who requested that Supreme Court issue an order that would be effective for a period of 24 months to allow a rapport to develop between the new treating psychiatrist and respondent. Moreover, the treating psychiatrist's evaluation reports admitted in evidence at the hearing established that respondent has a history of paranoia and suspicion of others, and of refusing to take medication. Contrary to respondent's contention, we conclude that the court properly took into consideration all of the relevant circumstances relating to the requested duration of the treatment order (*see id.* at 497-498).

With respect to the alternative medication regimens, the evaluation reports of the treating psychiatrist provided a list of the alternative medications, as well as, inter alia, the "appropriate dosages and frequencies" of those medications and their foreseeable side effects (*Matter of Tyrone M.*, 186 AD3d 604, 606 [2d Dept 2020]). In addition, one of the reports established that, with the "additional suggested medications that can be tried and maintained, [respondent was] expected to have alleviation of psychosis, diminish[ed] irritability and aggression and diminished impulsivity." Thus, under the circumstances of this case, we conclude that petitioners established by clear and convincing evidence that the treatment order should include the alternative medication regimens in question (*cf. Matter of Radcliffe M.*, 155 AD3d 956, 958 [2d Dept 2017]; *see generally Matter of Guttmacher [James M.]*, 181 AD3d 1313, 1314 [4th Dept 2020]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1210

KA 18-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKIM GRIMES, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 19, 2017. The appeal was held by this Court by order entered March 13, 2020, decision was reserved and the matter was remitted to Supreme Court, Onondaga County, for further proceedings (181 AD3d 1251 [4th Dept 2020]). The proceedings were held and completed (Gordon J. Cuffy, A.J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). We previously held this case, reserved decision, and remitted the matter to Supreme Court for a determination whether the arresting officer possessed the requisite justification to conduct the frisk of defendant after the lawful stop of the vehicle defendant was driving.

Upon remittal, a substitute Acting Justice replaced the prior Acting Justice, who had retired. The new Acting Justice did not hold a hearing; instead, he determined that his role was "to review the transcripts . . . and the findings of fact and make . . . a legal determination on the validity of . . . the frisk and whether there [were] any exclusionary rule exceptions that appl[ied]." We conclude that the substitute Acting Justice properly found the frisk to be lawful.

Contrary to defendant's contention, the substitute Acting Justice did not violate Judiciary Law § 21 in rendering his decision. That statute prohibits a trial level judge from deciding or taking part in decisions or questions, argued orally in court, when the judge "was not present and sitting therein as a judge." It does not, however, "bar a substitute judge from deciding a question of law presented in a

motion argued orally before another judge so long as a transcript or recording of the prior argument is available for review, and 'the substitute indicates on the record the requisite familiarity with the proceedings and no undue prejudice occurs to the defendant or the People' " (*People v Hampton*, 21 NY3d 277, 279 [2013]). Here, the substitute Acting Justice followed the procedure outlined in *Hampton* and made a legal determination based on the facts presented to the original Acting Justice (*see People v Massey*, 173 AD3d 1801, 1804 [4th Dept 2019]; *see generally Hampton*, 21 NY3d at 285).

We further conclude that the court properly determined that the officer had "knowledge of some fact or circumstance that support[ed] a reasonable suspicion that [defendant was] armed or pose[d] a threat to safety" (*People v Batista*, 88 NY2d 650, 654 [1996]; *see People v Daniels*, 103 AD3d 1204, 1204 [4th Dept 2013], *lv denied* 22 NY3d 1137 [2014]; *People v Goodson*, 85 AD3d 1569, 1570 [4th Dept 2011], *lv denied* 17 NY3d 953 [2011]). Defendant's vehicle stopped at a suspected drug house, and an occupant entered and exited that house quickly, which was indicative of a drug transaction. Defendant does not dispute that his vehicle was then lawfully stopped for vehicle and traffic violations. Upon approaching the stopped vehicle, the arresting officer "immediately noticed in the driver side mirror that the driver was aggressively moving around in the seat." In the officer's opinion, "[i]t looked like [the driver] was reaching behind him." Based on the officer's experience, "when you're seeing somebody moving around like that, you cautiously approach because you don't know what they're doing . . . A lot of times when they're doing that, they're trying to locate a weapon."

Inasmuch as "[i]t is well known that violence is typically associated with narcotics trafficking" (*People v Woolnough*, 180 AD2d 837, 839 [2d Dept 1992], *lv denied* 79 NY2d 1056 [1992]) and that weapons are "commonly associated with drug transactions" (*People v Contrero*, 232 AD2d 213, 214 [1st Dept 1996], *lv denied* 89 NY2d 1090 [1997]; *see People v Broadie*, 37 NY2d 100, 112-113 [1975], *cert denied* 423 US 950 [1975]), we conclude that the officer's observations combined with his knowledge that defendant was coming from a suspected drug transaction were sufficient to establish "a reasonable suspicion that [defendant was] armed or pose[d] a threat to safety" (*Batista*, 88 NY2d at 654; *see People v Carter*, 109 AD3d 1188, 1189 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *Daniels*, 103 AD3d at 1205; *cf. People v Ford*, 145 AD3d 1454, 1455 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]).

Finally, defendant contends that he was improperly sentenced as a second felony offender for three reasons, i.e., because the People failed to comply with the procedures set forth in CPL 400.21 by failing to file a predicate felony statement; because the court's response to defendant's challenges to the predicate conviction was insufficient and failed to comply with CPL 400.21; and because the court failed to make an express finding that the predicate felony was a violent felony pursuant to CPL 400.21 (7) (c).

With respect to the first reason, we conclude that defendant's

contention is not preserved for our review inasmuch as defendant failed to object to the absence of a predicate felony statement (*see People v Rohadfox*, 175 AD3d 1813, 1815 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *People v Mateo*, 53 AD3d 1111, 1112 [4th Dept 2008], *lv denied* 11 NY3d 791 [2008]). In any event, he waived that contention when he admitted the prior felony conviction in open court (*see People v Butler*, 96 AD3d 1367, 1368 [4th Dept 2012], *lv denied* 20 NY3d 931 [2012]; *People v Harris*, 233 AD2d 959, 959 [4th Dept 1996], *lv denied* 89 NY2d 1094 [1997]).

With respect to the second reason, we conclude that the court was not required to conduct a hearing because defendant was previously adjudicated to be a predicate felon, a finding that we affirmed on appeal (*People v Grimes*, 133 AD3d 1201, 1203 [4th Dept 2015]) and that is binding upon defendant here (*see* CPL 400.21 [8]; *People v Christian*, 229 AD2d 991, 991 [4th Dept 1996], *lv denied* 88 NY2d 1020 [1996], *cert denied* 543 US 841 [2004]; *see also People v Loughlin*, 66 NY2d 633, 635-636 [1985], *rearg denied* 66 NY2d 916 [1985]).

With respect to the third reason, defendant contends that, although the court repeatedly informed him that his predicate felony was a violent felony, the court failed to make an express finding that the predicate was for a violent felony "[a]t the conclusion of the hearing," as required by CPL 400.21 (7) (c). Defendant, however, raised no objection to the alleged procedural error, and we thus conclude that his contention is not preserved for our review (*see People v Hawkins*, 94 AD3d 1439, 1440 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]; *People v Hodge*, 23 AD3d 1062, 1063 [4th Dept 2005]). 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]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

1236

CA 20-00135

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

PAUL FUHLBRUCK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

3170 DELAWARE, LLC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LOSI & GANGI, BUFFALO (PATRICK J. BROWN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered January 17, 2020. The order denied the motion of plaintiff for partial summary judgment, granted the cross motion of defendant 3170 Delaware, LLC, for summary judgment and dismissed the complaint against that defendant.

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

Memorandum: Plaintiff commenced this action to recover damages pursuant to, inter alia, Labor Law § 240 (1) for injuries he sustained while cleaning the exterior windows of the store he managed, which was located at premises owned by 3170 Delaware, LLC (defendant). Plaintiff moved for partial summary judgment on the issue of liability, and defendant cross-moved for summary judgment dismissing the complaint against it. Supreme Court denied plaintiff's motion and granted defendant's cross motion, and plaintiff now appeals.

Plaintiff contends that the court erred in denying his motion and granting defendant's cross motion because he established that he was engaged in a protected activity under Labor Law § 240 (1) at the time of the accident and that defendant's failure to provide him with proper protection was the proximate cause of his injury. We reject that contention inasmuch as we conclude that plaintiff was not engaged in a protected activity under section 240 (1) when he fell.

Labor Law § 240 (1) applies to various types of cleaning projects (*see Soto v J. Crew Inc.*, 21 NY3d 562, 568 [2013]). However, other than commercial window cleaning, which is afforded protection under the statute, an activity cannot be characterized as "cleaning" under the statute if the task "(1) is routine, in the sense that it is the

type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project" (*id.*). Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors (*id.* at 568-569).

Here, plaintiff was directed by his supervisor to clean the exterior windows of the premises, a retail store. Plaintiff was provided a squeegee and told to extend its reach using a broom handle. While cleaning, plaintiff used an eight-foot ladder but worked at a maximum elevation of five feet. The top of the windows was approximately nine to ten feet above ground level. Plaintiff correctly concedes that the fourth factor does not apply in this case because he was not engaged in cleaning related to "any ongoing construction, renovation, painting, alteration, or repair project" (*id.* at 568), and we conclude that the court properly weighed the other three factors in determining that plaintiff was not engaged in the type of cleaning covered by Labor Law § 240 (1).

Defendant established that the cleaning was of the type that would be conducted routinely—i.e., on a regular schedule and with relative frequency— in a retail setting (*see Soto*, 21 NY3d at 568-569). Notably, plaintiff's district manager averred that she required that store windows be cleaned on at least a bi-monthly basis in keeping with the company's cleanliness standards. We reject plaintiff's contention that the cleaning cannot be considered "routine" because he had cleaned the exterior windows only once in the four years preceding the accident and was unaware of any other person cleaning those windows during that time. It is the generic nature of the cleaning task, rather than the particular frequency with which it is performed in a given case, that is determinative (*see id.)*. Defendant also established that the cleaning did not require any specialized equipment or unusual deployment of labor: in order to complete his work, plaintiff required only a squeegee, a broom handle, and an eight-foot ladder, all tools commonly found in a domestic setting (*see id.* at 569). Further, plaintiff worked at an elevation of approximately five feet, a height that presents an elevation-related risk comparable to that encountered during ordinary domestic or household cleaning (*see id.*; *see also Holguin v Barton*, 160 AD3d 819, 819-820 [2d Dept 2018]; *cf. Vasey v Pyramid Co. of Buffalo*, 258 AD2d 906, 906-907 [4th Dept 1999]).

Defendant thus met its initial burden on the cross motion of establishing that plaintiff was not engaged in a protected activity under Labor Law § 240 (1), and plaintiff failed to raise a triable issue of fact related to whether the statute covers his activity. In light of our determination, we need not consider plaintiff's further

contentions related to proximate cause (*see Soto*, 21 NY3d at 569).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

36

CA 20-01016

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

MICHAEL A. TAYLOR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PIATKOWSKI RITEWAY MEATS, INC.,
DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, BUFFALO (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered February 18, 2020. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff was hired by nonparty Durham Staffing, Inc. (Durham), an employment staffing agency, and was assigned to work at defendant, Piatkowski Riteway Meats, Inc. On his fifth day of work, plaintiff was injured in defendant's warehouse. He thereafter commenced this action against defendant, which moved for summary judgment dismissing the complaint, contending that, inasmuch as plaintiff was a special employee of defendant, the action was barred by the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6). We conclude that Supreme Court erred in granting defendant's motion.

Defendant failed to meet its initial burden on the motion of establishing as a matter of law that it exercised complete control over "the manner, details and ultimate result of [plaintiff's] work" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991]). The evidence submitted by defendant raised a triable issue of fact whether the agreement between Durham and defendant restricted defendant's control over plaintiff's work and thus whether Durham surrendered control over plaintiff's work to defendant (*see Evans v P.C.I. Paper Conversions, Inc.*, 32 AD3d 1310, 1311 [4th Dept 2006]; *Cobb v AMF Bowling Prods., Inc.*, 19 AD3d 1162, 1162-1163 [4th Dept 2005]; *cf. Filer v Keystone Corp.*, 128 AD3d 1323, 1325-1326 [4th Dept 2015]; *Majewicz v Malecki*, 9 AD3d 860, 861 [4th Dept 2004]; *Adams v*

North-Star Constr. Co., 249 AD2d 1001, 1001-1002 [4th Dept 1998]).

In addition, plaintiff worked at defendant's warehouse for only a few days, and there are triable issues of fact whether he was primarily trained and supervised by another Durham employee (*see VeRost v Mitsubishi Caterpillar Forklift Am., Inc.*, 124 AD3d 1219, 1221-1222 [4th Dept 2015], *lv denied* 25 NY3d 968 [2015]).

Inasmuch as defendant failed to establish, as a matter of law, that plaintiff was its special employee, the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore reverse the order, deny the motion, and reinstate the complaint.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

98

KA 19-00091

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN C. FELICIANO, DEFENDANT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, 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 December 21, 2018. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (two counts), course of sexual conduct against a child in the first degree, rape in the first degree, criminal sexual act in the first degree and criminal sexual act in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of course of sexual conduct against a child in the first degree and rape in the first degree and dismissing counts two and four of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of predatory sexual assault against a child (Penal Law § 130.96) and one count each of course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]), rape in the first degree (§ 130.35 [4]), criminal sexual act in the first degree (§ 130.50 [1]), and criminal sexual act in the second degree (§ 130.45 [1]). Defendant failed to preserve for our review his contention that County Court erred in admitting in evidence photographs depicting the victim at several different ages (*see* CPL 470.05 [2]; *People v Mandes*, 168 AD3d 764, 765 [2d Dept 2019], *lv denied* 33 NY3d 950 [2019]). In any event, most of the photographs, which were neither inflammatory nor prejudicial, were relevant to illustrate the victim's age at the time the crimes occurred and to demonstrate her changing physical appearance during the time periods in question (*see People v Khan*, 88 AD3d 1014, 1015 [2d Dept 2011], *lv denied* 18 NY3d 884 [2012]) and, even assuming, arguendo, that the court erred in admitting certain photographs due to their lack of probative value, we conclude that any error is harmless (*see People v Marra*, 96 AD3d 1623, 1626 [4th Dept 2012], *affd* 21 NY3d 979 [2013]; *People v Murray*, 140 AD2d 949, 950 [4th Dept 1988], *lv denied* 72 NY2d

960 [1988]). Furthermore, defendant was not deprived of effective assistance of counsel by defense counsel's failure to object to those photographs (*see People v Lundy*, 178 AD3d 1389, 1390 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]; *People v Lowery*, 158 AD3d 1179, 1180 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]).

Contrary to defendant's contentions, the court did not err in permitting the prosecution to elicit *Molineux* evidence that defendant had additional sexual contact with the victim both before and after the events charged in the indictment. Initially, we note that the record belies defendant's contention that the People failed to provide notice of their intent to introduce evidence regarding defendant's attacks on the victim after the events charged in the indictment. With respect to the merits, the victim's testimony concerning uncharged acts of sexual abuse was properly admitted " 'to complete the narrative of the events charged in the indictment . . . , and [to] provide[] necessary background information' " (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009]; *see People v Griffin*, 111 AD3d 1413, 1414-1415 [4th Dept 2013], *lv denied* 23 NY3d 1037 [2014]). In addition, such evidence was relevant to the forcible compulsion element of the criminal sexual act counts and to explain the victim's delay in disclosing the charged crimes and the timing of her disclosure (*see People v Brown*, 128 AD3d 1183, 1184-1186 [3d Dept 2015], *lv denied* 27 NY3d 993 [2016]; *see generally People v Leeson*, 12 NY3d 823, 826-827 [2009]). Moreover, the probative value of that evidence outweighed its potential for prejudice (*see People v Elmore*, 175 AD3d 1003, 1004 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]), and the court's limiting instructions minimized any prejudice to defendant (*see Workman*, 56 AD3d at 1157; *see also Griffin*, 111 AD3d at 1415). Although defendant further contends that the court was required to give a limiting instruction to the jury immediately after the victim testified about the subsequent bad acts, defendant failed to seek such an additional instruction and failed to object to the instructions that were given, and thus "that issue has not been preserved for our review" (*People v Williams*, 231 AD2d 868, 868 [4th Dept 1996], *lv denied* 89 NY2d 868 [1996]; *see generally People v Hymes*, 34 NY3d 1178, 1179 [2020]). In any event, in light of defendant's failure to request an additional instruction, to seek a mistrial, or to object to the instructions that were given, we conclude that the instructions that were given " 'must be deemed to have corrected the [alleged] error to the defendant's satisfaction' " (*People v Lane*, 106 AD3d 1478, 1480-1481 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013], quoting *People v Heide*, 84 NY2d 943, 944 [1994]).

Defendant also contends that the court erred in its handling of a jury note requesting a readback of the court's instructions concerning the criminal sexual act counts, i.e., counts five and six of the indictment. During the court's readback, the court eliminated certain parts of the statutory definition of oral sexual conduct that had been included in the original instruction. "The court has discretion to respond as it deems proper to an inquiry by a deliberating jury . . . , provided that the supplemental instruction is a meaningful response to the jury's inquiry" (*People v Williams*, 277 AD2d 945, 945

[4th Dept 2000], *lv denied* 96 NY2d 789 [2001]; *see People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). In determining whether the court's response constituted an abuse of discretion, "[t]he factors to be evaluated are the form of the jury's question . . . , the particular issue of which inquiry is made, the supplemental instruction actually given and the presence or absence of prejudice to the defendant" (*Malloy*, 55 NY2d at 302; *see People v Taylor*, 26 NY3d 217, 224 [2015]). Here, the court merely eliminated certain parts of the statutory definition of oral sexual conduct that did not apply to the allegations against defendant (*see* Penal Law § 130.00 [2] [a]). Consequently, we conclude that "the court's supplemental instruction, viewed together with the court's main charge, adequately conveyed the applicable principles of law to the jury and was a meaningful response to the jury's inquiry" (*People v Smith*, 21 AD3d 1277, 1278 [4th Dept 2005], *lv denied* 7 NY3d 763 [2006]; *see generally Malloy*, 55 NY2d at 301-302).

As the People correctly concede, counts two and four of the indictment, charging defendant with course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the first degree (§ 130.35 [4]), respectively, must be dismissed inasmuch as they are inclusory concurrent counts of counts one and three, respectively, charging defendant with predatory sexual assault against a child (§ 130.96) (*see People v Scott*, 61 AD3d 1348, 1349 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009]; *see also People v Lancaster*, 143 AD3d 1046, 1053 [3d Dept 2016], *lv denied* 28 NY3d 1147 [2017], *reconsideration denied* 29 NY3d 999 [2017]; *People v Slishevsky*, 97 AD3d 1148, 1151 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). We therefore modify the judgment accordingly.

Defendant further contends that the conviction is not supported by legally sufficient evidence that the crimes occurred during the time periods specified in the indictment. Although defendant raised that challenge with respect to some of the counts, he failed to raise it with respect to the criminal sexual act counts and, as a result, failed to preserve his contention for our review with respect to those two counts (*see People v Owens*, 149 AD3d 1561, 1562 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that the evidence is legally sufficient to support defendant's conviction with respect to each of the remaining counts, i.e., counts one and three, charging predatory sexual assault against a child, count five, charging criminal sexual act in the first degree, and count six, charging criminal sexual act in the second degree (*see Owens*, 149 AD3d at 1562; *People v Lawrence*, 81 AD3d 1326, 1327 [4th Dept 2011], *lv denied* 17 NY3d 797 [2011]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Additionally, viewing the evidence in light of the elements of those 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 with respect thereto (*see generally Bleakley*, 69 NY2d at 495).

Finally, defendant contends that the court relied on improper evidence at sentencing. We reject that contention. With respect to defendant's specific contention that the court erred in relying on evidence that there was another victim, we note that defendant had previously pleaded guilty to a sexual offense related to that victim, and it is well settled that, "[u]nder its discretionary sentencing power, a court may properly consider evidence of prior crimes" (*People v Naranjo*, 89 NY2d 1047, 1049 [1997]). With respect to defendant's specific contention that the court relied on biased and inaccurate information in the presentence report, the record establishes that the court redacted the information that it considered unreliable from the report and did not rely on any materially untrue assumptions or misinformation (*cf. People v Bratcher*, 291 AD2d 878, 879 [4th Dept 2002], *lv denied* 98 NY2d 673 [2002]; *see generally People v Outley*, 80 NY2d 702, 712 [1993]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

203

CA 20-00607

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

CHRISANNTHA, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARC DEBAPTISTE AND MELISSA DEBAPTISTE,
DEFENDANTS-APPELLANTS.

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

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered January 16, 2020. The order granted the motion of plaintiff for partial summary judgment on liability and for summary judgment dismissing the counterclaim, and denied the cross motion of defendants for summary judgment dismissing the complaint and for summary judgment on their counterclaim.

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

Memorandum: In this breach of contract action, defendants appeal from an order that granted plaintiff's motion for partial summary judgment on liability and for summary judgment dismissing the counterclaim and denied defendants' cross motion for, inter alia, summary judgment dismissing the complaint. In August 2016, defendants executed an agreement to purchase one of many condominiums being constructed by plaintiff. The purchase price was based on builder-grade finishes, but the agreement permitted defendants to make modifications or upgrades of various fixtures, with any difference in cost being charged to them. Of particular importance to defendants was having a closing date on or before December 30, 2016 so that they could claim a $9,000 federal tax credit. Due to the importance of that tax credit to defendants, an addendum was attached to the agreement, providing that defendants would receive a $9,000 credit from plaintiff if title could not be transferred by December 30, 2016, "through no fault of [defendants]." In addition, the addendum required plaintiff to "provide [defendants] with a list of finish selections and dates" by which defendants had to make their selections in order for plaintiff to meet the expedited closing date. In the event defendants did not make their selections by the dates set by plaintiff, and that omission was a "material cause" of plaintiff's

failure to transfer title by the deadline, defendants would not be entitled to the $9,000 credit.

The addendum further provided that, should plaintiff fail "to perform or observe any of the covenants or obligations to be performed or observed . . . prior to closing," defendants would be entitled to a return of any deposit or any other sums paid to plaintiff and to pursue an action for specific performance as their "sole remedies prior to closing." In addition, "[s]hould any conditions to [defendants'] obligations not be satisfied or waived prior to closing, [defendants] [would] have the right to terminate the Contract in which event [their] deposit" would be refunded and they would have no further liability to plaintiff.

The agreement contained a standard provision for attorney approval, stating that it was "subject to the written approval, as to form[,] of [defendants'] attorney." Defendants' attorney thereafter approved the agreement and all attachments and addenda thereto as to form, "subject to [defendants'] satisfactory receipt, review and acceptance of [the] list of finish selections and dates when [they] must notify [plaintiff] of [their] selections in order to transfer title." The attorney also added the following provision, "[defendants] may terminate the . . . [a]greement should [defendants] and [plaintiff] fail to agree on the terms of the List."

Plaintiff provided defendants with a finish selection schedule, listing all of the categories of items for which selections were required and the dates by which those decisions needed to be made in order to transfer title by the deadline. The schedule did not list the myriad of finishes available for each item. Following receipt of that schedule, defendants paid the contractually-required deposit.

Defendants failed to meet the finish selection deadlines listed in the schedule, and the parties disagree as to the cause of the delay. Regardless of the cause, it became apparent that plaintiff would not be able to transfer title by the closing deadline. Defendants' attorney subsequently wrote to plaintiff's attorney, informing plaintiff's attorney that defendants were terminating the agreement, as supplemented by the addendum (collectively, contract), "on several grounds, including but not limited to, the fact that the parties have been unable to mutually agree upon modifications, extras and other items."

Plaintiff thereafter commenced this action, asserting causes of action for breach of contract and wrongful termination. Defendants answered and asserted a counterclaim for the return of their deposit. Plaintiff then moved for partial summary judgment on liability and for summary judgment dismissing the counterclaim, and defendants cross-moved for summary judgment dismissing the complaint and on their counterclaim. Supreme Court granted the motion and denied the cross motion. We now affirm.

Defendants contend that their termination of the contract was proper as a matter of law because plaintiff failed to satisfy a

condition precedent, i.e., mutual agreement on the cost of the finish selections. They further contend that the addendum provided them with the right to terminate the contract and that their attorney's approval was subject to defendants' satisfactory receipt and acceptance of the finish selections and the parties' mutual agreement on the terms of the list. We reject all of those contentions.

Contrary to defendants' initial contention, the parties' mutual agreement concerning the cost of the finish selections was not a condition precedent to defendants' performance under the contract. "It is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 [2009]). Neither the agreement nor the addendum made the parties' agreement related to the cost of the finish selections a condition precedent to the formation of the contract or defendants' basic obligations under that contract (*see generally MHR Capital Partners LP*, 12 NY3d at 645; *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). Conditions precedent are not favored, and "[a] contractual duty will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (*Ashkenazi v Kent S. Assoc., LLC*, 51 AD3d 611, 611-612 [2d Dept 2008]).

Nothing within the four corners of the contract conditioned the formation of the contract or defendants' basic obligations under the contract on *potential, future modifications to the contract*. The contract provided that plaintiff agreed to sell, and defendants agreed to buy, a builder-grade condominium for a set price. The contract permitted modifications, but only if the parties mutually agreed to those modifications in writing. Those modifications, however, were not a condition of or required by the contract itself. Inasmuch as the remedy for any delay in the closing deadline was a monetary credit, we conclude that any failure of plaintiff to meet its obligations under the addendum did not give defendants a unilateral right to terminate the contract.

Defendants further contend that their attorney's approval, which was a contractual condition precedent (*see Moran v Erk*, 11 NY3d 452, 456 [2008]), was conditioned on the parties' agreement on the finish selections and, because the parties did not reach an agreement on the selections, there was no binding contract. We reject that contention. Where, as here, a real estate sales agreement is subject to the approval of attorneys, either for one or both parties, that agreement is "not binding and enforceable until approved by the attorneys" (*Pepitone v Sofia*, 203 AD2d 981, 981 [4th Dept 1994]; *see Moran*, 11 NY3d at 456). Although an attorney's approval or disapproval of a contract can be "for any reason or for no stated reason" (*Moran*, 11 NY3d at 459), the essential terms of the attorney approval clause must be met (*see Christ v Brontman*, 175 Misc 2d 474, 477-478 [Sup Ct,

Monroe County 1997]). As plaintiff correctly notes, the terms of the attorney approval provided defendants' attorney with three options: approve the contract, disapprove the contract or raise a curable objection to the contract, *as written* (*see id.* at 478). Nothing in that provision permitted defendants' attorney to unilaterally modify the terms of the contract by adding an additional contractual requirement.

As discussed above, neither the agreement nor the addendum made defendants' acceptance of the finish schedule, agreement on the terms of the schedule or agreement regarding the costs of the finishes a contractual requirement. All that the addendum required was that plaintiff "provide" defendants with the list of finish selections and the deadlines for those selections.

We thus conclude that plaintiff met its initial burden of establishing that defendants breached the contract, and defendants failed to raise any triable issues of fact that would warrant denial of plaintiff's motion or any basis upon which they would be entitled to judgment as a matter of law dismissing the complaint or on their counterclaim.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

220

CA 20-00268

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

DWAYNE D. TANKSLEY, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LCO BUILDING LLC, DEFENDANT-RESPONDENT,
CITYVIEW CONSTRUCTION MANAGEMENT, LLC, AND
S.A.B. SPECIALTIES, LLC, DEFENDANTS.

S.A.B. SPECIALTIES, LLC, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

BLAS ZUNIGA BUILDERS, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., BUFFALO (BRADY J. O'MALLEY OF COUNSEL), FOR DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 4, 2020. The order, among other things, granted the motion of defendant-third-party plaintiff for summary judgment seeking a conditional order of contractual indemnification against third-party defendant.

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

Memorandum: Plaintiff commenced this litigation by bringing a Labor Law and common-law negligence action against defendants LCO Building LLC (LCO) and Cityview Construction Management, LLC (Cityview), and defendant-third-party plaintiff S.A.B. Specialties, LLC (SAB), seeking to recover damages for injuries sustained by plaintiff when he fell through a skylight hole on a roof while working on a construction project. SAB subsequently commenced a third-party action against third-party defendant Blas Zuniga Builders, LLC (Blas Zuniga) for, inter alia, contractual indemnification. Thereafter, SAB moved pursuant to CPLR 3212 for summary judgment seeking a conditional order of contractual indemnification against Blas Zuniga. Blas Zuniga cross-moved pursuant to CPLR 1008 and 3212 for summary judgment dismissing plaintiff's amended complaint and all other claims against

SAB. Supreme Court, inter alia, granted SAB's motion, denied that part of Blas Zuniga's cross motion seeking to dismiss LCO's cross claims against SAB, and granted those parts of the cross motion seeking to dismiss the amended complaint and remaining claims against SAB. Blas Zuniga appeals, and we affirm.

Contrary to Blas Zuniga's contention, the court did not err in granting SAB's motion. "[T]he right to contractual indemnification depends upon the specific language of the contract" (*Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018] [internal quotation marks omitted]). The indemnification provision in the subcontract between Blas Zuniga and SAB provides, inter alia, that Blas Zuniga agreed to indemnify SAB against all claims "for or on account of any injury to any person . . . which may arise (or which may alleged to have risen) out of or in connection with performance of contract work" by Blas Zuniga. The agreement does not condition the indemnification of SAB upon a finding that Blas Zuniga was negligent or at fault (*see generally Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]). It is undisputed that Blas Zuniga was subcontracted to perform the framing of the skylights and roof and that, the day before the accident, Blas Zuniga placed pieces of plywood over the skylight holes that it cut out on the roof of the building. Consequently, we conclude that SAB established as a matter of law that plaintiff's accident arose out of or in connection with the performance of Blas Zuniga's work (*see Allington*, 167 AD3d at 1441; *Cuellar v City of New York*, 139 AD3d 996, 998 [2d Dept 2016]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 463 [1st Dept 2014]; *Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]).

Contrary to Blas Zuniga's further contention, although the subcontract was executed after plaintiff's accident, the parties did intend that the indemnification provision in the subcontract apply retroactively (*see Nephew v Klewin Bldg. Co.*, 21 AD3d 1419, 1421-1422 [4th Dept 2005]; *Elescano v Eighth-19th Co., LLC*, 13 AD3d 80, 81 [1st Dept 2004]; *Stabile v Viener*, 291 AD2d 395, 396 [2d Dept 2002], *lv dismissed* 98 NY2d 727 [2002]). "An indemnification agreement that is executed after a plaintiff's accident . . . may only be applied retroactively where it is established that (1) the agreement was made as of a date prior to the accident and (2) the parties intended the agreement to apply as of that prior date" (*Guthorn v Village of Saranac Lake*, 169 AD3d 1298, 1300 [3d Dept 2019]). Here, on October 21, 2015, representatives of SAB and Blas Zuniga spoke about the subject project and reached an oral agreement. The subcontract that memorialized the oral agreement, and that contained the indemnification provision at issue here, is dated October 23, 2015, which was one day prior to plaintiff's accident. Jaime Zuniga (Zuniga), president of Blas Zuniga, signed the subcontract on October 30, 2015. Zuniga testified at his deposition that, at the time that the work began, he understood that Blas Zuniga would be working under the terms set forth in the indemnification provisions of the subcontract, even though he had not yet signed that subcontract, and he understood that he would sign the subcontract at a later date.

Zuniga also testified that it was Blas Zuniga's custom and practice with SAB to enter into subcontract agreements every time they worked together. Zuniga testified that Blas Zuniga had executed approximately 10 prior contracts with SAB, and that each of those prior contracts included the same provisions as the subcontract at issue in this appeal. Thus, the record establishes that, prior to the accident, SAB and Blas Zuniga reached an agreement that included the indemnification provision, and they intended that their agreement "apply as of that prior date" (*id.*).

Blas Zuniga further contends that the court erred in denying that part of its cross motion seeking summary judgment dismissing LCO's cross claims against SAB. Blas Zuniga, however, failed to include in the record on appeal LCO's submissions in opposition to the cross motion. Inasmuch as it was Blas Zuniga's responsibility, as the appellant, to assemble an adequate record on appeal, and it has failed to do so with respect to this issue, we cannot review the propriety of the court's determination with respect to LCO's cross claims against SAB (*see Matter of Unczur v Welch*, 159 AD3d 1405, 1405 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286 [4th Dept 2016]). In reaching that conclusion, we have not considered Blas Zuniga's belated postargument submissions (*see generally Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1495-1496 [4th Dept 2018]).

Blas Zuniga also contends that SAB is not entitled to be indemnified for any liabilities that SAB accepted pursuant to its contract with LCO. That contention was raised in the motion court for the first time in Blas Zuniga's reply papers and is therefore not properly before us (*see generally Jacobson v Leemilts Petroleum, Inc.*, 101 AD3d 1599, 1600 [4th Dept 2012]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

227

TP 20-01347

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

IN THE MATTER OF TIP-A-FEW, INC., PETITIONER,

V MEMORANDUM AND ORDER

FRANK CALIVA, CITY OF SYRACUSE CHIEF ADMINISTRATIVE OFFICER, KENNETH J. TOWSLEY, DIRECTOR, CITY OF SYRACUSE CODE ENFORCEMENT, AND CITY OF SYRACUSE, RESPONDENTS.

HOFFMANN, HUBERT & HOFFMANN, LLP, SYRACUSE (TERRANCE J. HOFFMANN OF COUNSEL), FOR PETITIONER.

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 [Joseph E. Lamendola, J.], dated October 8, 2020) to review a determination of respondent Kenneth J. Towsley, the Director of the Division of Code Enforcement for the City of Syracuse. The determination ordered petitioner to close for one year.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determination of respondent Kenneth J. Towsley, the Director of the Division of Code Enforcement for the City of Syracuse, to close petitioner's business for a period of one year. Although the order of closure expired on December 6, 2020, we agree with petitioner that the proceeding is not moot because " 'the case presents a live controversy and enduring consequences potentially flow' " from the order of closure (*Frederick v New York State Thruway Auth.*, 143 AD3d 1267, 1268 [4th Dept 2016], quoting *Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 576 [2014]; *see Matter of Taylor v Justice Ctr. for the Protection of People with Special Needs*, 182 AD3d 815, 816 n [3d Dept 2020]). In particular, the order of closure may negatively impact petitioner's ability to obtain a business certificate of use pursuant to Article 12 of the Property Conservation Code of the City of Syracuse ([Article 12] Revised General Ordinances of the City of Syracuse, Chapter 27).

Addressing the merits, "[j]udicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether the determination is supported by substantial evidence based upon the entire record" (*Matter of Klein v City of N.Y. Dept. of Fin. Parking Violations Bur.*, 189 AD3d 1238, 1239 [2d Dept 2020]; *see* CPLR 7803 [4]; *Matter of B.P. Global Funds, Inc. v New York State Liq. Auth.*, 169 AD3d 1506, 1506 [4th Dept 2019]; *Matter of Frank J. Marianacci, Inc. v Reardon*, 156 AD3d 1422, 1423 [4th Dept 2017]). Further, "[t]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] [internal quotation marks omitted]). Contrary to petitioner's contention, we conclude that the determination was supported by substantial evidence in the record and was rational, particularly in light of the express purpose of Article 12.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

245

CA 20-00594

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

EMMET J. COTTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LASCO, INC., AND LEON SMITH, III,
DEFENDANTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (JOHN B. LICATA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered May 6, 2020. The order denied defendants' motion seeking summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified by granting the motion in part, dismissing the amended complaint against defendant Leon Smith, III and dismissing the first cause of action and the remaining causes of action against defendant Lasco, Inc. insofar as they allege exposure to toxic fumes and hazardous substances, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for two separate injuries that he sustained in the course of his employment at nonparty Niagara Lubricant, which conducted business on premises owned by defendant Lasco, Inc. (Lasco). Defendant Leon Smith, III was the sole shareholder of Lasco and also owned and was employed by Niagara Lubricant. Plaintiff alleged that he was injured when he slipped and fell as a result of grease on the floor outside of his office at Niagara Lubricant and also that he was injured by exposure to toxic fumes and hazardous materials on the premises throughout his employment. Defendants now appeal from an order denying their motion for summary judgment dismissing the amended complaint.

We agree with defendants that Supreme Court erred in denying that part of the motion for summary judgment dismissing the amended complaint against Smith, and we therefore modify the order accordingly. To the extent that plaintiff seeks damages from Smith in Smith's capacity as an employee of Niagara Lubricant, the action is

barred inasmuch as workers' compensation is the exclusive remedy for an employee injured as the result of "the negligence or wrong of another in the same employ" who acted within the scope of his or her employment (Workers' Compensation Law § 29 [6]; *see Hajdaj v Zubin*, 147 AD3d 1362, 1363 [4th Dept 2017]; *see generally Macchirole v Giamboi*, 97 NY2d 147, 150 [2001]). To the extent that plaintiff seeks damages from Smith on the basis that Smith is the sole shareholder of Lasco, defendants established their prima facie entitlement to judgment as a matter of law with respect to the claim against Smith, and plaintiff failed to raise a triable issue of fact whether the corporate veil could be pierced as to Smith (*see Mistrulli v McFinnigan, Inc.*, 39 AD3d 606, 607 [2d Dept 2007]).

We also agree with defendants that the court erred in denying the motion with respect to the first cause of action and the remaining causes of action insofar as they allege the purported exposure to toxic fumes and hazardous substances (exposure claims) because they are untimely under the applicable three-year statute of limitations (*see* CPLR 214-c [2]). We therefore further modify the order accordingly. As relevant here, that statute of limitations began to run from the date of discovery of plaintiff's injury. Discovery occurs "when the injured party discovers the primary condition on which the claim is based" and not "when the connection between . . . symptoms and the injured's exposure to a toxic substance is recognized" (*Matter of New York County DES Litig.*, 89 NY2d 506, 509 [1997]). By submitting, inter alia, plaintiff's deposition testimony and a workers' compensation claim filed by him in 2011, defendants established that the exposure claims accrued in 2003 when he "made repeated visits to [his] treating providers for symptoms described in [his] bill of particulars as caused by the [chemical] exposure" (*Brightman v Sim*, 188 AD3d 558, 559 [1st Dept 2020]), and well over three years prior to the commencement of this action in 2014. To the extent that plaintiff relies on the one-year statute of limitations provided by CPLR 214-c (4), plaintiff cannot avail himself of that limitations period because, inter alia, plaintiff explicitly linked his exposure-related symptoms to exposure at Niagara Lubricant in his workers' compensation claim, i.e., over one year prior to the commencement of this action (*see id*.).

Contrary to defendants' further contention, however, they failed to meet their initial burden of establishing that Lasco cannot be held liable for plaintiff's slip and fall on the ground that Lasco was an out-of-possession landlord and had relinquished complete control of the property to Niagara Lubricant (*see Villafane v Industrial Constr. Mgt., Ltd.*, 137 AD3d 526, 526 [1st Dept 2016]; *Thompson v Corbett*, 13 AD3d 1060, 1061-1062 [4th Dept 2004]; *Vasquez v RVA Garage*, 238 AD2d 407, 408 [2d Dept 1997]). Because defendants failed to meet their initial burden with respect to that issue, the burden never shifted to plaintiff to raise a triable issue of fact in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to defendants' contention, even assuming, arguendo, that defendants met their initial burden of establishing that they neither created nor had actual or constructive notice of a dangerous condition

that caused plaintiff's slip and fall (*see generally Majchrzak v Harry's Harbour Place Grille, Inc*., 28 AD3d 1109, 1109 [4th Dept 2006]), we conclude that plaintiff "raised an issue of fact [in opposition] whether the presence of a greasy substance [in the area where plaintiff fell] was a dangerous condition that occurred at regular intervals so as to constitute constructive notice" (*Foley v Exolon-Esk Corp.*, 261 AD2d 835, 835 [4th Dept 1999]; *see Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1378 [4th Dept 2008]), and whether defendants exacerbated the condition caused by tracked in grease by placing a carpet runner outside of plaintiff's office such that grease would accumulate in exposed areas of the floor (*see generally Mentasi v Eckerd Drugs*, 61 AD3d 650, 651 [2d Dept 2009]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

277

KA 14-01827

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE COLON, DEFENDANT-APPELLANT.

FRANK MELLACE, II, ROME, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 6, 2014. The judgment convicted defendant upon a jury verdict of murder in the second 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 directing that the sentence imposed on count two of the indictment shall run concurrently with the sentence imposed on count one of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]) in connection with an incident involving two shooters that caused the death of the victim. Defendant contends that Supreme Court erred in refusing to suppress identification testimony by two of the People's witnesses. One of those witnesses (witness one) observed the shooting and thereafter identified the two shooters by their clothing and physical size, as depicted in a surveillance video. At no time did witness one identify any person in the video as either defendant or the codefendant. The other of those witnesses (witness two), who had a long-term relationship with the codefendant, thereafter identified defendant and the codefendant as the men depicted on the surveillance video. After a pretrial hearing concerning the identifications made by, inter alia, those two witnesses, the court determined with respect to witness one that, inasmuch as that witness did not specifically identify *defendant* as one of the shooters—indeed, it was undisputed at the hearing that witness one never saw the shooters' faces—CPL 710.30 (1) (b) did not apply, and a *Wade* hearing with respect to that witness was unnecessary. With respect to witness two, the court concluded after the hearing that the identification of defendant was merely

confirmatory. On appeal, defendant contends that the court erred in refusing to conduct a *Wade* hearing with respect to witness one's identification, and erred in concluding that the identification by witness two was merely confirmatory. We conclude that defendant did not preserve his contention with respect to witness one because he did not object to the court's statement that CPL 710.30 (1) (b) did not apply and did not specifically object to the court's failure to conduct a *Wade* hearing with respect to that witness (*see generally* CPL 470.05 [2]). 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]).

We also reject defendant's contention that the court erred in determining that the identification of defendant by witness two was confirmatory. "A court's invocation of the 'confirmatory identification' exception is . . . tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" (*People v Rodriguez*, 79 NY2d 445, 450 [1992]). "This type of confirmatory identification exception to the notice and hearing requirements for suggestive pretrial identification 'may be confidently applied where the [identifying witness is a] family member[], friend[] or acquaintance[] or [has] lived [with the defendant] for a time' " (*People v Sanchez*, 75 AD3d 911, 912 [3d Dept 2010], *lv denied* 15 NY3d 895 [2010], quoting *Rodriguez*, 79 NY2d at 450). "[T]he People are not obligated to call the identifying witness at a *Rodriguez* hearing" (*People v Graham*, 283 AD2d 885, 887 [3d Dept 2001], *lv denied* 96 NY2d 940 [2001]). Here, the People met their burden of establishing that the identification of defendant by witness two was confirmatory by presenting the testimony of a police detective, which established that defendant and witness two, through her relationship with the codefendant, had known each other for at least a year and had met on several occasions (*see People v Gambale*, 158 AD3d 1051, 1052 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *People v Allen*, 231 AD2d 900, 901 [4th Dept 1996], *lv denied* 89 NY2d 918 [1996]).

Defendant also contends that the People violated their obligation under *Brady v Maryland* (373 US 83 [1963]) to disclose certain evidence that defendant alleged supported his third-party culpability defense—i.e., that the victim was potentially killed by someone other than defendant or the codefendant in retaliation for an armed robbery that the victim had allegedly committed minutes before the shooting (*see generally People v Vilardi*, 76 NY2d 67, 73 [1990]). In particular, defendant sought, inter alia, the police reports concerning the alleged robbery and the identity of the confidential informant (informant) referenced in those reports. After conducting a proceeding with the informant outside of the presence of defendant and defense counsel, the court determined, inter alia, that the informant did not possess exculpatory evidence that should be disclosed to defendant. Having reviewed the sealed transcripts pertaining to that proceeding, we conclude that the court properly determined that the People were not required under *Brady* to disclose any further

information about the informant or the informant's account of the alleged robbery, inasmuch as the informant's account was not exculpatory to defendant (*see People v Fisher*, 119 AD3d 426, 429 [1st Dept 2014], *affd* 28 NY3d 717 [2017]; *People v Hotaling*, 135 AD3d 1171, 1173 [3d Dept 2016]; *see generally People v Andre W.*, 44 NY2d 179, 185 [1978]).

We also reject defendant's contention that the court erred in admitting, under the dying declaration exception to the hearsay rule (*see generally People v Nieves*, 67 NY2d 125, 131-133 [1986]), testimony from a police officer stating that the victim identified defendant as the person who shot him. The People presented evidence establishing that, when the officer arrived at the scene shortly after the shooting, he encountered the victim, who was bleeding from his nose and mouth, was having trouble breathing, and had a gunshot wound to the center of his chest. The officer asked the victim who did that to him, and twice the victim identified defendant as the shooter. The victim thereafter asked the officer to "tell my mother I love her," before he became unresponsive and died. Contrary to defendant's contention, we conclude that the People laid a proper foundation for the testimony by establishing, inter alia, that the victim spoke "under a sense of impending death, with no hope of recovery" (*Nieves*, 67 NY2d at 132; *see also People v Elder*, 108 AD3d 1117, 1117-1118 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *People v Walsh*, 222 AD2d 735, 737 [3d Dept 1995], *lv denied* 88 NY2d 855 [1996]).

We also reject defendant's contention that the admission of the victim's dying declaration violated the Confrontation Clause of the Sixth Amendment to the United States Constitution (*see* US Const 6th, 14th Amends). We agree with defendant that the victim's declaration was a "[t]estimonial statement[] of [a] witness[ ] absent from trial" (*Crawford v Washington*, 541 US 36, 59 [2004]) because the testifying officer's question to the victim about the shooter "was designed only to learn the identity of the perpetrator," not to resolve any then-existing emergency (*People v Clay*, 88 AD3d 14, 23 [2d Dept 2011], *lv denied* 17 NY3d 952 [2011]; *cf. People v Houston*, 142 AD3d 1397, 1398 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]). Nonetheless, we conclude that the court's admission of the dying declaration did not violate the Confrontation Clause of the Sixth Amendment inasmuch as " 'the Sixth Amendment incorporates an exception for testimonial dying declarations,' " which is consistent with the recognition at common law, at the time of the ratification of that amendment, of such an exception to the right of confrontation (*Clay*, 88 AD3d at 27, quoting *Crawford*, 541 US at 56 n 6; *see also King v Woodcock*, 168 Eng Rep 352, 352-353, 1 Leach 500, 501 [1789]).

To the extent that defendant contends that the Confrontation Clause of the New York Constitution (NY Const, art I, § 6) provides greater protection than the Confrontation Clause of the United States Constitution with respect to the admission of testimonial dying declarations, we conclude that defendant's contention is not preserved for our review inasmuch as defendant failed to raise that contention before the trial court (*see* CPL 470.05 [2]), 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]).

Defendant's contention that the court should have followed the pattern Criminal Jury Instructions when instructing the jury with respect to the dying declaration testimony is not preserved for our review inasmuch as defendant did not object or take any exception to the instructions that were given (*see* CPL 470.05 [2]; *People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). To the extent that defendant also contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the dying declaration jury instructions, we conclude that defendant did not meet his burden of showing " 'the absence of strategic or other legitimate explanations for counsel's challenged [in]action[]' " (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019]). Indeed, defense counsel may have had a strategic reason for not objecting to the given instruction inasmuch as "the language of the standard charge might not have been entirely helpful to the defense"—i.e., it would have been inconsistent with defense counsel's argument on summation (*People v Butler*, 190 AD3d 464, 465 [1st Dept 2021], *lv denied* 36 NY3d 1095 [2021]).

Finally, as defendant contends and the People correctly concede, the court erred in directing that the sentence imposed on the conviction of criminal possession of a weapon in the second degree run consecutively to the sentence imposed on the conviction of murder in the second degree. Here, " '[n]o evidence was adduced at trial to establish that the defendant's possession of a gun was separate and distinct from his shooting of the victim' " (*People v Ross*, 164 AD3d 528, 529 [2d Dept 2018], *lv denied* 32 NY3d 1067 [2018]; *see People v Tripp*, 177 AD3d 1409, 1411 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]). We therefore modify the judgment accordingly.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

299

KA 19-01860

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID STELTER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 13, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of one count of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and two counts of criminal possession of a weapon in the fourth degree (§ 265.01 [4]). Preliminarily, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021]; *People v Maddison*, 191 AD3d 1393, 1393 [4th Dept 2021], *lv denied* 36 NY3d 1121 [2021]; *People v Jones*, 188 AD3d 1682, 1682 [4th Dept 2020], *lv denied* 36 NY3d 1057 [2021]). Nevertheless, contrary to defendant's contention, we conclude that defendant's sentence is not unduly harsh or severe.

We further conclude that defendant's contentions that County Court did not make a sufficient inquiry into defendant's alleged *Outley* violations and improperly enhanced his sentence are without merit (*see generally People v Outley*, 80 NY2d 702, 713 [1993]). At the plea proceeding, the court warned defendant that, if he, inter alia, failed to appear for sentencing or was arrested prior to sentencing, it would no longer be bound by the plea agreement to impose the promised sentence. Defendant failed to return to court on the scheduled sentencing date and a bench warrant was issued. When defendant was brought into court, the People informed the court that defendant had been arrested during his presentence release. After an

inquiry, the court imposed an enhanced sentence by adding an additional year to both his promised term of incarceration and period of postrelease supervision.

Defendant's failure to appear in court on the scheduled sentencing date constituted a violation of the plea agreement and for that reason alone the court was no longer bound by the agreed-upon sentence and could properly impose an enhanced sentence (*see People v Figgins*, 87 NY2d 840, 841 [1995]; *People v Capers*, 83 AD3d 1462, 1463 [4th Dept 2011], *lv denied* 17 NY3d 805 [2011]). In any event, we conclude that the court conducted a sufficient inquiry regarding the postplea arrest "to support 'the existence of a legitimate basis for' " that arrest (*People v Fumia*, 104 AD3d 1281, 1281-1282 [4th Dept 2013], *lv denied* 21 NY3d 1004 [2013]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

302

KA 19-01379

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY GOODISON, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, 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 March 9, 2018. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [a]), defendant contends that his waiver of the right to appeal is invalid and that County Court should have granted that part of his omnibus motion seeking dismissal of the indictment on speedy trial grounds pursuant to CPL 30.30 (1) (a). As the People correctly concede, defendant's waiver of the right to appeal is unenforceable because, among other reasons, 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—the right to remain silent, the right to confront one's accusers and the right to a jury trial, for example" (*People v Lopez*, 6 NY3d 248, 256 [2006]).

We nevertheless conclude that defendant abandoned his speedy trial claim by pleading guilty before the court ruled on that part of his omnibus motion and, "[a]s a consequence, defendant is 'foreclosed from pursuing the merits of [it] on appeal' " (*People v Hardy*, 173 AD3d 1649, 1650 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019], quoting *People v Alexander*, 82 AD3d 619, 624 [1st Dept 2011], *affd* 19 NY3d 203 [2012]).

The omnibus motion was filed on September 7, 2017, and the court addressed the speedy trial issue at the next appearance on September 21, 2017. During that appearance, the court stated that it thought that the People announced readiness for trial in a timely manner and

that a decision would be forthcoming. At defense counsel's request, however, the court entertained oral argument on the issue. Following oral argument, the court stated that it had received a written submission from defendant on the speedy trial issue and would "certainly look at that and see if it changes [the court's] mind," adding that "I think you have a feeling which way we're going to go."

Defense counsel thereafter submitted a letter to the court in support of the speedy trial claim stating, inter alia, "Because the [c]ourt *has not yet issued the ruling*, but has provided the parties with the basis for likely denial of the motion, I write to provide additional background and citations for the [c]ourt and the record. I respectfully request the [c]ourt consider this submission *prior to issuing its ruling on the issue*, and further request that it be made an exhibit to the record of trial" (emphasis added). At the end of the letter, which offers numerous reasons why the People's announcement of readiness was untimely, defense counsel stated: "On the above considerations, we respectfully request the [c]ourt reconsider its indicated ruling on the motion."

There is no indication in the record that the court thereafter issued a decision or ruling on that part of the omnibus motion with respect to the speedy trial claim. At the next court appearance, on October 20, 2017, defendant pleaded guilty, and no mention was made of his speedy trial claim. "Even assuming, arguendo, that the court at some point denied that part of defendant's omnibus motion," we cannot consider the merits of the contention because, without such a decision before us, defendant has failed in his "obligation to prepare a proper record" (*People v Smith*, 187 AD3d 1652, 1654 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021] [internal quotation marks omitted]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

319

KA 19-00222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 27, 2017. 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]). We affirm. We agree with defendant that his waiver of the right to appeal is invalid. Although no "particular litany" is required for a valid waiver of the right to appeal (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), here, defendant's waiver of the right to appeal is invalid because Supreme Court's oral colloquy 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 Harlee*, 187 AD3d 1586, 1587 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]). We note 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).

Additionally, although defendant signed a purported written waiver during the plea colloquy, that document did not correct any defects in the court's oral colloquy because "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because the court failed to apprise him of his right to have his guilt proven beyond a reasonable doubt and because the court coerced him into accepting the plea. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that contention (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Darling*, 125 AD3d 1279, 1279 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]; *People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]). Contrary to defendant's contention, this case does not fall within the "rare exception to the preservation rule" (*Wilkes*, 160 AD3d at 1491 [internal quotation marks omitted]; *see People v Lopez*, 71 NY2d 662, 666 [1988]).

In any event, defendant's challenge to the voluntariness of the plea is without merit. It is well settled that there is no "uniform mandatory catechism of pleading defendants" (*People v Nixon*, 21 NY2d 338, 353 [1967], *cert denied sub nom. Robinson v New York*, 393 US 1067 [1969]; *see People v Harris*, 61 NY2d 9, 16-17 [1983]), and a plea is not rendered invalid " 'solely because the [t]rial [j]udge failed to specifically enumerate all the rights to which the defendant was entitled' " (*People v Tyrell*, 22 NY3d 359, 365 [2013]), including the right to have his or her guilt proven beyond a reasonable doubt (*see People v Johnson*, 60 AD3d 1496, 1496 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]).

We also reject defendant's contention that the court coerced him into pleading guilty. That contention is belied by the record because, at the plea colloquy, defendant denied that he had been threatened or otherwise pressured into pleading guilty (*see People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]). The court's statement "that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion" (*People v Carr*, 147 AD3d 1506, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]; *see People v Green*, 140 AD3d 1660, 1661 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]). Further, the court did not coerce defendant into pleading guilty by merely commenting on the strength of the People's evidence (*see Pitcher*, 126 AD3d at 1472), or by informing him of the range of sentences he faced if he proceeded to trial and was convicted (*see Carr*, 147 AD3d at 1507; *Pitcher*, 126 AD3d at 1472; *People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]).

We reject defendant's contention that he was deprived of effective assistance of counsel. " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Singletary*, 51 AD3d 1334, 1335 [3d Dept 2008], *lv denied* 11 NY3d 741 [2008]). Here, defense counsel negotiated a favorable plea, and defendant has not demonstrated "the absence of strategic or other legitimate explanations" for counsel's alleged shortcomings at the plea colloquy

(*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]; *People v Meddaugh*, 150 AD3d 1545, 1547-1548 [3d Dept 2017]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

326

OP 20-00844

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

IN THE MATTER OF DAVID M. BLY, PETITIONER,

V MEMORANDUM AND ORDER

HON. M. WILLIAM BOLLER, ACTING SUPREME COURT JUSTICE, RESPONDENT.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul a determination of respondent. The determination denied the application of petitioner for a firearms license.

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

Memorandum: Petitioner commenced this original CPLR article 78 proceeding pursuant to CPLR 506 (b) (1) seeking to annul the determination of respondent denying petitioner's application for a firearms license. Contrary to petitioner's contention, the determination is not arbitrary and capricious. "A licensing officer has broad discretion in determining whether to grant or deny a permit under Penal Law § 400.00 (1)" (*Matter of Papineau v Martusewicz*, 35 AD3d 1214, 1214 [4th Dept 2006]; *see Matter of Bly v Boller*, 164 AD3d 1618, 1618 [4th Dept 2018]). Here, petitioner failed to report three prior arrests on his application, and "[t]he failure of [a] petitioner to report on his [or her] application [a] prior arrest[] provide[s] a sufficient basis to deny the application" (*Papineau*, 35 AD3d at 1214; *see Bly*, 164 AD3d at 1618; *Matter of DiMonda v Bristol*, 219 AD2d 830, 830 [4th Dept 1995]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

337

CA 20-00386

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

PHILIP LAMA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PETER PHAM, DEFENDANT-RESPONDENT.

STEINER & BLOTNIK, BUFFALO (RICHARD J. STEINER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered December 17, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that he sustained when he slipped and fell on a snow-covered piece of debris on defendant's property. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not establish that defendant created the dangerous condition or had actual or constructive notice of the dangerous condition. Supreme Court granted defendant's motion and dismissed the complaint. Plaintiff appeals, and we reverse.

We agree with plaintiff that defendant failed to meet his initial burden on his motion, and thus the court was required to deny the motion "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). It is well settled that "a landowner or occupier of land owes a duty to persons coming upon his or her land to keep it in a reasonably safe condition" (*Cox v McCormick Farms, Inc.*, 144 AD3d 1533, 1534 [4th Dept 2016] [internal quotation marks omitted]). Landowners are liable for a dangerous or defective condition on their property if they "created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it" (*Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318 [4th Dept 2012] [internal quotation marks omitted]). Thus, defendant, as the moving party, had the burden of " 'establishing that [he] did not create the alleged dangerous condition and did not have actual or constructive notice of it' "

(*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]).

Here, defendant failed to establish that he did not create the dangerous condition and did not have actual or constructive notice of that condition (*see generally id.*). Defendant's assertion in his moving papers that plaintiff failed to demonstrate that defendant created or had notice of the dangerous condition is insufficient to establish a prima facie case that defendant is not liable as a matter of law (*see generally Lewis v Carrols LLC*, 158 AD3d 1056, 1056 [4th Dept 2018]), inasmuch as defendant cannot meet his burden on his motion by simply " 'pointing to gaps in [his] opponent's proof' " (*Frank v Price Chopper Operating Co.*, 275 AD2d 940, 941 [4th Dept 2000]). Furthermore, defendant did not submit evidence establishing that he relinquished control over the property such that his duty to maintain the premises was extinguished as a matter of law (*see Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011], *rearg denied* 19 NY3d 856 [2012]; *see also Balash v Melrod*, 167 AD3d 1442, 1442 [4th Dept 2018]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

369

KA 19-00149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHEN MALONE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS 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 (Christopher J. Burns, J.), rendered December 18, 2018. The judgment convicted defendant, after a nonjury trial, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a nonjury verdict, of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the verdict is against the weight of the evidence with respect to his identity as the shooter. Even assuming, arguendo, that an acquittal would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence as to identity (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The testimony at trial established that defendant made admissions to his family members regarding the shooting. Additionally, although no one saw him shoot the victim, there is ample circumstantial evidence establishing defendant's identity as the shooter, including video footage of defendant shortly before the shooting, witness testimony regarding defendant's actions immediately before and after the shooting, and ballistics and DNA evidence.

Defendant failed to preserve for our review his contention that he was deprived of a fair trial because of certain allegedly improper testimony regarding prior bad acts, i.e., his father's testimony that defendant had asked him to hold onto defendant's rifle on several occasions prior to the date of the crime (*see* CPL 470.05 [2]; *People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]; *People v Woods*, 72 AD3d 1563, 1564 [4th Dept 2010], *lv denied*

15 NY3d 811 [2010]). In any event, as defendant correctly concedes, the prosecutor did not intentionally elicit that testimony and, thus, the testimony "[about] which defendant complains is not a ground for reversal" (*People v Vasquez*, 88 NY2d 561, 578 [1996]; *see People v Thigpen*, 30 AD3d 1047, 1048 [4th Dept 2006], *lv denied* 7 NY3d 818 [2006]; *People v Holton*, 225 AD2d 1021, 1021 [4th Dept 1996], *lv denied* 88 NY2d 986 [1996]).

To the extent that defendant contends that defense counsel was ineffective for failing to object to the allegedly improper testimony of defendant's father, we reject that contention. There was no allegation that the rifle in question was a "firearm" under Penal Law § 265.00 (3), and the possession of a rifle is not necessarily unlawful. Thus, the testimony of defendant's father did not constitute evidence of an uncharged crime or a prior bad act. In any event, we note that Supreme Court is presumed to have considered only competent evidence in reaching its verdict in this nonjury trial (*see People v Dyson*, 169 AD3d 917, 918 [2d Dept 2019], *lv denied* 33 NY3d 975 [2019]; *see also People v Wise*, 46 AD3d 1397, 1399 [4th Dept 2007], *lv denied* 10 NY3d 872 [2008]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

372

CA 20-01559

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

THE ESTATE OF KATHRYN ESSIG BY EXECUTOR
BARRY C. ESSIG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN F. ESSIG, DEFENDANT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES G. DISTEFANO, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 1, 2020. The order and judgment, among other things, awarded plaintiff a money judgment of $87,612.84.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the 2nd through 5th decretal paragraphs, and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiff, the executor of the estate of Kathryn Essig (decedent), commenced this breach of contract action alleging that defendant, a son of the decedent, failed to make payments pursuant to a note secured by a mortgage on real property that had been executed between defendant and the decedent. Defendant appeals from an order and judgment entered after a nonjury trial that, inter alia, awarded plaintiff damages and interest.

Defendant's contention that the evidence proffered by plaintiff at trial to establish the existence of the note violated the best evidence rule is not preserved for our review inasmuch as defendant failed to make a timely objection to the evidence on that basis (*see Kaygreen Realty Co. v IG Second Generation Partners, L.P.*, 68 AD3d 933, 934 [2d Dept 2009]; *Matter of Rutledge v Rutledge*, 269 AD2d 852, 852 [4th Dept 2000]; *see also* CPLR 4017). Defendant also contends that Supreme Court erred in admitting in evidence the decedent's bank statements because those documents were not properly authenticated. Defendant waived that contention inasmuch as defendant's counsel stated that he had no objection to the bank statements being admitted in evidence (*see Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1417 [4th Dept 2005]; *see also Matter of Cuttino v New York State Comptroller*, 80 AD3d 1067, 1068 [3d Dept 2011]). Contrary to defendant's further contention, we conclude

that the court properly admitted in evidence an amortization schedule and the decedent's tax returns after concluding that such documents were sufficiently authenticated (*cf. Fairlane Fin. Corp. v Greater Metro Agency, Inc.*, 109 AD3d 868, 870 [2d Dept 2013]; *see generally Kliamovich v Kliamovich*, 85 AD3d 867, 869-870 [2d Dept 2011]; Jerome Prince, Richardson on Evidence § 9-103, at 703-704 [Farrell 11th ed]).

We agree with defendant, however, that the court erred in determining that plaintiff was entitled to recover for the entire amount of the note. "As a general rule, in the absence of an acceleration clause providing for the entire amount of a note to be due upon the default of any one installment, [a plaintiff is] only entitled to recover past due installments and [can]not unilaterally declare the note[] accelerated" (*Libeson v Copy Realty Corp.*, 167 AD2d 376, 377 [2d Dept 1990]; *see generally Barr v Country Motor Car Group, Inc.*, 15 AD3d 985, 986 [4th Dept 2005], *lv denied* 6 NY3d 704 [2006]). "Rather, each default on each installment gives rise to a separate cause of action" (*Libeson*, 167 AD2d at 377; *see U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020]). Here, the record is devoid of any evidence of an acceleration clause and, thus, plaintiff was entitled to recover "only the amount of the installments past due at the time of trial" (*Admae Enters. v Smith*, 222 AD2d 471, 472 [2d Dept 1995]; *see Libeson*, 167 AD2d at 377).

Plaintiff nonetheless contends as an alternative ground for affirmance that the entire amount of the note is recoverable under the theory of account stated. That contention is not properly preserved for our review (*see Breau v Burdick*, 166 AD3d 1545, 1549 [4th Dept 2018]; *Davis v State of New York* [appeal No. 2], 91 AD3d 1356, 1358 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]) and, in any event, it is without merit (*see Cameron Eng'g & Assoc., LLP v JMS Architect & Planner, P.C.*, 75 AD3d 488, 489 [2d Dept 2010]).

We further agree with defendant that the court erred in awarding plaintiff damages on claims for past unpaid installments that were time-barred. "Where, as here, 'a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due' " (*U.S. Bank N.A.*, 186 AD3d at 1039; *see Sce v Ach*, 56 AD3d 457, 458 [2d Dept 2008]). As defendant correctly asserted as a defense, inasmuch as plaintiff commenced this action on July 13, 2017, any claims for missed installments that accrued prior to July 13, 2011 were time-barred by the applicable statute of limitations (*see Sce*, 56 AD3d at 458-459). We note that plaintiff's alternative ground for affirmance on that issue, i.e., that defendant should be equitably estopped from relying on the statute of limitations, is raised for the first time on appeal and thus is not properly before us (*see Mitchell v Nassau Community Coll.*, 265 AD2d 456, 456 [2d Dept 1999]; *see generally Parochial Bus Sys.*, 60 NY2d at 545-546) and, in any event, is without merit (*see Mitchell*, 265 AD2d at 457).

In light of the foregoing, we modify the order and judgment by vacating the 2nd through 5th decretal paragraphs, and we remit the matter to Supreme Court to recalculate the award of damages and interest consistent with our decision. Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant reversal or further modification of the order and judgment.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

374

CA 20-01041

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

MICHAEL JULIUS AND KELLY JULIUS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.

RICHARD S. BINKO, CHEEKTOWAGA, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 11, 2020. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the complaint is reinstated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Michael Julius (plaintiff) while he was delivering a package to the Erie County Holding Center (Holding Center). Defendant moved for summary judgment dismissing the complaint on several grounds, and Supreme Court, relying in part on *Metcalf v County of Erie* (173 AD3d 1799 [4th Dept 2019]), granted the motion on the ground that defendant owed no duty of care to plaintiffs. In light of its determination, the court did not consider the alternative grounds for summary judgment raised in defendant's motion.

We agree with plaintiffs that defendant failed to meet its initial burden of establishing as a matter of law that it owed no duty to plaintiffs, and the court thus erred in granting the motion on that ground. Indeed, defendant's own submissions in support of the motion raise triable issues of fact whether it owed plaintiffs a duty of care inasmuch as they establish that maintenance workers from the Holding Center, who were employed by defendant, dumped allegedly toxic liquid in a parking lot behind the Holding Center that came into contact with plaintiff as he was walking through the parking lot to make his delivery. Further, because plaintiffs' claim arises from the actions of maintenance workers employed by defendant during their performance of a maintenance function in a parking lot owned by defendant, the

court's reliance on *Metcalf* is misplaced. The incident here did not involve an inmate or the actions of a Sheriff's deputy (*see id.* at 1800), and defendant's submissions do not establish that plaintiff's injury arises from a jail condition over which the Sheriff maintained custody and control (*cf. Snyder v Plank*, 77 AD3d 1332, 1332-1333 [4th Dept 2010]; *see generally Dugan v County of Rensselaer*, 67 NY2d 979, 980-981 [1986]).

The court did not address the alternative grounds for summary judgment raised in the motion, and we therefore remit the matter to Supreme Court to "consider those grounds and determine the . . . motion anew" (*Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

376

CA 20-01426

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

IN THE MATTER OF ANTONIO BORRELLI,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND ERIE COUNTY DEPARTMENT OF
PUBLIC WORKS BUILDINGS AND GROUNDS DIVISION,
RESPONDENTS-APPELLANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ERIN E. MOLISANI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 14, 2020. The order granted the claimant's application for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the application is denied.

Memorandum: Respondents appeal from an order granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). On February 13, 2019, claimant allegedly sustained injuries when he slipped on ice on the first step of the exterior stairs leading into the Erie County Court building. We conclude that claimant did not meet his burden on his application, and that Supreme Court abused its discretion in granting it. We therefore reverse the order and deny the application.

In determining whether to grant a party's application for leave to serve a late notice of claim, " 'the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality' " (*Tate v State Univ. Constr. Fund*, 151 AD3d 1865, 1865 [4th Dept 2017]; *see* General Municipal Law § 50-e [5]; *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 461 [2016], *rearg denied* 29 NY3d 963 [2017]). With respect to reasonable excuse, claimant offered only the explanation that he was unaware of the notice of claim requirement. We have previously held that ignorance of the law does not constitute a

reasonable excuse (*see Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601, 1602 [4th Dept 2016]; *Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]; *Le Mieux v Alden High School*, 1 AD3d 995, 996 [4th Dept 2003]).

Claimant's unsubstantiated assertion that he informed guards on duty at the courthouse of his fall and injuries fails to establish that respondents received actual knowledge constituting the essential facts of the claim within 90 days (*see* General Municipal Law § 50-e [1] [a]; [5]; *Le Mieux*, 1 AD3d at 996; *Matter of Riordan v East Rochester Schools*, 291 AD2d 922, 923 [4th Dept 2002], *lv denied* 98 NY2d 603 [2002]; *Matter of Morrison v New York City Health & Hosps. Corp.*, 244 AD2d 487, 488 [2d Dept 1997]; *Matter of Hurley v Avon Cent. School Dist.*, 187 AD2d 982, 983 [4th Dept 1992]; *see generally Washington v City of New York*, 72 NY2d 881, 883 [1988]). We accord great weight to claimant's failure to meet his burden with respect to that factor (*see Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1654 [4th Dept 2018]).

The fact that there may be preserved surveillance footage of the accident could work in claimant's favor (*see Matter of Sproule v New York Convention Ctr. Operating Corp.*, 180 AD3d 496, 497 [1st Dept 2020]; *see also Matter of John P. v Plainedge Union Free Sch. Dist.*, 165 AD3d 1263, 1264 [2d Dept 2018]), but claimant has failed to establish that the footage still exists. We therefore cannot conclude that claimant met his burden of "show[ing] that the late notice will not substantially prejudice" respondents (*Newcomb*, 28 NY3d at 466; *see Zarrello v City of New York*, 61 NY2d 628, 630 [1983]; *Matter of Casale v City of New York*, 95 AD3d 744, 745 [1st Dept 2012]). Even assuming, arguendo, that the surveillance footage exists, we conclude that the absence of the first two factors compels the denial of claimant's application.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

391

KA 17-00190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL DAVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME 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 (Judith A. Sinclair, J.), rendered August 30, 2016. The judgment convicted defendant upon a plea of guilty of strangulation 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 strangulation in the second degree (Penal Law § 121.12). Defendant's contention that his plea was not knowingly, intelligently, or voluntarily entered is not preserved for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Hough*, 148 AD3d 1671, 1671 [4th Dept 2017], *lv denied* 29 NY3d 1081 [2017]; *People v Brinson*, 130 AD3d 1493, 1493 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]). Contrary to defendant's further contention, this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

In any event, defendant's challenge to the plea lacks merit. While defendant raised questions at various times during the plea colloquy, Supreme Court consistently provided defendant with an opportunity to consult with defense counsel and ensured that defendant's questions were answered and that he wished to proceed with the plea. Moreover, defendant stated that he was educated, sober, and alert, and that he understood the proceedings. Indeed, there is no indication in the record "that defendant was uninformed, confused or incompetent when he entered the plea" (*People v Nudd*, 53 AD3d 1115, 1115 [4th Dept 2008], *lv denied* 11 NY3d 834 [2008] [internal quotation

marks omitted]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

497

KA 21-00170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL F. DASKIEWICH, DEFENDANT-APPELLANT.

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

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered December 6, 2019. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree (two counts), criminal sexual act in the third degree (two counts), sexual abuse in the first degree, endangering the welfare of a child and unlawfully dealing with a child (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 by reducing the sentences imposed for criminal sexual act in the first degree under counts one and three of the indictment to determinate terms of incarceration of 7½ years and a period of postrelease supervision of 20 years, and directing that those sentences run consecutively to each other but concurrently with the sentences imposed on the remaining counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and criminal sexual act in the third degree (§ 130.40 [2]). Defendant contends that he was denied due process of law and was prejudiced by the admission in evidence of a controlled telephone call between defendant and the victim, allegedly acting as an agent of the police, without being afforded a *Huntley* hearing on the voluntariness of his statements during that call. Defendant sought suppression of various statements that he made on the ground that they were involuntary and, in the alternative, he requested a *Huntley* hearing. At the *Huntley* hearing, however, the only issue before County Court was the voluntariness of defendant's statements to the police, not his statements to the victim during the controlled call. Defendant raised no objection at the hearing, never sought a ruling on that part of his motion seeking to suppress the statements made during the controlled call, and failed to

object to the admission of the controlled call at trial on the ground that his statements were involuntarily made. We therefore conclude that he abandoned his request to suppress the statements made during the controlled call (*see People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *see generally People v Garcia*, 148 AD3d 1559, 1561 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]; *People v Barill*, 120 AD3d 951, 953-954 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014], *reconsideration denied* 25 NY3d 949 [2015], *cert denied* 577 US 865 [2015]).

We reject defendant's further contention that his statements during the controlled call regarding possible future sexual acts with the victim were highly prejudicial and should have been redacted. Defendant correctly concedes that those parts of the controlled call containing defendant's admissions concerning the charged crimes were properly admissible in evidence (*see People v Ward*, 107 AD3d 1605, 1605-1606 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]; *People v Cruz*, 41 AD3d 893, 896 [3d Dept 2007], *lv denied* 10 NY3d 933 [2008]). "In the context of a recorded call, when references to prior bad acts in the conversation are 'inextricably interwoven with the crime charged in the indictment,' the entire conversation 'may be received in evidence . . . where . . . the value of the evidence clearly outweighs any possible prejudice' " (*People v Gibbs*, 126 AD3d 1409, 1409 [4th Dept 2015]). At oral argument of defendant's motion in limine, defense counsel agreed that defendant's admissions with respect to the charged crimes and his statements concerning the possible future sexual encounter with the victim were "intertwined throughout the call." Thus, the court properly concluded that the entire controlled call was admissible in evidence to complete the narrative (*see People v Juliano*, 128 AD3d 1521, 1522 [4th Dept 2015], *lv denied* 26 NY3d 931 [2015]). The court also properly concluded that the prejudicial effect of the references to defendant's statements concerning a possible future sexual encounter with the victim did not outweigh their probative value (*see People v Hall*, 182 AD3d 1023, 1024 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]). Defendant failed to preserve for our review his contention that the court erred in failing to give a limiting instruction (*see* CPL 470.05 [2]; *Hall*, 182 AD3d at 1024), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court did not abuse its discretion in admitting in evidence the testimony of the People's expert concerning child sexual abuse accommodation syndrome (*see People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]; *see generally People v Nicholson*, 26 NY3d 813, 829 [2016]).

We reject defendant's contention that the court erred in imposing consecutive sentences for the counts of criminal sexual act in the first degree. Although the two acts constituting those crimes "took place over a continuous course of activity, they constituted separate

and distinct acts" (*People v Bailey*, 17 AD3d 1022, 1023 [4th Dept 2005], *lv denied* 5 NY3d 803 [2005] [internal quotation marks omitted]; *see People v Boyd*, 175 AD3d 1030, 1031 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]). Defendant's contention that the sentence constitutes cruel and unusual punishment is not preserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v McDermid*, 177 AD3d 1412, 1412 [4th Dept 2019], *lv denied* 34 NY3d 1161 [2020]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that the disparity between the plea offer of 15 years' incarceration and 20 years' postrelease supervision and the sentence he received after trial establishes that he was punished for asserting his right to a jury trial. "The imposition of a more severe sentence after trial than that offered to defendant pursuant to a plea offer that he rejected, without more, does not support the contention of defendant that he was penalized for exercising his right to go to trial" (*People v Taplin*, 1 AD3d 1044, 1046 [4th Dept 2003], *lv denied* 1 NY3d 635 [2004] [internal quotation marks omitted]; *see People v Becraft*, 140 AD3d 1706, 1706 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]). "[D]efendant's rejection of the plea offer . . . required the victim to testify about the sexual abuse at trial, a factor . . . recognized as a legitimate basis for the imposition of a more severe sentence after trial than that which the defendant would have received upon a plea of guilty" (*Becraft*, 140 AD3d at 1707 [internal quotation marks omitted]). We agree with defendant, however, that the aggregate sentence of 40 years' incarceration with 20 years' postrelease supervision is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentences imposed for the two counts of criminal sexual act in the first degree to determinate terms of 7½ years' incarceration with 20 years' postrelease supervision, to run consecutively to each other but concurrently with the sentences imposed on the remaining counts (*see* CPL 470.15 [6] [b]), for an aggregate sentence of 15 years' incarceration and 20 years' postrelease supervision.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

504

CAF 19-01610

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

IN THE MATTER OF ROBERT C.E.,
PETITIONER-APPELLANT,

V OPINION AND ORDER

FELICIA N.F., RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR PETITIONER-APPELLANT.

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

MARGARET MCMULLEN RESTON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered July 31, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the cross petition of respondent for permission to relocate with the subject child to Arizona.

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

Opinion by TROUTMAN, J.:

In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, inter alia, granted respondent mother's cross petition for permission to relocate with the subject child. Contrary to the father's contention, Family Court properly granted the cross petition. Accordingly, we affirm.

I

A prior order of custody and visitation awarded the mother sole custody of the child with visitation to the father. That order included a provision prohibiting either parent from permanently removing the child from Monroe County without the written consent of the other parent or a court order. Despite that provision, the mother unilaterally relocated to Arizona with the five-year-old child. Approximately one year later, the father discovered the mother's whereabouts and commenced this proceeding by way of petition seeking custody of the child. The mother filed a cross petition seeking permission to relocate nunc pro tunc. Therein, she asserted that she relocated due to a "continuous and relentless cycle of domestic

violence" perpetrated by the father.

At a hearing on the petition and cross petition, the mother testified about instances of domestic violence perpetrated by the father. Once, during the brief period that they lived together, the mother tried to leave their home with the child and the father prevented her from doing so by physically restraining her and blocking the doorway; the father later persuaded her to return by threatening to "blow his head off." Another time, when the mother declined to have sex with him, the father placed his hands around her neck while she was holding the child and choked her until she nearly lost consciousness. As a result of that incident, the court issued a one-year no-contact order of protection. When the mother reported the father's noncompliance with that order, he came to her residence, tried to break the door down by kicking it, and broke the taillights on her car. During that incident, the father gestured to his waistband as if he had a gun, causing the mother to fear for her life. After that, he continued sending her threatening text messages containing verbally abusive language. In addition, he sent her hundreds of messages over her social media account. She told him repeatedly to stop, but eventually she gave up and deleted the account. One day, while the mother was picking the child up from the father's residence, he began screaming at her in front of the child, calling her "a piece of shit" and telling her that she "wasn't going to win," causing her again to fear for her safety. Days later, the mother's fiancé found a threatening note that someone left on her car. The mother acknowledged that the note was not in the father's typical handwriting, but testified that she believed someone wrote it at his behest. The contents of the note caused the mother to fear for her safety. Shortly thereafter, the mother and her fiancé decided to move cross-country in order to ensure her safety and that of the child. She chose a location in Arizona based on the quality of the schools, affordability, and relative closeness to family in California. She did not inform the father or request permission of the court out of fear of retaliation from the father.

The father denied the allegations of domestic violence, testifying that he had never been criminally charged with domestic violence, he never perpetrated acts of domestic violence against the mother in front of the child, he never threatened the mother, and there were no incidents involving the police or Child Protective Services in the year before the mother's relocation. He denied owning any weapons, except for a collection of samurai swords. Nor did the father have a job or a driver's license. Instead, he lived with his brother in exchange for providing child care. He had never paid child support. If he were awarded custody of the child, he would rely on his brother to pay for and transport the child to private school.

In its trial findings, the court found the father's testimony not to be credible. The mother, in contrast, "gave honest and truthful testimony," particularly concerning instances of domestic violence perpetrated by the father in the child's presence and threats made towards the mother. The child's maternal grandmother, who corroborated portions of the mother's testimony at the hearing, gave

"exceptionally credible" testimony. The court found that the mother's fear of the father "was not feigned or pre-textual," and that her decision to relocate without informing him was not to deprive him of visitation, but to protect her own safety. Although the court stated that her conduct in doing so "cannot be condoned," it denied the father's petition for custody due to his own "fundamental unfitness," granted the mother's cross petition for permission to relocate with the child, and awarded visitation to the father in Monroe County.

II

"Although the unilateral removal of the child[ ] from the jurisdiction is a factor for the court's consideration . . . , an award of custody must be based on the best interests of the child[ ] and not a desire to punish a recalcitrant parent" (*Matter of Tekeste B.-M. v Zeineba H.*, 37 AD3d 1152, 1153 [4th Dept 2007] [internal quotation marks omitted]). In determining the best interests of the child, the court is "free to consider and give appropriate weight to all of the factors that may be relevant to the determination" (*Matter of Tropea v Tropea*, 87 NY2d 727, 740 [1996]). Those factors "include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*id.* at 740-741; *see Matter of Wells v Dellago*, — AD3d —, — 2021 NY Slip Op 03459, *1-2 [2d Dept 2021]). Courts place considerable weight on the effect of domestic violence on the child (*see Matter of Eddington v McCabe*, 98 AD3d 613, 615 [2d Dept 2012]; *Matter of Clarke v Boertlein*, 82 AD3d 976, 977 [2d Dept 2011]; *see also Matter of Monique J. v Keith S.*, 187 AD3d 500, 501 [1st Dept 2020]; *Matter of Ramirez v Velazquez*, 74 AD3d 1756, 1757 [4th Dept 2010]), particularly when a continuing pattern of domestic violence perpetrated by the child's father compels the mother to relocate out of legitimate fear for her own safety (*see Matter of Ramon R. v Carmen L.*, 188 AD3d 545, 545 [1st Dept 2020]; *Matter of Hill v Dean*, 135 AD3d 990, 991-992 [3d Dept 2016]; *Matter of Baker v Spurgeon*, 85 AD3d 1494, 1496-1497 [3d Dept 2011], *lv dismissed* 17 NY3d 897 [2011]; *Matter of Sara ZZ. v Matthew A.*, 77 AD3d 1059, 1060 [3d Dept 2010]; *Matter of Melissa Marie G. v John Christopher W.*, 73 AD3d 658, 658-659 [1st Dept 2010]; *cf. Matter of Francis-Miller v Miller*, 111 AD3d 632, 635-636 [2d Dept 2013]), or where the father minimized the past incidents of domestic violence (*see Matter of Doyle v Debe*, 120 AD3d 676, 680-681 [2d Dept 2014], *lv denied* 24 NY3d 910 [2014]; *cf. Matter of Adam OO. v Jessica QQ.*, 176 AD3d 1418, 1420 [3d Dept 2019]). Indeed, where domestic violence is alleged in a petition for custody, "the court must consider the effect of such domestic violence upon the best interests of the child" (*Matter of Jacobson v Wilkinson*, 128 AD3d 1335, 1336 [4th Dept 2015] [internal quotation marks omitted]; *see also* Domestic Relations Law § 240 [1]).

Here, in making its determination, the court appropriately considered the fact that the mother unilaterally removed the child from the jurisdiction, determining that the mother "did not relocate to separate the father from the child, but instead acted in good faith to escape the threat of domestic violence" (*Hill*, 135 AD3d at 992). Although the court did not countenance the mother's decision to relocate without permission, "it was the father's [violent] conduct that prompted [her] move to [Arizona] in the first instance and triggered the resulting disruption of his relationship with his daughter" (*Baker*, 85 AD3d at 1497). Furthermore, although the court did not expressly engage in the analysis required under *Tropea* (87 NY2d at 740-741), according deference to the court's factual findings and credibility assessments (*see Matter of Daniel XX. v Heather WW.*, 180 AD3d 1166, 1168 [3d Dept 2020]), we conclude that "there is a sound and substantial basis in the record supporting the court's determination that 'relocation would enhance the child['s life] economically, emotionally, and educationally, and that the child['s] relationship with the father could be preserved through a liberal parental access schedule including, but not limited to, frequent communication and extended summer and holiday visits' " (*Matter of McMiller v Frank*, 181 AD3d 1154, 1154-1155 [4th Dept 2020], *lv denied* 35 NY3d 911 [2020]; *see Matter of Mineo v Mineo*, 96 AD3d 1617, 1618-1619 [4th Dept 2012]).

III

We reject the father's further contention that the court erroneously conditioned visitation on his attendance at mental health counseling. The court may order a parent to obtain counseling as a component of a custody or visitation order, but it " 'does not have the authority to order such counseling as a prerequisite to custody or visitation' " (*Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). Here, the court did not order counseling as a prerequisite to visitation. Rather, in its trial findings, the court conditioned the mother's payment for the child's travel to Monroe County for visitation upon the father's attendance at counseling. If the father refuses to attend counseling, he may exercise visitation by traveling to Arizona or by paying for the child's travel to Monroe County.

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

Mark W. Bennett

Entered: July 9, 2021

Clerk of the Court

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

559

KA 18-01549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAWN CAMPBELL, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER 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 (Alex R. Renzi, J.), rendered November 29, 2017. The judgment convicted defendant upon her plea of guilty of attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]), defendant contends, and the People correctly concede, that her waiver of the right to appeal is invalid because Supreme Court "mischaracterized it as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*id*. [internal quotation marks omitted]). Nevertheless, we reject defendant's contention that the court erred in refusing to suppress her statements to the police.

Contrary to defendant's contention, the investigator's brief initial conversation with defendant prior to issuing the *Miranda* warnings did not vitiate or neutralize the effect of the later warnings (*see People v Box*, 181 AD3d 1238, 1239 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *cf. People v Dunbar*, 24 NY3d 304, 315-316 [2014], *cert denied* 575 US 1005 [2015]). Defendant's further contention that her statements to the police were involuntary or improperly obtained due to the investigator's failure to inquire into her diabetic condition is unpreserved for our review and, in any event, is lacking in merit (*see*

People v Kemp, 266 AD2d 887, 887-888 [4th Dept 1999], *lv denied* 94 NY2d 921 [2000]). Finally, defendant's contention that the court abused its discretion by refusing to suppress her statements to the police without viewing the video recording of the interview is unpreserved for our review (*see generally People v Hicks*, 6 NY3d 737, 739 [2005]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

630

KA 19-00781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK POTTER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN J. MORRISSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered October 9, 2018. The judgment convicted defendant upon his plea of guilty of rape 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 rape in the first degree (Penal Law § 130.35 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his contention that County Court erred in refusing to suppress a written statement that he provided to the police (*see generally People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), that contention is not preserved for our review because defendant did not raise the particular ground advanced on appeal either in his omnibus motion papers or at the suppression hearing (*see generally People v Panton*, 27 NY3d 1144, 1144-1145 [2016]; *People v Ricks*, 49 AD3d 1265, 1266 [4th Dept 2008], *lv denied* 10 NY3d 869 [2008], *reconsideration denied* 11 NY3d 740 [2008]). In any event, that contention lacks merit. Although defendant contends that the *Miranda* warnings provided to him before he spoke to the police and signed his written statement were insufficient because he was not specifically advised of his right to have counsel present during questioning (*see People v Hutchinson*, 59 NY2d 923, 924 [1983]), the testimony and other evidence admitted at the hearing established that proper *Miranda* warnings were provided (*cf. id.* at 924-925).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

641

KA 19-01431

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN SANDERS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered May 8, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.) after his conviction of rape in the third degree for engaging in sexual intercourse with a 16-year-old girl when he was 32 years old. We reject defendant's contention that County Court erred in refusing to grant him a downward departure from his presumptive risk level. Defendant had the initial burden of " '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' " (*People v Peoples*, 189 AD3d 1282, 1282 [2d Dept 2020], *lv denied* 36 NY3d 910 [2021]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]; *People v Slishevsky*, 174 AD3d 1399, 1400 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]).

At the SORA hearing, defendant argued that he should be granted a downward departure because there were no allegations that he was abusing drugs or alcohol at the time of the offense. In its decision denying defendant's request for a downward departure, the court found that marihuana "was found in the room where . . . defendant had sex with the victim, thus the use of drugs may very well have been a component of the offense." As defendant contends and the People

correctly concede, there is no record support for the court's statement that marihuana was found in the room where defendant had sexual intercourse with the victim. Nevertheless, we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*see People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]). The fact that alcohol and drug use may not have been a factor in the commission of the crime is not an appropriate mitigating factor for a downward departure inasmuch as it does not tend "to establish a lower likelihood of reoffense or danger to the community" (*id.* at 1325 [internal quotation marks omitted]). Moreover, the court examined the "totality of the circumstances" (*Gillotti*, 23 NY3d at 861), including defendant's extensive criminal history, in concluding that a downward departure was not warranted here.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

642

KA 19-00537

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. WIGGINS, 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 Ontario County Court (Brian D. Dennis, J.), rendered February 20, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that the postrelease supervision portion of his agreed-upon sentence is unduly harsh and severe and that the waiver of the right to appeal does not foreclose his challenge to the severity of that part of the sentence. Inasmuch as County Court incorrectly informed defendant about the maximum possible sentence by mistakenly stating that he could be sentenced as a persistent felony offender (*see People v Boykins*, 161 AD3d 183, 186-187 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]), we agree with defendant that the waiver of the right to appeal, even if it was valid, would not preclude his challenge to the severity of the sentence (*see People v Boyzuck*, 72 AD3d 1530, 1530 [4th Dept 2010]; *see also People v Hicks*, 173 AD3d 1768, 1769 [4th Dept 2019]). We nevertheless perceive no basis in the record for the exercise of our authority to reduce the three-year period of postrelease supervision as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

644

KA 19-02111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ASHTON BELLAMY, ALSO KNOWN AS AMIR,
DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 30, 2019. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [7]), defendant contends that his plea was not knowingly, intelligently or voluntarily entered. Defendant's contention is not preserved for review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Jones*, 175 AD3d 1845, 1845-1846 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]; *People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

645

KA 19-01760

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE BAPTISTA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 17, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that he did not validly waive his right to appeal and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —,140 S Ct 2634 [2020]), and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

648

TP 20-00758

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

IN THE MATTER OF LATASIO A. CENDALES, PETITIONER,

V MEMORANDUM AND ORDER

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

LATASIO A. CENDALES, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered June 17, 2020) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination, following a tier III hearing, that he violated various inmate rules. Initially, we note that, " '[b]ecause the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court' " (*Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362 [4th Dept 2003]). Nevertheless, we address petitioner's contentions in the interest of judicial economy (*see id*.).

To the extent that petitioner contends that he was improperly denied his right to call witnesses, we reject that contention inasmuch as the requested witnesses would have provided testimony that was either irrelevant or redundant (*see Matter of Cruz v Annucci*, 152 AD3d 1100, 1102 [3d Dept 2017]; *see also* 7 NYCRR 253.5 [a]).

We also reject petitioner's contention that he was denied effective employee assistance by his employee assistant's failure to interview every inmate who may have been present and witnessed the stabbing that led to this proceeding. Even assuming, arguendo, that there was a violation of 7 NYCRR 251-4.2 based on the failure of petitioner's employee assistant to interview all such witnesses, we

conclude that the Hearing Officer remedied any alleged defect in the assistance afforded to petitioner by taking testimony from five of the proposed witnesses at the hearing (*see Matter of Jones v Fischer*, 111 AD3d 1362, 1363 [4th Dept 2013]), all of whom testified that they did not see an assault. In addition, petitioner has not demonstrated that he was prejudiced by any of the employee assistant's alleged shortcomings (*see Matter of Clark v Annucci*, 170 AD3d 1499, 1500 [4th Dept 2019]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

649

KAH 20-01267

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CLIFTON PHILLIPS, JR., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (AMBER R. POULOS OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered January 13, 2020 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus. The appeal has been rendered moot by petitioner's release from custody (*see People ex rel. Dickerson v Unger*, 62 AD3d 1262, 1263 [4th Dept 2009], *lv denied* 12 NY3d 716 [2009]), and the exception to the mootness doctrine does not apply in this case (*see People ex rel. Stokes v New York State Div. of Parole*, 144 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]; *People ex rel. Smith v Cully*, 112 AD3d 1316, 1317 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Although this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances here (*see Stokes*, 144 AD3d at 1551).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

650

KA 19-01441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHUNDEE URBAEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM CLAUSS 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 (Rory A. McMahon, A.J.), rendered May 29, 2019. The judgment convicted defendant upon a plea of guilty of robbery in the first degree, attempted robbery in the first degree (two counts), assault in the second degree (two counts), and criminal mischief 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 robbery in the first degree (Penal Law § 160.15 [4]), two counts of attempted robbery in the first degree (§§ 110.00, 160.15 [4]), two counts of assault in the second degree (§ 120.05 [2]), and criminal mischief in the second degree (§ 145.10). Although defendant did not validly waive his right to appeal (*see People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

653

CAF 20-01562

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

IN THE MATTER OF LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES ON BEHALF OF DAWN M. DAVIS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIC D. HYDE, RESPONDENT-RESPONDENT.

SHANNON L. HILLIER, COUNTY ATTORNEY, GENESEO (JOHN M. LOCKHART OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered November 26, 2019 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objections are granted, the petition is granted, and respondent is directed to pay child support in the amount of $74 per week retroactive to August 5, 2019, and the matter is remitted to Family Court, Livingston County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner appeals from an order denying its objections to the order of the Support Magistrate. Petitioner commenced this proceeding on behalf of the mother of the subject child seeking an upward modification of respondent father's child support obligation. The record establishes that the father and the mother share legal and physical custody of the child, and the mother receives public assistance to help support the child. The father is employed and makes approximately $22,000 per year, and a prior order directed him to pay $50 per month in child support. The Support Magistrate determined that, pursuant to the Child Support Standards Act (CSSA) (*see* Family Court Act § 413 [1] [c]), the father's support obligation based on his income was $74 per week, and the record supports that calculation. Nevertheless, the Support Magistrate further determined that the amount was unjust, and granted a variance by setting the father's support obligation at $50 per week.

We agree with petitioner that Family Court erred in denying its objections to the Support Magistrate's order. It is well settled that "the CSSA must be applied to all child support orders, regardless of a child's receipt of public assistance" (*Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 153 [2001]). Here, the Support

Magistrate purported to reduce the father's obligation pursuant to Family Court Act § 413 (1) (f) (10) because the father made additional expenditures to maintain his house to permit the child to stay there during the time that he stayed with the father. Such a reduction for extended visitation is permitted by section 413 (1) (f) (9), however, and that subdivision of the statute applies only where "the child is not on public assistance" (*id.*; *see Matter of Soldato v Benson*, 128 AD3d 1524, 1525 [4th Dept 2015]). Furthermore, we have previously stated that a determination to grant a downward deviation from the presumptive support obligation on the ground that the noncustodial parent incurred expenses while the child was in his or her care " 'was merely another way of [improperly] applying the proportional offset method' "(*Matter of Jerrett v Jerrett*, 162 AD3d 1715, 1717 [4th Dept 2018]), and the proportional offset method of calculating child support has been explicitly rejected by the Court of Appeals (*see Bast v Rossoff*, 91 NY2d 723, 732 [1998]). The remaining grounds upon which the Support Magistrate relied in granting the variance have no support in the record (*see Jerrett*, 162 AD3d at 1717). Consequently, we reverse the order, grant petitioner's objections, grant the petition, and direct the father to pay child support in the amount of $74 per week retroactive to August 5, 2019, and we remit the matter to Family Court to calculate the amount of arrears owed to petitioner.

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

654

KA 19-00734

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MCELWEE, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered November 26, 2018. The judgment convicted defendant upon a plea of guilty of reckless endangerment 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 reckless endangerment in the first degree (Penal Law § 120.25). Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Taylor*, 192 AD3d 1683, 1684 [4th Dept 2021]). That valid waiver forecloses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court

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

656

KA 17-02112

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY B. MINTER, DEFENDANT-APPELLANT.

LINDSEY M. PIEPER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered August 24, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the third 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 indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) based on his possession of a "gravity knife" (*see* §§ 265.00 [5]; 265.01 [former (1)]).

Defendant contends that the judgment should be reversed because after his conviction, while his direct appeal was pending, Penal Law § 265.01 (1) was amended to decriminalize the simple possession of a gravity knife (L 2019, ch 34, § 1). The People, in the exercise of their broad prosecutorial discretion, have agreed that the indictment should be dismissed under the particular circumstances of this case and in light of the recent amendment decriminalizing the possession of gravity knives, notwithstanding the fact that the recent amendment does not require retroactive application (*see People v Johnson*, 192 AD3d 603, 603 [1st Dept 2021]; *People v Banos*, 68 Misc 3d 1, 4-5 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020], *lv denied* 35 NY3d 1064 [2020]; *see generally People v Oliver*, 1 NY2d 152, 157 [1956]). We agree, and therefore we reverse the judgment and dismiss the indictment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]; *People v Merrill*, 187 AD3d 1058, 1059 [2d Dept 2020]; *People v Alston*, 184 AD3d 415, 415 [1st Dept 2020]; *People v Caviness*, 176 AD3d 522, 522 [1st Dept 2019], *lv denied* 34 NY3d 1076 [2019]). In

light of the foregoing, we do not reach defendant's remaining contention.

Entered: July 9, 2021

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 19-00952

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HOWARD JAMES, JR., DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NOLAN D. PITKIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered January 11, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Entered: July 9, 2021

Mark W. Bennett
Clerk of the Court