SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 26, 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 AUGUST 26, 2021

_____	18	CA 20 00446	DREAMCO DEVELOPMENT CORPORATION V EMPIRE STATE DEVELOPMENT CORPORATIO N
_____	113	CA 20 00642	DOMINIC FRISCIA V VILLAGE OF GENESEO
_____	132	CA 20 00064	DAVID A. CHAPMAN V ADAM J. JACOBS
_____	136	CA 20 00136	LOUIS S. CARTER V JERMAINE PATTERSON
_____	136.1	CA 19 00724	PETER BRENT MCDEVITT V THE STATE OF NEW YORK
_____	179	CA 20 00832	REGAN DIDAS V ROCHESTER GAS & ELECTRIC CORPORATIO
_____	209	KA 18 00462	PEOPLE V YE MIN T. AUSTEN
_____	225	CA 20 00723	ROBERT OWEN LEHMAN FOUNDATION, INC. V ISRAELITISCHE KULTUSGEMEI WIEN
_____	226	CA 20 01289	ROBERT OWEN LEHMAN FOUNDATION, INC. V ISRAELITISCHE KULTUSGEMEI WIEN
_____	247	CA 20 00395	KAREN L. RYAN V JOHN B. RYAN
_____	248	CA 20 01075	KAREN L. RYAN V JOHN B. RYAN
_____	249	CA 20 00272	JENNIFER A. TABERKSKI V TIMOTHY J. TABERSKI
_____	272	CA 20 00397	EAST AURORA COOPERATIVE MARKET, INC V RED BRICK PLAZA LLC
_____	273	CA 20 00709	EAST AURORA COOPERATIVE MARKET, INC V RED BRICK PLAZA LLC
_____	275	KA 19 02170	PEOPLE V JASON RICHARDSON
_____	276	KA 19 00589	PEOPLE V ALEX GONZALES
_____	288	CA 20 00688	THE NEW Y-CAPP, INC. V YELLOWSTONE CAPITAL, LLC
_____	291	CA 20 00526	FAUSTO PRATTICO V CITY OF ROCHESTER
_____	293	CA 20 00499	CAMERON TRANSPORT CORP. V NEW YORK STATE DEPARTME
_____	294	CA 20 01410	LISA L. WALK-REINARD V JEFFREY A. SMITH
_____	335	CA 19 02006	KULBACK'S INC. V BUFFALO STATE VENTURES, LLC
_____	336	CA 20 00558	THOMAS M. KOWALAK, M.D. V KEYSTONE MEDICAL SERVICE

_____	352	CA 20 01465	RON B. V SHIRLEY W.
_____	355	CA 20 01393	JEANNIE-MARIE MCGUIRE V F. JAMES MCGUIRE
_____	356	CA 20 01394	JEANNIE-MARIE MCGUIRE V F. JAMES MCGUIRE
_____	380.1	KAH 20 00666	TRACI DECARR V JULIE WOLCOTT
_____	388	KA 19 00380	PEOPLE V ROBERT COLLINS
_____	389	KA 18 01351	PEOPLE V MICHAEL ROSS
_____	399	CA 20 01361	CASSIE SMITH V DANIEL COUSINS
_____	400	CA 19 01887	QUINTIN A. NOWLIN V A. TITUS
_____	402	CA 20 00334	MARILEE M. MORGAN V DALE MURAD
_____	421	CA 20 01481	STEVE HARRIS V TESMER BUILDERS, INC.
_____	424	CA 20 01050	WILLIE DANFORD V STATE OF NEW YORK
_____	425	CA 20 01056	JOSEPH SAPIENZA V CITY OF BUFFALO
_____	436	KA 18 01832	PEOPLE V REBECCA RUIZ
_____	459	CA 20 00085	DINAH LEE JARGIELLO V AYER DEVELOPMENT, LLC
_____	462	CA 20 01244	PARKWAY ELDERLY HOUSING DEVELOPMENT FUND CO., INC. ASSESSOR OF CITY OF CORNING
_____	467	CA 20 01604	JOSEPH MUNNO V CITY OF ROCHESTER
_____	477	KA 15 01892	PEOPLE V ANDRE L. JENKINS
_____	483	CA 20 00777	COREEN N. THOMPSON V THOMAS W. PETERS
_____	488.1	CA 19 01987	U.S. BANK TRUST, N.A. V KENNETH H. PIERI
_____	493	KA 18 00164	PEOPLE V JOSEPH T. BARTHEL
_____	498	KA 18 00163	PEOPLE V JOSEPH T. BARTHEL
_____	507	CA 20 01397	SENECA MEADOWS, INC. In the Matter of TOWN OF SENECA FALLS
_____	512	TP 21 00090	ALEX SHOGA V ANTHONY ANNUCCI
_____	517	KA 19 00587	PEOPLE V HEATH EDMEAD
_____	528	CA 20 01541	CHRISTOPHER W. WALKER V TOWN OF WEBSTER
_____	530	CA 20 01482	SAMID GRAVES V MVAIC
_____	531	CA 20 01473	DEBORAH ANN RAY-ROSEMAN V LIPPES MATHIAS WEXLER FR
_____	532	CA 20 00974	ROBERT JEFFERY V QUEEN CITY FOODS, LLC
_____	547	CAF 19 01537	Mtr of KATALINA M.

_____	553	CA 20 01621	MAXWELL B. COHEN V JEANNE D. BROTEN
_____	557	KA 17 01058	PEOPLE V RONNIE L. BOSWELL, JR.
_____	558	KA 19 01416	PEOPLE V ANTHONY MOSES
_____	561	KA 19 00777	PEOPLE V DYDISCI MARTIN
_____	563	KA 19 01437	PEOPLE V JUSTIN M. TILLMON
_____	564	KA 19 01438	PEOPLE V JUSTIN M. TILLMON
_____	565	CA 20 01072	RYAN S. In the Matter of SCOTT S.
_____	567	CA 20 01083	JOSEPH IANNAZZO V ELIZABETH IANNAZZO
_____	568	CA 20 01095	JOSEPH IANNAZZO V ELIZABETH IANNAZZO
_____	573	KA 16 00641	PEOPLE V ROBERT G. WILSON
_____	576	KA 16 02223	PEOPLE V DARVIS MOJENA, JR.
_____	577	KA 18 01630	PEOPLE V JUSTIN S. HAFFA
_____	578	KA 18 02187	PEOPLE V PRINCE ROYAL-CLANTON
_____	581	KA 19 00545	PEOPLE V MILTON BURKE
_____	583	CA 20 01006	MATTHEW FISCHIONE V PM PEPPERMINT, INC.
_____	584	CA 20 00673	JODI C. V CHEEKTOWAGA-SLOAN UNION FREE SCH
_____	587	CA 20 00625	CHS, INC. V LAND O' LAKES PURINA FEED, LLC
_____	589	KA 18 02443	PEOPLE V COURTNEY A. WILLIAMS
_____	592	CA 20 00707	COR VAN RENSSELAER STREET COMPANY, LLC V NEW YORK STATE URBAN DEVELOPMENT CO
_____	594	KA 19 01039	PEOPLE V RAEKWON BARNES
_____	603	CA 20 00719	STERLING MILLER V REROB, LLC
_____	604	CA 20 00898	STERLING MILLER V REROB, LLC
_____	605	CA 20 01589	GARY FRANKLIN V ERIC A. LEARN
_____	607	KA 19 00168	PEOPLE V EARL J. WILSON
_____	608	KA 18 01836	PEOPLE V ROBERT G. CASE
_____	609	KA 14 00664	PEOPLE V JASON IRVINE
_____	610	KA 16 01829	PEOPLE V IAN S. MCKAY
_____	613	KA 20 00053	PEOPLE V ADAM C. GREEN
_____	614	KA 18 02439	PEOPLE V SANTE D. TURNER
_____	615	KA 18 01532	PEOPLE V ISRAEL RAMOS-CARRASQUILLO

_____	619	CA 20 01471	CAROL L. JONES V TOWN OF CARROLL
_____	622	KA 19 02349	PEOPLE V KAVYIA A. SPENCER
_____	623	KA 20 00574	PEOPLE V KAVYIA A. SPENCER
_____	629	KA 18 02442	PEOPLE V NATHANIEL D. WILSON
_____	633	CA 20 00005	CHRISTOPHER M. V CHRISTOPHER J. MINEO
_____	634	CA 19 01938	2006905 ONTARIO INC. V GOODRICH AEROSPACE CANADA,
_____	638	CA 20 01094	CHARLES GUTTMAN V COVERT TOWN BOARD
_____	639.1	CA 21 00292	PHARAOHS GC. INC V NEW YORK STATE LIQUOR AUTHORIT
_____	640	TP 20 01618	LEROY JOHNSON V STEWART T. ECKERT
_____	643	KA 18 02052	PEOPLE V LEROY SAVAGE SMITH
_____	651	KA 16 00654	PEOPLE V WILLIE ALEXANDER
_____	660	KA 20 00702	PEOPLE V JOHN E. DZIEDZIC
_____	664	KA 18 00921	PEOPLE V FURQUAN MURRAY
_____	665	KA 19 02350	PEOPLE V HUGH SMITH
_____	668	KA 19 01368	PEOPLE V ERIC DEMPSEY
_____	669	KA 21 00227	PEOPLE V ANTHONY HICKS
_____	670	KA 20 00747	PEOPLE V HUGH SMITH
_____	682	CA 20 01257	ANNMARIE ENGLE V SERGI CONSTRUCTION, INC.
_____	702	CA 20 01078	WYOMING-GIFFORD, LLC V ANUP BHATT
_____	705	CA 20 01551	JEREMY KAPPELL V WHEC-TV
_____	713	CA 20 01552	JEREMY KAPPELL V CITY OF ROCHESTER

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

18

CA 20-00446

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

DREAMCO DEVELOPMENT CORPORATION AND
ROSANNE DIPIZIO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EMPIRE STATE DEVELOPMENT CORPORATION,
ET AL., DEFENDANTS,
AND MARIA LEHMAN, DEFENDANT-APPELLANT.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY J. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF DANIEL W. ISAACS, PLLC, MOUNT KISCO (DANIEL W. ISAACS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered February 7, 2020. The order, insofar as appealed from, denied in part the motion of defendant Maria Lehman to dismiss the complaint against her.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint against defendant Maria Lehman is dismissed.

Memorandum: As we set forth in earlier related appeals, nonparty DiPizio Construction Company, Inc. (DCC) and defendant Erie Canal Harbor Development Corporation (Erie) entered into a construction agreement pursuant to which DCC was to provide construction services for a revitalization project along the waterfront in Buffalo (*Dreamco Dev. Corp. v Empire State Dev. Corp.*, 191 AD3d 1444 [4th Dept 2021]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 151 AD3d 1750 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418 [4th Dept 2015]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905 [4th Dept 2014]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909 [4th Dept 2014]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 911 [4th Dept 2014]). Plaintiff Dreamco Development Corporation (Dreamco), owned by plaintiff Rosanne DiPizio, was retained by DCC to provide management and consulting services and construction materials for the project. Erie subsequently terminated DCC from the project, and DCC no longer needed Dreamco's services. Plaintiffs commenced this action seeking

money damages allegedly resulting from the termination. Maria Lehman (defendant) now appeals from an order insofar as it denied that part of her motion seeking to dismiss the fraud cause of action against her.

We agree with defendant that Supreme Court should have granted that part of her motion seeking to dismiss the fraud cause of action against her on the ground that it failed to state a cause of action (*see* CPLR 3211 [a] [7]). "The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Morrow v MetLife Invs. Ins. Co.*, 177 AD3d 1288, 1289 [4th Dept 2019]). It is also well settled "that a fraud claim requires the plaintiff to have relied upon a misrepresentation by a defendant to his or her detriment" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 829 [2016], *rearg denied* 28 NY3d 956 [2016]; *see Warren v Forest Lawn Cemetery & Mausoleum*, 222 AD2d 1059, 1059 [4th Dept 1995]).

Here, the complaint does not set forth any material misrepresentations that defendant allegedly made to plaintiffs (*see Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1008 [2d Dept 2017]; *Weinstein v CohnReznick, LLP*, 144 AD3d 1140, 1141 [2d Dept 2016]; *cf. Pike Co., Inc. v Jersen Constr. Group, LLC*, 147 AD3d 1553, 1556 [4th Dept 2017]), nor does it adequately allege that defendant made any misrepresentations to third parties "for the purpose of being communicated to . . . plaintiff[s] in order to induce [plaintiffs'] reliance thereon or that the[ ] misrepresentations were relayed to . . . plaintiff[s], who then relied upon them" (*Robles v Patel*, 165 AD3d 858, 860 [2d Dept 2018]; *see New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1353-1354 [2d Dept 2017]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

113

CA 20-00642

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

DOMINIC FRISCIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF GENESEO, DEFENDANT-RESPONDENT.

REFERMAT HURWITZ & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered December 18, 2019. The judgment granted the motion of defendant to dismiss the amended complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the second through fifth causes of action of the amended complaint and as modified the judgment is affirmed without costs.

Memorandum: In approximately June 2015, defendant, Village of Geneseo (Village), started a project to replace drainage pipes and repave Main Street. In order to complete the project, the Village obtained an easement from plaintiff related to his property on Main Street. In October 2015, after the drainage pipes were placed, the Village's contractors paid for landscaping to be performed at plaintiff's property. In June 2016, the Village repaved Main Street. Following completion of the project, plaintiff noticed that water ran from the street toward his property, resulting in continual bouts of flooding and significant erosion to his foundation. Ultimately, the foundation of plaintiff's property collapsed, allegedly as a result of the continual flooding of his property, and plaintiff was required to repair the damage. He thereafter commenced this action against the Village, asserting causes of action for negligence, trespass, nuisance, inverse taking and a permanent injunction.

In lieu of answering, the Village moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7), contending that the notice of claim was untimely because it was served well after 90 days of accrual of the negligence cause of action and that plaintiff could not establish his remaining causes of action. Plaintiff opposed the motion and filed an amended complaint, and he now appeals from an order granting the motion. Although the order was subsumed in a

subsequent judgment from which no appeal was taken, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [1988]; *see also* CPLR 5520 [c]). We conclude that Supreme Court erred in granting the motion with respect to the second, third, fourth and fifth causes of action, and we therefore modify the judgment accordingly.

As a preliminary matter, we note that plaintiff does not challenge the court's dismissal of the first cause of action, sounding in negligence, and we thus conclude that plaintiff has abandoned any claim of error in the dismissal of that cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). With respect to the remaining causes of action, we agree with plaintiff that the court erred in determining that plaintiff had failed to meet his burden of establishing that "facts essential to justify opposition [to the motion]" could not be stated (CPLR 3211 [d]). Plaintiff opposed the motion on the merits, contending that the "pleadings [were] (at least) sufficient to survive [the Village's] pre-Answer motion to dismiss" despite the lack of discovery.

We further conclude that the court erred in determining that those four causes of action were time-barred by General Municipal Law §§ 50-e (1) (a) and 50-i (1). "[I]t is well settled that a notice of claim is not required for an action brought in equity against a municipality where the demand for money damages is incidental and subordinate to the requested injunctive relief" (*Dutcher v Town of Shandaken*, 97 AD2d 922, 923 [3d Dept 1983]; *see Baumler v Town of Newstead*, 198 AD2d 777, 777 [4th Dept 1993]). Viewing the amended complaint in the light most favorable to plaintiff (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the four remaining causes of action alleged continuing harm and primarily sought equitable relief (*see Condello v Town of Irondequoit*, 262 AD2d 940, 941 [4th Dept 1999]; *Baumler*, 198 AD2d at 777; *Carr v Town of Fleming*, 122 AD2d 540, 541 [4th Dept 1986]).

Based on the allegations of the amended complaint, "the coincidental character of the money damages sought is 'truly ancillary to an injunction suit, i.e., there is a continuing wrong presenting a genuine case for the exercise of the equitable powers of the court' " (*Dutcher*, 97 AD2d at 923). "It is settled law that whether pleaded as trespass or nuisance, a continuous interference with a plaintiff's use or enjoyment of real property gives rise to successive causes of action, and would bar recovery only for damages occurring prior to the applicable period of limitations" (*Greco v Incorporated Vil. of Freeport*, 16 Misc 3d 1129[A], 2007 NY Slip Op 51635[U], *4 [Sup Ct, Nassau County 2007], *affd* 66 AD3d 836 [2d Dept 2009]).

We likewise agree with plaintiff that the amended complaint states causes of action for trespass (*cf. Boring v Town of Babylon*, 147 AD3d 892, 893 [2d Dept 2017]; *see generally National Fuel Gas Distrib. Corp. v Push Buffalo [People United for Sustainable Hous.]*, 104 AD3d 1307, 1309 [4th Dept 2013]), nuisance (*see generally Copart*

Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570 [1977], *rearg denied* 42 NY2d 1102 [1977]) and taking (*see Carr*, 122 AD2d at 541; *cf. Smith v Town of Long Lake*, 40 AD3d 1381, 1382-1383 [3d Dept 2007]). Although "[a]n entry cannot be both a trespass and a taking" (*Carr*, 122 AD2d at 541; *see Smith*, 40 AD3d at 1382-1383), the issue here is the sufficiency of the pleading, and plaintiff sufficiently pleaded both causes of action, albeit in the alternative.

Based on our determination, we conclude that the amended complaint sufficiently pleaded a cause of action for a permanent injunction (*see Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]; *Data-Track Account Servs. v Lee*, 291 AD2d 827, 827-828 [4th Dept 2002], *lv dismissed* 98 NY2d 727 [2002], *rearg denied* 99 NY2d 532 [2002]; *cf. McNeary v Niagara Mohawk Power Corp.*, 286 AD2d 522, 525 [3d Dept 2001]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

132

CA 20-00064

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

DAVID A. CHAPMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ADAM J. JACOBS AND JENNIFER A. JACOBS,
DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered December 23, 2019. The order granted the motion of defendants for summary judgment and dismissed the first cause of action.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, fraud arising from his purchase of a home from defendants, alleging that defendants represented that there was a certificate of occupancy for a pole barn situated on the property when, in fact, the Town of Farmington (Town) voided the certificate of occupancy when it discovered that the barn encroached on the adjoining property. Although the record establishes that plaintiff was aware of the encroachment prior to closing, plaintiff alleged that he was unaware that the Town had voided the certificate of occupancy and believed that any issue regarding the barn had been resolved through a boundary line agreement between defendants and the adjoining landowner. After plaintiff purchased the home, however, the Town informed him that he would have to relocate or remove the barn, and this action ensued. Plaintiff now appeals from an order that granted defendants' motion for summary judgment dismissing plaintiff's cause of action for fraud. We affirm.

"New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment" (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520 [2d Dept 2007]; *see Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005]). "False representation in a property condition disclosure statement mandated by Real Property Law § 462 (2) may constitute active concealment in the context of fraudulent nondisclosure . . . ,

[but] to maintain such a cause of action, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor" (*Mikulski v Battaglia*, 112 AD3d 1355, 1356-1357 [4th Dept 2013] [internal quotation marks omitted]; *see Gallagher v Ruzzine*, 147 AD3d 1456, 1458 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]; *Sample v Yokel*, 94 AD3d 1413, 1415 [4th Dept 2012]). Here, even assuming, arguendo, that defendants' alleged representations in the property condition disclosure statement constituted active concealment, we conclude that defendants met their initial burden on the motion by establishing that those representations did not "thwart[ ]" plaintiff's ability to conduct his own investigation into the property (*Mikulski*, 112 AD3d at 1357) inasmuch as the status of the certificate of occupancy "was readily ascertainable from the public record" (*Matos v Crimmins*, 40 AD3d 1053, 1055 [2d Dept 2007]). Plaintiff failed to raise a triable issue of fact in opposition (*see id.*). Further, an action for fraud requires, inter alia, "justifiable reliance by the plaintiff" (*Morrow v MetLife Invs. Ins. Co.* [appeal No. 2], 177 AD3d 1288, 1289 [4th Dept 2019]). Here, defendants met their initial burden of establishing the absence of justifiable reliance on defendants' alleged representations by submitting evidence that plaintiff was aware, prior to closing, that the barn encroached on the adjoining property (*see generally Gallagher*, 147 AD3d at 1459). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

136.1
CA 19-00724
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PETER BRENT MCDEVITT, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 122710.)

E. STEWART JONES HACKER MURPHY LLC, TROY (JULIE ANN NOCIOLO OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered April 1, 2019. The judgment dismissed the claim after a trial.

It is hereby ORDERED that the judgment so appealed from is reversed on the facts without costs, the claim is reinstated, judgment is granted in favor of claimant, and the matter is remitted to the Court of Claims for further proceedings in accordance with the following memorandum: While serving a prison term at Groveland Correctional Facility for a non-violent offense, claimant—who had an unblemished disciplinary record—cooperated with an investigation by the Department of Corrections and Community Supervision (DOCCS) into an illegal sexual relationship between a female correction officer (Parkinson) and several male inmates. Among the inmates involved in the illegal relationship was a gang leader inside the prison. During the course of the investigation, a state official left documents evidencing claimant's cooperation where an inmate porter could see them, and the porter shared that information with other inmates, including the gang leader implicated in the investigation. The gang leader then collaborated with other inmates to instigate a brutal assault on claimant. Prior to the attack, one of the inmates informed Parkinson of the plan.

Notably, Parkinson—the very officer implicated by the investigation with which claimant was assisting—was the only officer stationed in claimant's dormitory at the time of the attack. At no point did DOCCS or any other state official move claimant to protective custody, a different prison, or even a different housing pod. Nor did DOCCS or any other state official bar Parkinson from guarding or interacting with claimant, despite the fact that, by DOCCS's own admission, Parkinson had already retaliated against

claimant by filing a baseless misbehavior report against him.

Claimant subsequently filed this claim, alleging as relevant here that defendant was negligent in failing to protect him from the attack. The Court of Claims tried the case and rendered judgment in defendant's favor. Claimant now appeals.

"Following a nonjury trial, the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see Baba-Ali v State of New York*, 19 NY3d 627, 640 [2012], citing *Northern Westchester Professional Park Assoc.*, 60 NY2d at 499; *Alexandra R. v Krone*, 186 AD3d 981, 982 [4th Dept 2020], *appeal dismissed* 36 NY3d 933 [2020]; *Upstate Forestry & Dev., LLC v McDonough Hardwoods Ltd.*, 178 AD3d 1412, 1412-1413 [4th Dept 2019]). In this case, judgment should have been rendered in favor of claimant, not defendant. We therefore reverse.

"Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard inmates, even from attacks by fellow inmates . . . Like other duties in tort, the scope of the State's duty to protect inmates is limited to risks of harm that are reasonably foreseeable" (*Sanchez v State of New York*, 99 NY2d 247, 252-253 [2002]). Foreseeability is defined—with "words familiar to every first-year law student" (*id.* at 252)—in terms of both actual and constructive notice, i.e., anything the State was aware of or should have been aware of (*see id.* at 255). More specifically, constructive notice includes whatever information the State reasonably should have known from its knowledge of the risks to a class of inmates based on its institutional expertise, its prior experience, and its policies and practices (*see id.* at 254). Contrary to the dissent's insinuation, a risk of harm can be reasonably foreseeable even without a "specific threat" against a particular inmate; indeed, "[i]n *Sanchez*, . . . the Court of Appeals specifically rejected such a requirement" (*Rodriguez v City of New York*, 38 AD3d 349, 350 [1st Dept 2007] [internal quotation mark omitted]).

Here, the trial evidence proves decisively that defendant either knew or should have known that claimant was at serious risk of being attacked as a result of his cooperation. Specifically, defendant knew that claimant had just reported an illegal sexual relationship between Parkinson and an inmate gang leader, and defendant's failure to safeguard the investigatory file allowed that fact to spread through the inmate population. As defendant's own witnesses testified at trial, the risk to an inmate in claimant's position under these circumstances would have been obvious and well-known. Notwithstanding the reasonably foreseeable risk to claimant, defendant failed to take any steps to protect him. In short, given Parkinson's prior retaliation, the gang leader's influence, motive, and ability to instigate an attack, and defendant's failure to safeguard the facility's investigatory file, we conclude that defendant's decision

to simply leave claimant in his dormitory, surrounded by associates of the gang leader and guarded only by Parkinson, constituted a grave breach of its duty to use "reasonable care under the circumstances" to protect an inmate in its custody (*Sanchez*, 99 NY2d at 254).

Contrary to defendant's contention, the intentional conduct of Parkinson and the other inmates in instigating claimant's beating does not excuse or supersede defendant's own independent negligent acts, i.e., its failure to take any steps to protect claimant from that reasonably foreseeable beating (*see Hain v Jamison*, 28 NY3d 524, 528-530 [2016]). Rather, defendant's own negligent acts were—at a minimum—a co-equal proximate cause of claimant's injuries. Indeed, claimant's assault was occasioned by the confluence of the negligent acts of defendant and the intentional conduct of Parkinson and the other inmates. Parenthetically, although the dissent faults us for classifying Parkinson's conduct as "intentional," the dissent overlooks the fact that *defendant*—in an effort to avoid respondeat superior liability—has consistently characterized Parkinson's conduct in this case as intentional.

Contrary to defendant's further contention and the view of our dissenting colleagues, the fact that claimant himself did not seek protective measures and even expressed a willingness to return to his dormitory does not circumscribe defendant's nondelegable duty to protect him under these circumstances. For one thing, when claimant agreed to return to his dormitory, he was unaware that the investigatory file had been compromised. In any event, and more importantly, an inmate's own braggadocio about his or her safety at a state prison simply cannot be the barometer of defendant's duty to protect him or her while confined. Defendant's duty to safeguard an inmate must be evaluated by reference to what a reasonable person in DOCCS's position would foresee about the danger to that inmate, not what the inmate—for whatever reason—believes or claims to believe about his or her own safety (*see generally Sanchez*, 99 NY2d at 252-255).

Nor did defendant satisfy its duty to claimant simply by transferring the inmates implicated in the investigation. By defendant's own characterization, DOCCS transferred those specific inmates because they were deemed to be victims of statutory sodomy, not because they might retaliate against claimant. Moreover, in light of the gang leader's well-known status at Groveland, simply removing the particular inmates implicated in the investigation was inadequate to protect claimant from the reasonably foreseeable retaliatory assault that ultimately occurred, especially given defendant's incomprehensible decision to station Parkinson—who DOCCS knew had already retaliated against claimant by filing a false misbehavior report—as the only officer in the dormitory. Finally, and contrary to the dissent's view, claimant's purported discussion of the investigation with other inmates presents, at most, an issue of comparative negligence that does not preclude liability on defendant's part (*see Brown v State of New York*, 31 NY3d 514, 518-520 [2018]; *Smith v State of New York*, 180 AD3d 1270, 1271 [3d Dept 2020]).

In light of the foregoing, we reverse the judgment, reinstate the claim, grant judgment in claimant's favor, and remit the matter to the Court of Claims to fix damages based on the proof already taken at trial.

All concur except PERADOTTO, J.P., and CARNI, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent. As an initial matter, although "this Court has the authority to independently consider the weight of the evidence on an appeal in a nonjury case, deference is still afforded to the findings of the [court] where, as here, they are based largely on credibility determinations" (*Williams v State of New York*, 187 AD3d 1522, 1522 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021] [internal quotation marks omitted]). Thus, "[o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*id.* [internal quotation marks omitted]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Howard v Pooler*, 184 AD3d 1160, 1163 [4th Dept 2020]).

Here, the record reflects that, after claimant spoke to investigators about the incident he witnessed and before the assault took place, inmates who were involved in the illegal sexual relationship with the correction officer (Parkinson) were removed from claimant's dormitory; no specific threat had been made against claimant; claimant himself told investigators that he was not concerned with returning to his dormitory after speaking with them; and claimant did not request protective custody. Indeed, the testimony as credited by the Court of Claims established that claimant himself told other inmates that he had spoken to investigators, further reflecting an absence of fear on his part. In our view, these circumstances present a "fair interpretation of the evidence" supporting the conclusion that defendant was not negligent in failing to prevent what claimant asserts was a foreseeable assault (*Williams*, 187 AD3d at 1522).

In reaching the contrary conclusion, although the majority relies, in part, on the "intentional conduct of Parkinson and the other inmates," claimant on appeal contends that Parkinson acted negligently, not intentionally, and thus the majority's characterization of Parkinson's conduct as "intentional" addresses an argument that the appellant has not raised and in fact explicitly refutes. Additionally, while the majority writes that defendant's investigation had been "compromised," this again ignores the court's factual finding that claimant himself "directly told other inmates in the dormitory that he had spoken to the investigator" and that "to the extent that the inmates [in claimant's] dormitory did learn of the purpose of Claimant's interview, it appears more likely than not that it was because Claimant freely told them about it." Not only must we, as discussed above, generally accord a degree of deference to the court's view of the evidence on this issue (*see id.*), we are also, on this particular appeal, unable to refute it. In support of its conclusion, the court cited in its decision claimant's testimony at

page 329 of the original trial transcript. Claimant has not, however, submitted that page of the transcript as part of the appellate record and has not raised any contention on appeal disputing the particular finding of the court that claimant himself alerted other inmates to his discussions with investigators.

Based on the court's factual findings below, the record before us, and the applicable standard of review, we would therefore affirm.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

136

CA 20-00136

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

LOUIS S. CARTER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JERMAINE PATTERSON, DEFENDANT-APPELLANT-RESPONDENT,
AND EBONY R. PACE, DEFENDANT.

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

THE CAREY FIRM, LLC, GRAND ISLAND (SHAWN W. CAREY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered January 24, 2020. The amended order, among other things, denied the motion of defendant Jermaine Patterson for summary judgment dismissing the complaint against him, denied in part plaintiff's motion for partial summary judgment on the issue of negligence, and granted in part the cross motion of plaintiff for partial summary judgment on the issue of serious injury.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying those parts of plaintiff's cross motion for partial summary judgment with respect to the significant limitation of use and 90/180-day categories of serious injury within the meaning of Insurance Law § 5102 (d) and granting those parts of plaintiff's motion for partial summary judgment seeking a determination that defendant Jermaine Patterson was negligent and that his negligence was a proximate cause of the accident, and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he allegedly sustained when his vehicle was struck by a vehicle driven by Jermaine Patterson (defendant). Immediately prior to striking plaintiff's vehicle, which was stopped at a stop sign at an intersection, defendant's vehicle collided in the intersection with a vehicle driven by defendant Ebony R. Pace. Plaintiff asserted that, as a result of the accident, he suffered a serious injury within the meaning of Insurance Law § 5102 (d) under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories. Defendant appeals and plaintiff cross-appeals from an amended order of Supreme Court that, inter alia, denied defendant's motion for summary judgment dismissing the complaint on the ground

that plaintiff did not sustain a serious injury that was causally related to the accident, granted those parts of plaintiff's cross motion for partial summary judgment with respect to the significant limitation of use and 90/180-day categories of serious injury, and denied those parts of plaintiff's motion for partial summary judgment seeking a determination that defendant was negligent and that his negligence was a proximate cause of the accident.

Defendant contends on his appeal that the court erred in denying his motion for summary judgment because he met his initial burden of establishing that "plaintiff did not suffer a serious injury causally related to the accident" (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]) and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to defendant's contention, his own submissions in support of his motion raise triable issues of fact with respect to whether the motor vehicle accident caused plaintiff's alleged injuries (*see Schaubroeck v Moriarty*, 162 AD3d 1608, 1609 [4th Dept 2018]; *Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017]). Defendant submitted the report of his expert physician, who concluded that plaintiff's lumbar strain or sprain was not significant and that plaintiff's disc injuries were degenerative in nature and not caused by trauma from the accident. The report of defendant's expert, however, "does not establish that plaintiff's condition is the result of a preexisting degenerative [condition] inasmuch as it 'fails to account for evidence that plaintiff had no complaints of pain prior to the accident' " (*Crane*, 151 AD3d at 1842; *see Baldauf v Gambino*, 177 AD3d 1307, 1308 [4th Dept 2019]).

Even assuming, arguendo, that defendant met his initial burden on his motion, we conclude that plaintiff raised a triable issue of fact in opposition with respect to causation (*see Chunn v Carman*, 8 AD3d 745, 746-747 [3d Dept 2004]) by submitting the affirmations of his orthopaedic and chiropractic experts, who concluded that plaintiff sustained two herniated discs that were traumatic in nature and caused by the accident.

We also reject defendant's contention that he established his entitlement to judgment as a matter of law with respect to the 90/180-day category of serious injury. Defendant's own submissions in support of his motion included plaintiff's deposition testimony that he was not able to perform his normal or customary activities during the first four or five months after the accident. Thus, defendant failed to establish that plaintiff was not limited or impaired in carrying out substantially all of his customary daily activities during 90 of the first 180 days following the accident (*see Latini v Barwell*, 181 AD3d 1305, 1307 [4th Dept 2020]; *cf. Yoonessi v Givens*, 39 AD3d 1164, 1165-1166 [4th Dept 2007]).

Contrary to defendant's further contention, we conclude that the court also properly denied those parts of his motion with respect to the significant limitation of use and permanent consequential limitation of use categories of serious injury. Even assuming, arguendo, that defendant made a "prima facie showing that plaintiff's

alleged injuries did not satisfy [the] serious injury threshold" with respect to those categories (*Pommells v Perez*, 4 NY3d 566, 574 [2005]), we conclude that plaintiff raised an issue of fact sufficient to defeat defendant's motion by presenting objective proof that he sustained two herniated discs, together with the qualitative and quantitative assessments of his treating orthopedist and chiropractor, who both concluded that plaintiff's injuries were significant, permanent, and causally related to the accident (*see Vitez v Shelton*, 6 AD3d 1180, 1181-1182 [4th Dept 2004]).

We agree with defendant, however, that the court erred in granting plaintiff's cross motion insofar as it sought partial summary judgment with respect to the significant limitation of use and 90/180-day categories of serious injury, and we therefore modify the amended order accordingly. Although plaintiff met his initial burden on the cross motion by submitting evidence establishing as a matter of law that he sustained a serious injury under each of those categories, defendant raised a triable issue of fact in opposition with respect to both the significant limitation of use and 90/180-day categories (*see George v City of Syracuse*, 188 AD3d 1612, 1613 [4th Dept 2020]).

Defendant submitted the report of his expert physician, who reviewed plaintiff's medical records and conducted an independent examination of plaintiff and opined within a reasonable degree of medical certainty that plaintiff did not suffer an acute injury as a result of the accident. Defendant's expert opined that plaintiff "show[ed] no evidence of a herniated disc, neurologic deficit or lumbar radiculopathy" and noted that plaintiff's physical therapy records indicated that plaintiff was 95% improved approximately five months after the accident. Thus, defendant's expert concluded that there was no evidence that plaintiff suffered a significant limitation of use of his lumbar spine. The expert's report was therefore sufficient to raise a triable issue of fact with respect to the significant limitation of use category (*see Savilo v Denner*, 170 AD3d 1570, 1570-1571 [4th Dept 2019]).

With respect to the 90/180-day category, defendant's expert opined, based on his review of the medical records and his examination, that plaintiff's lumbar strain or sprain was a minor or mild injury that would not have impaired plaintiff's ability to perform his usual and customary activities (*see Howard v Espinosa*, 70 AD3d 1091, 1093 [3d Dept 2010]). The conflicting opinion of defendant's expert was thus sufficient to raise a triable issue of fact whether plaintiff's injuries were so severe as to prohibit him from performing his customary activities for 90 out of the first 180 days (*see generally Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013]).

Finally, we agree with plaintiff on his cross appeal that the court erred in denying his motion for partial summary judgment insofar as it sought a determination that defendant was negligent and that his negligence was a proximate cause of the accident. We therefore further modify the amended order accordingly. Plaintiff met his initial burden with respect to negligence by establishing that

defendant violated Vehicle and Traffic Law §§ 1142 (a) and 1172 (a) by proceeding into an intersection controlled by a stop sign and failing to yield the right-of-way to Pace's vehicle and that defendant's violation of the statutes was unexcused (*see Peterson v Ward*, 156 AD3d 1438, 1439 [4th Dept 2017]; *Rolls v State of New York*, 129 AD3d 1638, 1638-1639 [4th Dept 2015]). Plaintiff also established that defendant's negligence was a proximate cause of the collision with plaintiff's vehicle (*see Van Doren v Dressler*, 45 AD3d 1366, 1367 [4th Dept 2007]). In opposition, defendant failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

179

CA 20-00832

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

REGAN DIDAS, PLAINTIFF-RESPONDENT,

V ORDER

ROCHESTER GAS AND ELECTRIC CORPORATION,
DEFENDANT-APPELLANT.

BURKE, SCOLAMIERO & HURD, LLP, ALBANY (STEVEN V. DEBRACCIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SEGAR & SCIORTINO PLLC, ROCHESTER (JASON D. POSELOVICH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

A memorandum and order having been entered August 26, 2021, affirming an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered June 25, 2020,

Now, upon the Court's own motion, having been informed by counsel for defendant-appellant immediately after the release of the August 26, 2021 memorandum and order that a stipulation of discontinuance was filed by the parties in the Monroe County Clerk's Office on May 25, 2021, without notice to this Court,

It is hereby ORDERED that the memorandum and order entered August 26, 2021, is vacated and the appeal is dismissed as moot.

Mark W. Bennett

Entered: August 30, 2021

Clerk of the Court

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

209

KA 18-00462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YE MIN T. AUSTEN, ALSO KNOWN AS YE MIN THET AUSTEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 31, 2018. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of rape in the first degree (Penal Law § 130.35 [4]) and course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]). We reject defendant's contention that he was deprived of a fair trial by the prosecutor's failure to produce a video-recorded statement of the victim until one week prior to trial. Defendant does not dispute that the recording constitutes *Rosario* material. Under the discovery rules in effect at the time of defendant's trial, "[w]here, as here, [a] witness[is] not called to testify at a pretrial hearing, *Rosario* material need not be disclosed until '[a]fter the jury has been sworn and before the prosecutor's opening address' " (*Matter of Doorley v Castro*, 160 AD3d 1381, 1383 [4th Dept 2018], quoting CPL former 240.45 [1] [a]). Neither party requested that this Court consider the retroactivity of the new discovery statute now in effect.

Defendant contends that defense counsel was ineffective for failing to object at trial to alleged hearsay testimony from the investigating police officer. We reject that contention. Failure to "to make a motion or argument that has little or no chance of success" does not constitute ineffective assistance (*People v Patterson*, 115 AD3d 1174, 1175 [4th Dept 2014], *lv denied* 23 NY3d 1066 [2014] [internal quotation marks omitted]) and, here, the officer's testimony

about the victim's reports of sexual abuse was admissible " 'for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to . . . defendant's arrest' " (*People v Ludwig*, 24 NY3d 221, 231 [2014]). Likewise, we conclude that defense counsel's failure to object to the admission in evidence of text messages on hearsay grounds did not constitute ineffective assistance because, even assuming, arguendo, that the text messages constituted hearsay evidence, any error " 'was at most a mistaken judgment as to trial strategy and cannot be characterized as ineffective assistance of counsel' " (*People v Simms*, 244 AD2d 920, 921 [4th Dept 1997], *lv denied* 91 NY2d 897 [1998]).

We reject defendant's further contention that Supreme Court erred in denying his motion to preclude the People's expert witness from testifying regarding child sexual abuse accommodation syndrome (CSAAS). Such testimony is admissible "for the purpose of explaining behavior that might be puzzling to a jury" (*People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *see People v Nicholson*, 26 NY3d 813, 828 [2016]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). Contrary to defendant's contention, the expert testimony did not exceed permissible bounds inasmuch as the expert spoke of the subject matter in general terms and expressly declined to provide an opinion regarding the victim's credibility or whether she was in fact a victim of sexual abuse (*see People v Lathrop*, 171 AD3d 1473, 1473-1474 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]). We reject defendant's contention that CSAAS is no longer generally accepted in the relevant scientific community. Although a small number of other state courts do not allow expert testimony on CSAAS (*see e.g. State of New Jersey v J.L.G.*, 234 NJ 265, 289, 303, 190 A3d 442, 456, 464 [2018]), the record here provides no basis for us to reach a similar conclusion (*see Spicola*, 16 NY3d at 466). We therefore conclude that the court did not abuse its discretion in permitting the expert testimony (*see People v Meir*, 178 AD3d 1452, 1453 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020]).

All concur except SMITH, J.P., who concurs in the result in the following memorandum: I agree with the majority's determination to affirm the judgment of conviction, but I write to address an issue of law that the majority has not discussed. Defendant contends that Supreme Court erred in permitting the prosecution to provide certain *Rosario* materials one week before the start of the trial, and the majority concludes that the materials were properly provided "[u]nder the discovery rules in effect at the time of defendant's trial," without discussing whether we are to apply those rules (*see* CPL former 240.45 [1] [a]), or the amended discovery rules enacted in 2019 (*see* CPL 245.10 [1] [a]; 245.20). I cannot agree that we may resolve this appeal without addressing that issue.

Defendant summarily contends that the former discovery statute applies to this case, and the People implicitly concede that this is so. It is well settled that such a "concession does not, however, relieve us from the performance of our judicial function and does not require us to adopt the proposal urged upon us" (*People v Berrios*, 28

NY2d 361, 366-367 [1971]; *see People v Colsrud*, 144 AD3d 1639, 1640 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]; *see also Matter of Knavel v West Seneca Cent. Sch. Dist.*, 149 AD3d 1614, 1616 [4th Dept 2017], *lv dismissed* 29 NY3d 1116 [2017]), inasmuch as an appellate court is not bound by "the erroneous concession of a legal principle" (*People v Diviesti*, 101 AD3d 1163, 1164 n [3d Dept 2012], *lv denied* 20 NY3d 1097 [2013]). Indeed, where appropriate this Court has rejected incorrect concessions by the People (*see e.g. People v Morrison*, 179 AD3d 1454, 1455 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]; *People v Adair*, 177 AD3d 1357, 1357 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]; *People v Wilson*, 175 AD3d 1800, 1801 [4th Dept 2019]). Thus, although appellate courts "have no quarrel with a litigant conceding an issue of fact . . . , or conceding that a bill of particulars is sufficiently specific . . . , or waiving a beneficial right . . . [, t]hose types of concessions do not intrude upon the judicial function of correctly identifying and applying the law to the facts" (*Knavel*, 149 AD3d at 1616). Therefore here, as in any appeal, it is our judicial function to "correctly identify[ ] and apply[ ] the law to the facts" (*id.*). Upon performing that function, however, I conclude that the new discovery rules should not be applied retroactively, thus I join the majority in voting to affirm.

At the time of trial, CPL former 240.45 (1) (a) required that the People provide *Rosario* material "[a]fter the jury has been sworn and before the prosecutor's opening address" (*id.*; *see Matter of Doorley v Castro*, 160 AD3d 1381, 1383 [4th Dept 2018]). The CPL was amended in 2019 so that such materials must be provided within 20 to 35 days of arraignment upon an indictment, depending on whether the defendant is in or out of custody (*see* CPL 245.10 [1] [a]; *see also* 245.20). Pursuant to the enacting session law, the new discovery rules took effect January 1, 2020 (*see* L 2019, ch 59, part LLL, §§ 1, 2 14), or approximately 8½ months after the legislature enacted that law on April 12, 2019 (*see id.*). Here, the record establishes that the recorded statement at issue was not provided until one week before the start of trial, and therefore, although it was timely provided within the meaning of CPL former article 240, it was not timely provided within the meaning of CPL article 245.

In determining whether to apply a statutory amendment retroactively, the courts must ascertain whether that was what legislature intended, and inasmuch " '[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' " (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 56 [2011]; *see People v M.E.*, 121 AD3d 157, 160 [4th Dept 2014]). Thus, " '[i]t is well settled . . . that a statute will not be given a retroactive construction unless an intention to make it retroactive is to be deduced from its wording, and a law will not receive a retroactive construction unless its language, either expressly or by necessary implication, requires that it be so construed. A clear expression of the legislative purpose is required to justify a retrospective application' " (*People v Lawrence*, 80 AD3d 1011, 1012 [3d Dept 2011]; *see e.g. People v Stephenson*, 34 AD3d 983,

983 [3d Dept 2006]).

In general, amendments to procedural statutes apply retroactively (*see People v Anderson*, 306 AD2d 536, 536-537 [2d Dept 2003], *lv denied* 1 NY3d 594 [2004]; *see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 55). Nevertheless, as noted in the comment to Statutes § 55, "[w]hat is really meant when it is said that procedural statutes are generally retroactive is that they apply to pending proceedings, and even with respect to such proceedings they only affect procedural steps taken after their enactment. In other words, while procedural changes are generally deemed applicable to subsequent proceedings in pending actions, it takes a clear expression of legislative intent to justify a retroactive application of a procedural statute so as to affect proceedings previously taken in such actions; and in the latter case, a change in procedure is inapplicable, unless in exceptional conditions, where the effect is to nullify by relation things already done in a pending proceeding" (McKinney's Cons Laws of NY, Book 1, Statutes § 55, Comment at 117-118 [1971 ed]). Applying the newly enacted CPL 245.10 (1) (a) retroactively would nullify the procedures used in all cases prior to the enactment of the new discovery rules and in pending cases for a period of 8½ months between the enactment and the effective date, and therefore only the clearest indication of legislative intent will require such retroactive application. Additionally, because the legislature provided that the new discovery rules would not take effect until 8½ months after their enactment, that delay "is additional evidence that the provisions were meant to apply prospectively. 'The postponement of the effective date of [the new discovery rules] furnishes critical and clear indicia of intent. If [they] were to have retroactive effect, there would have been no need for any postponement' " of the new rule's effective date (*People v Utsey*, 7 NY3d 398, 403-404 [2006]).

Furthermore, the CPL states that "[t]he provisions of this chapter do not impair or render ineffectual any proceedings or procedural matters which occurred prior to the effective date thereof" (CPL 1.10 [3]). Although that statute was part of the original enactment of the Criminal Procedure Law, it applies to amendments to the CPL (*see People v Bell*, 161 AD2d 1137, 1138 [4th Dept 1990], *lv denied* 76 NY2d 784 [1990]; *see also People v Battaglia*, 159 AD2d 993, 993 [4th Dept 1990], *lv denied* 76 NY2d 852 [1990]).

In addition, in determining whether to apply an amendment retroactively, " '[t]he criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards' " (*People v Morales*, 37 NY2d 262, 269 [1975], quoting *Desist v United States*, 394 US 244, 249 [1969]). Applying that test, I note that the People relied in innumerable cases on the old discovery rule in determining when to turn over *Rosario* material. Thus, it will severely impact the criminal justice system if we apply the statute retroactively because, in every case in which *Rosario* materials were requested, the People,

relying on the existing law, did not turn over the materials until the start of trial. There is no indication that the legislature intended that result, and every indication that it intended that the new rule apply only prospectively. Thus, I join the majority in applying the former discovery rule and in voting to affirm.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

225

CA 20-00723

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

ROBERT OWEN LEHMAN FOUNDATION, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ISRAELITISCHE KULTUSGEMEINDE WIEN, ET AL.,
DEFENDANTS,
AND ROBERT RIEGER TRUST, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DUNNINGTON BARTHOLOW & MILLER, NEW YORK CITY (RAYMOND J. DOWD OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (ZACHARY C. OSINSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 14, 2020. The order, among other things, denied the motion of defendant Robert Rieger Trust for a change of venue or, in the alternative, to dismiss the amended complaint.

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

Memorandum: In 1917, Austrian artist Egon Schiele made a portrait of his wife Edith. In 1964, that artwork was bought by art collector Robert Lehman, Sr. from an exhibition at an art gallery in London, England and, later that year, Lehman, Sr. gifted the artwork to his son, Robert Owen Robin Lehman (Robin). In 2016, Robin gifted the artwork to plaintiff, his eponymous foundation. After plaintiff consigned the artwork to Christie's for auction, two groups asserted competing claims of ownership of the artwork, alleging that the artwork left the possession of its rightful owner during the Holocaust. Defendant Israelitische Kultusgemeinde Wien (IKG) represents defendant Susan Zirkl Memorial Foundation Trust, which claims ownership of the artwork as an heir of Karl Maylander. Defendant Robert Rieger Trust (Rieger) and defendant Michael Bar claim ownership as heirs of Heinrich Rieger. Plaintiff then commenced this action seeking, inter alia, a declaration that it is the rightful owner of the artwork. In appeal No. 1, Rieger appeals from an order that denied its motion for a change of venue or, in the alternative, to dismiss plaintiff's amended complaint against it pursuant to CPLR 3211. Rieger and defendant Jacob Barak, the trustee of Rieger, then

moved for leave to renew or reargue the motion denied in the order in appeal No. 1 and, in the alternative, to dismiss plaintiff's amended complaint against Rieger and Barak pursuant to CPLR 3211. Bar subsequently joined the motion of Rieger and Barak and, in appeal No. 2, Rieger, Barak and Bar (collectively, defendants) appeal from an order denying that motion. Insofar as the order in appeal No. 2 denied that part of defendants' motion seeking leave to reargue, it is not appealable and we therefore dismiss the appeal to that extent (*see Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1469 [4th Dept 2020]).

Rieger contends in appeal No. 1 that Supreme Court erred in denying its motion insofar as Rieger sought to dismiss the amended complaint against it. Specifically, Rieger contends that plaintiff does not have standing to seek a declaration that it is the rightful owner of the artwork because plaintiff's tax returns do not list the artwork as an asset or state that it received the artwork in a gift transaction and thus, under the doctrine of tax estoppel, plaintiff cannot assert in this litigation that it owns the artwork. We reject that contention. "Where, as here, a defendant makes a pre-answer motion to dismiss based on lack of standing, 'the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied' " (*Matter of Violet Realty, Inc. v County of Erie*, 158 AD3d 1316, 1317 [4th Dept 2018], *lv denied* 32 NY3d 904 [2018]). "Under the doctrine of tax estoppel, [a] party to litigation may not take a position contrary to a position taken in [a] . . . tax return" (*Rizzo v National Vacuum Corp.*, 186 AD3d 1094, 1095 [4th Dept 2020] [internal quotation marks omitted]; *see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). " '[T]ax estoppel' is applied where a party's subsequently-adopted litigation position flatly contradicts express assertions previously made in tax filings . . . , but the omission of an asset leaves all questions in regard to it open" (*Angiolillo v Christie's, Inc.*, 185 AD3d 442, 443 [1st Dept 2020]; *see Matter of Elmezzi*, 124 AD3d 886, 887 [2d Dept 2015]). Here, tax estoppel does not prevent plaintiff from contending that it owns the artwork because plaintiff did not affirmatively assert in its tax return that it did not own the artwork; it simply did not list the artwork in a schedule of gifts that it received in 2016 (*see Angiolillo*, 185 AD3d at 443; *Matter of Courant*, 142 AD3d 614, 616 [2d Dept 2016], *lv dismissed* 29 NY3d 929 [2017]).

Contrary to Rieger's further contention in appeal No. 1, the court did not abuse its discretion in denying its motion insofar as it sought a change in venue. "The decision whether to grant a change of venue is committed to the sound discretion of the trial court, and will not be disturbed absent a clear abuse of discretion . . . Three grounds are available for a change of venue: (1) 'the county designated for that purpose is not a proper county'; (2) 'there is reason to believe that an impartial trial cannot be had in the proper county'; or (3) 'the convenience of material witnesses and the ends of justice will be promoted by the change' (CPLR 510)" (*Harvard Steel Sales, LLC v Bain*, 188 AD3d 79, 81 [4th Dept 2020]). " 'To effect a change of venue pursuant to CPLR 510 (1), a defendant must show both

that the plaintiff's choice of venue is improper and that its choice of venue is proper' " (*Matter of Zelazny Family Enters., LLC v Town of Shelby*, 180 AD3d 45, 47 [4th Dept 2019]). Rieger failed to make such a showing inasmuch as plaintiff's choice of venue, i.e., Monroe County, is proper because plaintiff is "deemed a resident of" that County (*see* CPLR 503 [c]). Furthermore, contrary to Rieger's contention, CPLR 508 does not require that venue be placed in the county where the chattel is located (*see Tower Broadcasting, LLC v Equinox Broadcasting Corp.*, 160 AD3d 1435, 1437 [4th Dept 2018]). Rieger abandoned any reliance on CPLR 510 (3) as a ground for change in venue inasmuch as it failed to raise that contention in defendants' main brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In any event, Rieger failed to meet its burden of demonstrating that the convenience of material witnesses would be better served by a change in venue (*see Rowland v Slayton*, 169 AD3d 1474, 1475 [4th Dept 2019]).

We reject Rieger's contention that plaintiff impermissibly chose Monroe County as a more tactically favorable forum for litigation. Rieger seeks to change venue to a different county within the same state, and thus the same substantive and procedural law will be applied regardless of which venue is the place of trial (*cf. IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 447 [1st Dept 2017]; *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7-10 [1st Dept 2007]).

Contrary to defendants' contention in appeal No. 2, the court properly denied defendants' motion insofar as they sought to dismiss the amended complaint against them pursuant to CPLR 3211. With respect to Rieger, we conclude that the motion violated the single motion rule. Successive motions to dismiss a pleading pursuant to CPLR 3211 are prohibited (*see* CPLR 3211 [e]; *Held v Kaufman*, 91 NY2d 425, 430 [1998]) and, in the motion at issue in appeal No. 1, Rieger had already sought to dismiss the action against it pursuant to CPLR 3211. Moreover, we conclude that, contrary to defendants' contention, the amended complaint states a cause of action to quiet title to the artwork inasmuch as the facts alleged in the amended complaint are sufficient to establish that plaintiff owned the artwork (*see* CPLR 3211 [a] [7]; *see generally D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 960 [4th Dept 2014]).

Finally, defendants' contention that the court erred in denying that part of their motion seeking leave to renew is not properly before us inasmuch as it was raised for the first time in their reply brief (*see O'Sullivan v O'Sullivan*, 206 AD2d 960, 961 [4th Dept 1994]). In any event, we conclude that the court did not abuse its discretion in denying that part of the motion inasmuch as "a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Kairis v Graham*, 118 AD3d 1494, 1495 [4th Dept 2014] [internal quotation marks omitted]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

226

CA 20-01289

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

ROBERT OWEN LEHMAN FOUNDATION, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ISRAELITISCHE KULTUSGEMEINDE WIEN, ET AL.,
DEFENDANTS,
MICHAEL BAR, ROBERT RIEGER TRUST, AND JACOB
BARAK, AS TRUSTEE OF THE ROBERT RIEGER TRUST,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DUNNINGTON BARTHOLOW & MILLER, NEW YORK CITY (RAYMOND J. DOWD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (ZACHARY C. OSINSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 1, 2020. The order denied the motion of defendants Robert Rieger Trust and Jacob Barak, as trustee of the Robert Rieger Trust, joined by defendant Michael Bar, seeking leave to renew and reargue a motion for a change of venue or, in the alternative, to dismiss the amended complaint.

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

Same memorandum as in *Robert Owen Lehman Found., Inc. v Israelitische Kultusgemeinde Wien* ([appeal No. 1] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

247

CA 20-00395

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

KAREN L. RYAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN B. RYAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

GERMAIN & GERMAIN, LLP, SYRACUSE (GALEN F. HAAB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 8, 2019. The order, inter alia, denied that part of defendant's application seeking to terminate his spousal maintenance obligation and recalculated defendant's child support obligation.

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

Memorandum: Plaintiff and defendant divorced in 2016. Pursuant to the terms of the parties' oral stipulation, which was incorporated but not merged into the judgment of divorce, defendant was, among other things, required to pay plaintiff spousal maintenance and child support for the benefit of the parties' six children. In 2017, defendant moved by order to show cause for an order, inter alia, terminating his obligation to pay spousal maintenance and recalculating and reducing his child support obligation due to his health issues and inability to continue working as a surgeon. Supreme Court, after a hearing, recalculated the parties' child support obligations and denied that part of defendant's application seeking to terminate his obligation to pay spousal maintenance and reduce his child support obligation. We affirm.

We reject defendant's contention that the court, in recalculating the parties' child support obligations, erred in imputing income to him. "Trial courts . . . possess considerable discretion to impute income in fashioning a child support award . . . , and a court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1398 [4th Dept 2014] [internal quotation marks omitted]; *see Irene v Irene* [appeal No. 2],

41 AD3d 1179, 1180 [4th Dept 2007]). Child support is determined by the parents' ability to provide for their children rather than their current economic situation (*see Irene*, 41 AD3d at 1180), and the record supports the court's discretionary determination to impute income to defendant based on, inter alia, his employment history and earning capacity (*see Matter of Drake v Drake*, 185 AD3d 1382, 1383 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]; *Matter of Deshotel v Mandile*, 151 AD3d 1811, 1812 [4th Dept 2017]).

Defendant contends that the court erred in refusing to grant a downward modification with respect to his child support and spousal maintenance obligations. We reject that contention and conclude that the court did not abuse its discretion in determining that defendant had the ability to meet those obligations (*see Jelfo v Jelfo*, 81 AD3d 1255, 1257 [4th Dept 2011]).

With respect to defendant's child support obligation, a "parent seeking to modify a child support order arising out of an agreement or stipulation must demonstrate that the agreement was unfair when entered into or that there has been a substantial, unanticipated and unreasonable change in circumstances warranting a downward modification" (*Matter of Brink v Brink*, 147 AD3d 1443, 1444 [4th Dept 2017] [internal quotation marks omitted]). In addition, the parent "must submit competent proof that the change in circumstance was not of his or her own making and that the parent thereafter made a good-faith effort to obtain employment commensurate with his or her qualifications and experience" (*Ashmore v Ashmore*, 114 AD3d 712, 713 [2d Dept 2014], *appeal dismissed* 24 NY3d 974 [2014]).

Here, the court determined and the record establishes that defendant's change in circumstance, i.e., his medical disability, was not of his own making. Defendant failed to demonstrate, however, that he made a good-faith or diligent effort to obtain employment commensurate with his ability, qualifications, and experience such that a downward modification is warranted (*see id.*; *see also Gray v Gray*, 52 AD3d 1287, 1288 [4th Dept 2008], *lv denied* 11 NY3d 706 [2008]). Defendant testified that he did not conduct a job search or attempt to replace his lost income because he hoped to return to his medical practice after his surgery. Furthermore, although defendant obtained employment as an administrative consultant at a hospital after his surgery, he was fired from that position and thereafter made only one inquiry about potentially obtaining a teaching position (*cf. Matter of Glinski v Glinski*, 199 AD2d 994, 994-995 [4th Dept 1993]).

Even assuming, arguendo, that defendant demonstrated that he made a good-faith or diligent effort to obtain employment to replace his lost income, we conclude that a downward modification of defendant's child support obligation is unwarranted because the record establishes that, in addition to his non-taxable disability income, defendant has substantial assets, and "the proper amount of support payable is determined not by a parent's current economic situation, but by a parent's assets and earning powers" (*Ashmore*, 114 AD3d at 713).

With respect to defendant's spousal maintenance obligation, as the party moving to modify an order or judgment incorporating the terms of a stipulation regarding spousal maintenance, defendant bore the burden of establishing that the continued enforcement of his maintenance obligation would create an "extreme hardship" (*Sayers v Sayers*, 129 AD3d 1519, 1520 [4th Dept 2015]; *see* Domestic Relations Law § 236 [B] [9] [b] [1]), which he failed to do.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

248

CA 20-01075

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

KAREN L. RYAN, PLAINTIFF-RESPONDENT,

V ORDER

JOHN B. RYAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GERMAIN & GERMAIN, LLP, SYRACUSE (GALEN F. HAAB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 3, 2019. The amended order, inter alia, denied that part of defendant's application seeking to terminate his spousal maintenance obligation and recalculated defendant's child support oligation.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

249

CA 20-00272

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

JENNIFER A. TABERSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY J. TABERSKI, DEFENDANT-APPELLANT.

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO (DONNA L. HASLINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SAKOWSKI & MARKELLO, LLP, ELMA (JOSEPH SAKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered December 30, 2019. The order, insofar as appealed from, denied that part of the motion of defendant seeking to recoup a lump sum payment from plaintiff.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted in its entirety, and the matter is remitted to Supreme Court, Genesee County, for further proceedings in accordance with the following memorandum: Plaintiff and defendant were divorced pursuant to a judgment entered in February 2009 that incorporated but did not merge a stipulation of the parties that, inter alia, provided that plaintiff would receive her marital share of defendant's retirement benefits under the New York State and Local Retirement System (NYSLRS) pursuant to the *Majauskas* formula (*see Majauskas v Majauskas*, 61 NY2d 481, 489-491 [1984]). A Domestic Relations Order (DRO) was filed in December 2010. In December 2011, defendant received a letter from NYSLRS approving the submitted DRO. The letter stated that the DRO was "silent" regarding what would happen if defendant retired under a disability and that NYSLRS would calculate plaintiff's distribution using the disability retirement allowance, which was apparently pursuant to its standard policy. Defendant retired in August 2016 and filed a disability retirement application at the same time. The parties began receiving their respective shares of defendant's service retirement benefit soon thereafter, but it was not until February 2019 that NYSLRS approved defendant's disability retirement application, retroactive to his retirement date. The resulting lump sum retroactive payment and increased monthly benefits were both apportioned between plaintiff and defendant. Before the retroactive payment was distributed, defendant's attorney contacted plaintiff and put her on notice that defendant was disputing her entitlement to a portion of defendant's disability retirement benefit.

In August 2019, defendant moved to amend the DRO to specify that plaintiff was not entitled to any portion of his disability retirement benefit and to recoup the retroactive payment via a reduction in plaintiff's monthly benefits. Supreme Court granted defendant's motion to the extent that it sought to amend the DRO to specify that plaintiff was entitled only to the service retirement benefit payments, retroactive to the date the motion was filed. The court further held, however, that under the doctrine of laches defendant was not entitled to recoup the retroactive payment made to plaintiff when the disability retirement application was approved in 2019. Defendant now appeals from the order insofar as it denied that part of his motion seeking recoupment of the retroactive payment.

We agree with defendant that the court abused its discretion in determining that the doctrine of laches applies to this case (*see generally Capruso v Village of Kings Point*, 23 NY3d 631, 642 [2014]), and we therefore reverse the order insofar as appealed from, grant defendant's motion in its entirety, and remit the matter for the preparation of an amended DRO. "Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity . . . The essential element of this equitable defense is delay prejudicial to the opposing party" (*Matter of Schulz v State of New York*, 81 NY2d 336, 348 [1993] [internal quotation marks omitted]). "The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]).

Here, the court found that defendant should have sought to amend the DRO in 2011, after receiving the letter from NYSLRS. But at that time, defendant was not eligible for and had not applied for a disability retirement. When his disability retirement application was approved in February 2019 and defendant became aware that plaintiff's distribution would accordingly increase, he promptly moved to amend the DRO. Moreover, even if there was a delay here, plaintiff utterly failed to make a showing of prejudice (*see Santillo v Santillo*, 155 AD3d 1688, 1689 [4th Dept 2017]; *Denaro v Denaro*, 84 AD3d 1148, 1149-1150 [2d Dept 2011], *lv dismissed* 17 NY3d 921 [2011]; *Beiter v Beiter*, 67 AD3d 1415, 1416 [4th Dept 2009]). The court's determination that plaintiff "relied to her detriment upon [d]efendant's apparent acquiescence to [the]NYSLRS disability benefit determination" has no basis in the record. Plaintiff was aware that defendant was disputing her entitlement to the disability retirement allowance before she ever received the retroactive payment.

All concur except NEMOYER and BANNISTER, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. Contrary to the majority, we conclude that Supreme Court did not abuse its discretion in denying defendant's motion insofar as it sought recoupment of the retroactive disability retirement payment made by the New York State and Local Retirement System (NYSLRS) to plaintiff (*see generally D'Amato v D'Amato*, 132 AD3d 1424, 1425 [4th Dept 2015]). Because the parties' Domestic Relations Order (DRO) was

silent as to the payout distribution if defendant was to retire under a disability, and because the parties and counsel knew that the NYSLRS and the State Comptroller interpreted the DRO as authorizing NYSLRS to calculate plaintiff's distribution using defendant's disability retirement allowance, we conclude that plaintiff was entitled to receive the retroactive payment for the time period that it represented. We note in particular that defendant did not move to amend the DRO until more than eight years after the DRO was filed and the NYSLRS interpretation was issued, and several months after distribution of the funds to plaintiff had already occurred.

The majority appears to credit the statements of defendant's counsel that he contacted plaintiff by letter and email before defendant filed his motion. However, there is no such email or letter in the record to support that assertion. In our view, there is no proof in this record that plaintiff was on notice any earlier than August 2019, when defendant filed his motion, that defendant intended to contest the DRO and the Comptroller's interpretation of it. Therefore, we conclude that it was within the court's discretion to hold that defendant was barred from recouping the retroactive payment made to plaintiff (*see generally Capruso v Village of Kings Point*, 23 NY3d 631, 641-642 [2014]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

272

CA 20-00397

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

EAST AURORA COOPERATIVE MARKET, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RED BRICK PLAZA LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered November 8, 2019. The order, inter alia, granted the motion of plaintiff to disburse funds from an escrow account.

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

Same memorandum as in *East Aurora Coop. Market, Inc. v Red Brick Plaza LLC* ([appeal No. 2] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

273

CA 20-00709

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

EAST AURORA COOPERATIVE MARKET, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

RED BRICK PLAZA LLC,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Henry J. Nowak, J.), entered May 29, 2020. The order and judgment, inter alia, awarded plaintiff attorneys' fees.

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

Memorandum: In 2014, plaintiff entered into a lease agreement (Lease) with defendant, the owner and landlord of a commercial building in East Aurora (Property). Plaintiff began renovating the Property, and the assessed value of the Property increased in 2016 and 2017. Defendant then applied for and obtained a business investment exemption for the Property based on the improvements made by plaintiff. The business investment exemption resulted in a reduction of defendant's property taxes over a 10-year period beginning in 2018.

In 2018, defendant sent invoices to plaintiff demanding payment within 15 days of amounts representing unpaid water bills and an increase in property taxes based on the reassessment of the Property in 2016. Plaintiff disputed the invoices and requested an explanation and documentation from defendant regarding its calculation of the amounts allegedly owed. Plaintiff thereafter commenced this action seeking, inter alia, declarations setting forth the parties' respective rights and obligations under the Lease with respect to the water charges in the invoice and with respect to any increase in property taxes resulting from the reassessment of the Property in 2016, and an award of interest, costs, attorneys' fees, and disbursements. Supreme Court granted plaintiff's subsequent

application for an order pursuant to CPLR 6301 temporarily restraining defendant from, among other things, taking any action to collect payment on the invoices or to terminate plaintiff's tenancy in the Property and tolling the due date for payment of the invoices. The court also directed plaintiff to deposit funds to be held in escrow. Plaintiff paid the water bill invoice and deposited into escrow the amount in dispute after the water bill invoice was paid. Plaintiff thereafter moved to modify the temporary restraining order to permit plaintiff to use the escrowed funds to pay a portion of the property taxes owed, and defendant cross-moved for, inter alia, summary judgment in its favor on plaintiff's causes of action.

In appeal No. 1, defendant appeals from an order that, inter alia, calculated the amount of additional taxes owed by plaintiff, granted plaintiff's motion for disbursement of the funds held in escrow, denied defendant's cross motion for summary judgment, and determined that plaintiff was the prevailing party under the Lease. In appeal No. 2, defendant appeals from an order and judgment insofar as it granted plaintiff's application for attorneys' fees as the prevailing party under the Lease and denied defendant's cross motion seeking, among other things, leave to renew its opposition to the court's determination that plaintiff was the prevailing party, and plaintiff cross-appeals from the same order and judgment insofar as it denied that part of plaintiff's motion seeking a further award of attorneys' fees and costs.

Defendant contends on its appeal in appeal No. 1 that the court erred in calculating the 2018 County and Village taxes owed by plaintiff to defendant because it awarded plaintiff the benefit of a credit for the business investment exemption that had already been applied by the taxing authorities. Contrary to defendant's assertion, however, the court determined that plaintiff was not entitled under the terms of the Lease to a credit based on the decrease in property taxes owed by defendant arising from the business investment exemption. Pursuant to the terms of the Lease, plaintiff was responsible for any increase in taxes resulting from plaintiff's work on the Property. Because the taxable basis of the Property for the purpose of calculating County and Village taxes decreased significantly in 2018 based on the application of the business investment exemption, defendant was not required to pay any additional taxes as a result of plaintiff's work on the Property, and the court thus properly determined that plaintiff owed no additional taxes to defendant as a result of that work.

We also reject defendant's contention in appeal No. 1 that the court erred in determining that plaintiff was the "prevailing party" under the Lease, thereby entitling plaintiff to an award for reasonable attorneys' fees and costs. "In determining whether a party is a prevailing party, a fundamental consideration is whether that party has 'prevailed with respect to the central relief sought' " (*Chainani v Lucchino*, 94 AD3d 1492, 1494 [4th Dept 2012], quoting *Nestor v McDowell*, 81 NY2d 410, 416 [1993], *rearg denied* 82 NY2d 750 [1993]; *see Leonard E. Riedl Constr., Inc. v Homeyer*, 105 AD3d 1391, 1392 [4th Dept 2013]). "[S]uch a determination requires an initial

consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*Excelsior 57th Corp. v Winters*, 227 AD2d 146, 147 [1st Dept 1996]; *see Chainani*, 94 AD3d at 1494).

Here, the court determined that plaintiff substantially prevailed in the litigation because defendant's invoice for additional property taxes contained multiple errors, the methodology used by defendant in calculating the amount owed by plaintiff was contrary to the terms of the Lease, and defendant utilized plaintiff's renovation work on the Property to effectively reduce the taxes and then sought to augment the benefit of that tax reduction by seeking reimbursement from plaintiff for taxes that defendant was not required to pay. Plaintiff obtained the relief it requested in the litigation, i.e., a declaration of its rights and obligations under the Lease, and the court substantially adopted plaintiff's formula in calculating the taxes owed.

Defendant contends on its appeal in appeal No. 2 that the court erred in granting plaintiff's application for attorneys' fees because plaintiff had not actually paid attorneys' fees. We reject that contention. The submissions of plaintiff's counsel, which included a pre-bill worksheet, establish that plaintiff incurred attorneys' fees in connection with the commenced proceeding, even if plaintiff had not yet paid those fees. Where, as here, there is no definition of the word "incur" in the contract, that word is to be afforded its ordinary meaning, i.e., to "become liable for" (*Rubin v Empire Mut. Ins. Co.*, 25 NY2d 426, 429 [1969] [internal quotation marks omitted]).

We also reject defendant's alternative contention that the amount of attorneys' fees awarded to plaintiff is unreasonable. "In evaluating what constitutes . . . reasonable attorney[s'] fee[s], factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability and reputation, the amount [of money] involved, the customary fee charged for such services, and the results obtained" (*Matter of Dessauer*, 96 AD3d 1560, 1561 [4th Dept 2012] [internal quotation marks omitted]; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1290 [4th Dept 2014]). "[A] trial court is in the best position to determine those factors integral to fixing [attorneys'] fees . . . and, absent an abuse of discretion, the trial court's determination will not be disturbed" (*A&M Global Mgt. Corp.*, 115 AD3d at 1290 [internal quotation marks omitted]; *see Pelc v Berg*, 68 AD3d 1672, 1673 [4th Dept 2009]). Here, we conclude that the court did not abuse its discretion in determining that the attorneys' fees awarded to plaintiff were reasonable given the complexity of the issues presented in defendant's cross motion (*see Hinman v Jay's Vil. Chevrolet*, 239 AD2d 748, 748-749 [3d Dept 1997]; *see generally National Union Fire Ins. Co. of Pittsburgh, Pa. v Marangi*, 214 AD2d 469, 470 [1st Dept 1995]; *Matter of Simmons [Government Empls. Ins. Co.]*, 59 AD2d 468, 472-473 [2d Dept 1977]).

Contrary to defendant's further contention on its appeal in

appeal No. 2, the court did not abuse its discretion in denying defendant's cross motion insofar as it sought leave to renew based on the discovery of information concerning plaintiff's fee arrangement with counsel. Defendant failed to demonstrate the existence of material new facts inasmuch as its claims that plaintiff's counsel had a conflict of interest and that the conflict of interest negatively impacted defendant are based on speculation (*see Caryl S. v Child & Adolescent Treatment Servs.*, 238 AD2d 953, 953 [4th Dept 1997]; *Bethlehem Steel Corp. v United States Fid. & Guar. Co.*, 193 AD2d 1058, 1059 [4th Dept 1993]; *see also Olmoz v Town of Fishkill*, 258 AD2d 447, 447-448 [2d Dept 1999]).

Plaintiff contends on its cross appeal in appeal No. 2 that the court erred in declining to award it additional attorneys' fees, court costs, and other expenses as the prevailing party under the Lease. Initially, we reject defendant's contention that the law of the case doctrine applies to bar a further award (*see Dazzo v Kilcullen*, 127 AD3d 1126, 1127-1128 [2d Dept 2015]). Nevertheless, we conclude that the court did not abuse its discretion in awarding plaintiff attorneys' fees and costs with respect to the motions at issue in the order in appeal No. 1 but declining, based on equitable considerations, to award plaintiff additional attorneys' fees and expenses with respect to, inter alia, the motions at issue in the order and judgment in appeal No. 2 (*see generally A&M Global Mgt. Corp.*, 115 AD3d at 1290). Although the court determined that plaintiff was the prevailing party under the Lease, the court further determined that most of the relief sought in the complaint had already been decided by the order at issue in appeal No. 1 or was moot, and that an award of additional attorneys' fees, costs, and expenses thus was not warranted. Finally, to the extent that the court did not rule on plaintiff's request for fees pursuant to 22 NYCRR 130-1.1, the court's failure to do so is deemed to be a denial (*see Violet Realty, Inc. v Amigone, Sanchez & Mattrey, LLP*, 183 AD3d 1278, 1280 [4th Dept 2020]), and we conclude that the court did not abuse its discretion in implicitly denying that request (*see Matter of Bedworth-Holgado v Holgado*, 85 AD3d 1589, 1590 [4th Dept 2011]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

275

KA 19-02170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON RICHARDSON, 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 August 23, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing points under risk factors 11 and 12, and that after subtracting those points he should be classified as a level two risk. We reject that contention, and thus we affirm.

Initially, we note that, although defendant contended at the SORA hearing that he was entitled to a downward departure to a level two risk from the presumptive level three risk yielded by his total point score on the risk assessment instrument, he has not raised that contention on appeal, and thus it is deemed abandoned (*see People v Liddle*, 159 AD3d 1286, 1287 n [3d Dept 2018], *lv denied* 32 NY3d 905 [2018]; *People v Encarnacion*, 138 AD3d 1497, 1498 [4th Dept 2016]).

Pursuant to the SORA Risk Assessment Guidelines and Commentary (2006) (Guidelines), "offenders are assessed 15 points under risk factor 11 if they have a history of drug or alcohol abuse or if they were abusing drugs or alcohol at the time of the sex offense" (*People v Palmer*, 20 NY3d 373, 376 [2013]; *see People v Turner*, 188 AD3d 1746, 1746-1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *People v Kunz*, 150 AD3d 1696, 1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]). Here, although there is no evidence that defendant used drugs during the offense at issue, the People introduced evidence that

he was convicted of criminal possession of a controlled substance and possession of marihuana, that he admitted using alcohol, marihuana, acid and crack cocaine at other times, that he sought treatment for substance abuse and that, after a period of sobriety, he returned to using drugs and alcohol. The People also established that defendant admitted using alcohol to self-medicate during bouts of depression and anxiety and that, although he said that he "would benefit from intervention," he refused to participate in substance abuse counseling in prison. Thus, the court properly assessed points under risk factor 11 because the People established, by clear and convincing evidence, a "pattern of drug or alcohol use in . . . defendant's history" evincing substance abuse (*People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019] [internal quotation marks omitted]; *see Turner*, 188 AD3d at 1746-1747).

Next, points are properly assessed under risk factor 12 where, as here, an offender has refused sex offender treatment, because "such conduct is powerful evidence of the offender's continued denial and his [or her] unwillingness to alter his [or her] behavior" (*People v Ford*, 25 NY3d 939, 941 [2015] [internal quotation marks omitted]; *see People v Loughlin*, 145 AD3d 1426, 1427 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). "Refusal contemplates an intentional explicit rejection of what is being offered" (*Ford*, 25 NY3d at 941). Furthermore, the Guidelines "do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment" (*People v Graves*, 162 AD3d 1659, 1660 [4th Dept 2018], *lv denied* 32 NY3d 906 [2018] [internal quotation marks omitted]). Here, defendant failed to introduce any evidence to support his assertion that the facility in which he was confined did not provide sex offender treatment. In any event, he admitted that he was unwilling to transfer to a correctional facility where he could participate in such treatment, thereby establishing an "intentional explicit rejection of what [was] being offered" (*Ford*, 25 NY3d at 941).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

276

KA 19-00589

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEX GONZALES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Seneca County Court (Richard M. Healy, A.J.), rendered February 15, 2019. The judgment convicted defendant upon his plea of guilty of attempted promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]), defendant contends that his waiver of the right to appeal is invalid and that County Court should have granted his request at sentencing to withdraw his plea. We agree with defendant that his waiver is unenforceable because "[t]he written waiver of the right to appeal signed by defendant [at the time of the plea] and the verbal waiver colloquy conducted by [the court] together improperly characterized the waiver as 'an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief' " (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020], quoting *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]).

Nevertheless, we perceive no basis in the record to conclude that the court abused its discretion in denying defendant's request to withdraw his plea (*see People v Morris*, 78 AD3d 1613, 1614 [4th Dept 2010], *lv denied* 17 NY3d 798 [2011]; *see generally People v Tolbert*, 185 AD3d 1513, 1514 [4th Dept 2020], *lv denied* 35 NY3d 1116 [2020]). Although defendant contends that the factual colloquy was insufficient inasmuch as he did not admit the elements of the crime to which he pleaded guilty, he "pleaded guilty to a lesser crime than that charged in the indictment, and thus no factual colloquy was required" (*People v Reynolds*, 295 AD2d 986, 987 [4th Dept 2002], *lv denied* 98 NY2d 713

[2002]; *see People v Johnson*, 23 NY3d 973, 975 [2014]). To the extent that defendant contends that his plea was involuntary because it was coerced by defense counsel, such contention is belied by the record (*see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *People v Merritt*, 115 AD3d 1250, 1251 [4th Dept 2014], *lv denied* 30 NY3d 1021 [2017], *reconsideration denied* 35 NY3d 1068 [2020]). Indeed, during the plea colloquy, defendant said that he was pleading guilty voluntarily and that no one had threatened, forced or coerced him into pleading guilty.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

288

CA 20-00688

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

THE NEW Y-CAPP, INC., JONATHAN EUGENE COLEMAN
AND DONNA ZEMORIA PIERCE-BAYLOR,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

YELLOWSTONE CAPITAL, LLC, DEFENDANT-APPELLANT.

STEIN ADLER DABAH & ZELKOWITZ LLP, NEW YORK CITY (CHRISTOPHER R. MURRAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), AND WHITE AND WILLIAMS, NEW YORK CITY, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered May 11, 2020. The order, insofar as appealed from, granted in part plaintiffs' motion seeking, inter alia, to vacate a judgment by confession.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, plaintiffs' motion is denied in its entirety and the judgment by confession is reinstated nunc pro tunc.

Memorandum: Plaintiffs commenced this action seeking to vacate a judgment by confession and declaratory relief based on, inter alia, allegations of fraud related to defendant's filing of the judgment as well as the underlying merchant cash advance agreement between the parties. Plaintiffs concomitantly moved by order to show cause to enjoin defendant from enforcing the judgment by confession and for vacatur of the same. Defendant opposed plaintiffs' motion and moved, inter alia, to dismiss the complaint on multiple grounds, including the pendency of a federal action between the parties on the same cause of action (CPLR 3211 [a] [4]) and failure to state a cause of action (CPLR 3211 [a] [7]). In the resulting decision and order, Supreme Court granted that part of defendant's motion seeking dismissal of the complaint pursuant to CPLR 3211 (a) (4) to "permit the parties to litigate the subject dispute together with the matters already pending in the [f]ederal [c]ourt action, which makes the most sense for the sake of judicial economy." The court expressly declined to address the merits of plaintiffs' allegations regarding either "[d]efendant's filing of the previously executed confession of judgment" or "the legal issues as to the parties' underlying agreement" raised in plaintiffs' motion and complaint. Nonetheless, the court, inter alia,

granted plaintiffs' motion insofar as it sought vacatur of the judgment by confession, "until such time as those issues . . . can be properly examined" in federal court, noting that the vacatur was not "a determination by this court that such agreement is illegal, as argued by the [p]laintiff[s]." Defendant appeals.

We note at the outset that defendant is not aggrieved by the order on appeal insofar as it granted that part of its motion seeking dismissal of the complaint pursuant to CPLR 3211 (a) (4), and plaintiffs did not take a cross appeal; therefore, the parties' contentions regarding the sufficiency of plaintiffs' complaint pursuant to CPLR 3211 (a) (7) are not properly before us (*see generally* CPLR 5511; *Matter of McGraw v Town Bd. of Town of Villenova*, 186 AD3d 1014, 1016 [4th Dept 2020]; *Parker v Town of Alexandria*, 163 AD3d 55, 58 [4th Dept 2018]). We agree with defendant, however, that the court effectively granted summary judgment to plaintiffs on the ultimate relief requested by granting plaintiffs' motion insofar as it sought vacatur of the judgment by confession (*see Coolidge Equities Ltd. v Falls Ct. Props. Co.*, 45 AD3d 1289, 1289 [4th Dept 2007]). Inasmuch as plaintiffs did not prevail on the merits of their plenary action (*see generally Scheckter v Ryan*, 161 AD2d 344, 345 [1st Dept 1990]; *Bufkor, Inc. v Wasson & Fried*, 33 AD2d 636, 637 [4th Dept 1969]), that was error.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

291

CA 20-00526

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

FAUSTO PRATTICO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, ET AL., DEFENDANTS,
TITAN INSURANCE AND EMPLOYEE BENEFITS AGENCY, LLC,
MICHAEL GUROWSKI, TAMMY GUROWSKI, MARISSA BENETT
AND US RETIREMENT PARTNERS, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, ROCHESTER (PAUL A. SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered February 3, 2020. The order, among other things, granted the motion of plaintiff pursuant to CPLR 3126 for an order striking the answer of defendants Titan Insurance and Employee Benefits Agency, LLC, Michael Gurowski, Tammy Gurowski, Marissa Benett and US Retirement Partners.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, malicious prosecution. The amended complaint alleges, among other things, that Titan Insurance and Employee Benefits Agency, LLC (Titan), its employees Michael Gurowski, Tammy Gurowski, and Marissa Benett, and Titan's successor in interest, US Retirement Partners (collectively, defendants), along with other defendants not relevant to this appeal, maliciously instigated a criminal prosecution of plaintiff. The record establishes that the criminal charges were dismissed by a grand jury before plaintiff commenced this action. Discovery ensued in this action, during which Supreme Court directed defendants to provide various materials to plaintiff. After determining that defendants failed to comply, the court repeatedly directed defendants to provide those and other discovery materials, and imposed sanctions on defendants for their failures to comply. No appeal was taken with respect to those directions. Plaintiff then moved, inter alia, pursuant to CPLR 3126 for an order striking defendants' answer and deeming the allegations in the malicious prosecution cause of action admitted, and defendants, inter alia, moved for an order granting them summary judgment dismissing the

amended complaint against them. Defendants now appeal from an order that, inter alia, granted plaintiff's motion and denied defendants' motion. We affirm.

"It is well settled that '[t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed' " (*Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715 [4th Dept 2003]; *see Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). We have "repeatedly held that the striking of a pleading is appropriate only where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Perry v Town of Geneva*, 64 AD3d 1225, 1226 [4th Dept 2009] [internal quotation marks omitted]). "The willful or contumacious character of a party's conduct can be inferred from the party's *repeated* failure to respond to demands or to comply with discovery orders" (*Pezzino v Wedgewood Health Care Ctr., LLC*, 175 AD3d 840, 841 [4th Dept 2019] [internal quotation marks omitted]). " 'Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse' " (*Hann v Black*, 96 AD3d 1503, 1504-1505 [4th Dept 2012]).

Here, plaintiff established on his motion that defendants repeatedly failed to comply with discovery orders, that such failure was willful, contumacious and in bad faith, and that plaintiff was precluded by that failure from establishing a prima facie case on his malicious prosecution cause of action (*cf. McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1311 [4th Dept 2012]). Thus, the court properly determined that plaintiff met his initial burden on his motion, thereby shifting the burden to defendants to offer a reasonable excuse (*see Allen*, 121 AD3d at 1513). Defendants failed to meet that burden, and indeed they do not contend that there is a reasonable excuse; rather, they argue only that they did not violate any of the court's discovery orders. That argument is belied by the record. Consequently, we conclude that the court properly exercised its discretion by striking defendants' answer and deeming the allegations in the malicious prosecution cause of action admitted.

We have considered defendants' remaining contention and conclude that it does not require a different result.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

293

CA 20-00499

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

IN THE MATTER OF THE APPLICATION OF CAMERON TRANSPORT CORP., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND OFFICE OF MEDICAID INSPECTOR GENERAL, RESPONDENTS-APPELLANTS.

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

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 16, 2020 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, directed respondents to discontinue withholding Medicaid payments from petitioner.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner, a transportation provider enrolled in the Medicaid program, commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, New York State Department of Health and Office of Medicaid Inspector General (OMIG), to discontinue withholding Medicaid payments from it and to pay to petitioner sums that previously had been withheld after a determination that payments should be suspended due to credible allegations that petitioner engaged in fraud. Respondents appeal from a judgment that granted the petition by, inter alia, ordering them to discontinue withholding petitioner's Medicaid payments and to immediately pay it the previously withheld sums.

We conclude that Supreme Court erred in granting the petition to the extent of directing respondents to discontinue withholding Medicaid payments from petitioner and to immediately repay previously withheld payments. Mandamus to compel under CPLR 7803 (1)—the principal relief sought by petitioner—is "an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a *clear legal right* to the

relief sought" (*Matter of Shaw v King*, 123 AD3d 1317, 1318-1319 [3d Dept 2014] [emphasis added and internal quotation marks omitted]; *see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]). Mandamus to compel lies where a petitioner seeks to "compel the performance of a ministerial act [imposed] by law" (*Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]; *see Matter of Heck v Keane*, 6 AD3d 95, 99 [4th Dept 2004]).

Here, we conclude that petitioner was not entitled to that relief because it did not have a clear legal right under the governing regulation—18 NYCRR 518.7—to have the withholding of Medicaid payments discontinued. Respondents are permitted to withhold Medicaid payments from a provider where it is determined that the "provider has abused the [Medicaid] program or has committed an unacceptable practice" (18 NYCRR 518.7 [a] [1]). Such a determination may be based on, inter alia, "preliminary findings by [OMIG's] audit or utilization review staff of unacceptable practices or significant overpayments . . . or information . . . of an ongoing investigation of a provider for fraud or criminal conduct involving the program" (*id.*). Such a "withholding may continue only temporarily" (18 NYCRR 518.7 [d]).

In granting the petition and ordering respondents to discontinue the withholding, the court concluded that 18 NYCRR 518.7 (d) (1) applied. That provision states in pertinent part that, "[w]hen initiated by the department prior to the issuance of a draft audit report or notice of proposed agency action, *the withholding will not continue for more than 90 days* unless a written draft audit report or notice of proposed agency action is sent to the provider" (*id.* [emphasis added]). The court concluded that more than 90 days had elapsed without respondents issuing a draft audit report or notice of proposed agency action, requiring it to grant the petition. In our view, however, the court relied on the wrong paragraph of 18 NYCRR 518.7 (d) in evaluating whether the withholding should be discontinued.

Specifically, we conclude that the duration of the withholding should be evaluated under 18 NYCRR 518.7 (d) (4), which provides, in relevant part, that "[w]hen initiated by the department when it has determined or has been notified that the provider is the subject of a pending investigation of a *credible allegation of fraud* all withholding actions will be temporary *and will not continue after either* . . . [t]he department, or the Medicaid fraud control unit, or other law enforcement organization determines that there is insufficient evidence of fraud by the provider," or "[l]egal proceedings related to the provider's alleged fraud are completed" (18 NYCRR 518.7 [d] [4] [i], [ii] [emphasis added]). That paragraph—not 18 NYCRR 518.7 (d) (1)—applied to respondents' determination to withhold petitioner's Medicaid payments because, according to the letter that OMIG sent to petitioner notifying it of the withholding, petitioner was "the subject of a pending investigation of a credible allegation of fraud," and the letter also informed petitioner that the temporary withholding would cease once it was determined "that there is insufficient evidence of fraud by [petitioner], or legal

proceedings related to the alleged fraud are completed." That language tracks the language in 18 NYCRR 518.7 (d) (4), not 18 NYCRR 518.7 (d) (1). Consequently, the court erred in concluding that the 90-day time frame for withholdings under 18 NYCRR 518.7 (d) (1) applied to this case.

Evaluated under the proper paragraph of 18 NYCRR 518.7 (d), we conclude that, on this record, there is no dispute that petitioner is the subject of an investigation into a credible allegation of fraud, and that it is also undisputed on this record that there has been no determination by law enforcement that there is insufficient evidence of fraud, or completed legal proceedings related to the alleged fraud. Thus, pursuant to the plain meaning of 18 NYCRR 518.7 (d) (4), respondents were permitted to continue withholding Medicaid payments from petitioner, and the petition insofar as it seeks to compel the discontinuance of the withholding should be dismissed (*see generally Matter of Springer v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 27 NY3d 102, 107 [2016]; *Matter of Visiting Nurse Serv. of N.Y. Home Care v New York State Dept. of Health*, 5 NY3d 499, 506 [2005]; *Matter of Able Health Servs., Inc. v New York State Off. of the Medicaid Inspector Gen.*, 59 Misc 3d 171, 183 [Sup Ct, Albany County 2017]).

To the extent that petitioner contends that respondents effectively used 18 NYCRR 518.7 (d) (4) to permanently deprive it of a protected property interest without due process—i.e., due to the seemingly indefinite duration of the withholding—that specific contention was not raised in the petition, and it is therefore unpreserved for our review (*see Matter of Cornell v Annucci*, 173 AD3d 1760, 1761 [4th Dept 2019]; *Matter of Board of Mgrs. v Assessor, City of Buffalo*, 156 AD3d 1322, 1324 [4th Dept 2017]). We have no discretionary authority to reach unpreserved contentions in a CPLR article 78 proceeding such as this one (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Matter of Barnes v Venettozzi*, 135 AD3d 1250, 1251 [3d Dept 2016]).

Furthermore, we agree with respondents that the petition, to the extent that it seeks to annul the initial determination to implement the withholding, should be dismissed due to petitioner's failure to exhaust its administrative remedies. " 'Those who wish to challenge agency determinations under [CPLR] article 78 may not do so until they have exhausted their administrative remedies' " (*Matter of Hopewell Volunteer Fire Dept., Inc. v Gardner*, 101 AD3d 1652, 1653 [4th Dept 2012], quoting *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 195 [2007]). To that end, "where a right to proceed by administrative appeal exists, a party must pursue that appeal before seeking judicial review" (*Matter of Di Pietro v State Ins. Fund*, 206 AD2d 211, 215 [4th Dept 1994]).

Here, OMIG's letter informing petitioner that its Medicaid payments were being withheld stated that, although it was "not entitled to an administrative hearing" with respect to that determination, petitioner "may, within thirty (30) days of the date of

this notice, submit written arguments and documentation that the withhold[ing] should be removed," and directed petitioner to submit such arguments and documentation to OMIG. It is undisputed that petitioner did not comply with that requirement because, instead of contacting OMIG during the 30-day period, it contacted a completely different state agency. Petitioner first contacted OMIG about the determination well after the 30-day deadline expired. Thus, because petitioner failed to challenge respondents' initial determination via the administrative appeal process, it did not exhaust its administrative remedies and may not challenge that determination in this CPLR article 78 proceeding.

In light of the foregoing, we conclude that respondents' remaining contention is academic.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

294

CA 20-01410

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

LISA L. WALK-REINARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY A. SMITH AND FELICIA S. SMITH,
DEFENDANTS-APPELLANTS.

HAGELIN SPENCER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered May 19, 2020. The order, insofar as appealed from, denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving collided with a vehicle owned by defendant Jeffrey A. Smith and operated by defendant Felicia S. Smith. Plaintiff alleged that, as a result of the motor vehicle accident, she sustained injuries to her cervical and thoracic spine and head under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories as defined in Insurance Law § 5102 (d). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff cross-moved for summary judgment on the issues of, inter alia, negligence and serious injury. Supreme Court granted plaintiff's cross motion on the issue of negligence and denied the remainder of plaintiff's cross motion and the entirety of defendants' motion. Defendants appeal from an order insofar as it denied their motion, and we affirm.

Preliminarily, "[a]lthough defendants' motion . . . sought summary judgment dismissing the complaint in its entirety, their moving papers did not address plaintiff's claim for economic loss, and thus defendants failed to establish that they were entitled to summary judgment with respect to that claim" (*Woodward v Ciamaricone*, 175 AD3d 942, 944-945 [4th Dept 2019]).

Contrary to defendants' contention, we conclude that the court properly denied their motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. With respect to plaintiff's alleged cervical and thoracic spine injuries, we conclude that defendants' own submissions raise triable issues of fact whether plaintiff's alleged limitations and injuries are " 'significant' " or " 'consequential' " (*Monterro v Klein*, 160 AD3d 1459, 1460 [4th Dept 2018]). Notably, "while the physician who examined plaintiff on behalf of defendants set forth range of motion limitations and considered those findings to be insignificant, he failed to explain the basis for his calculations, such as the basis for his opinion as to what constitutes a normal . . . range of motion" (*id.* [internal quotation marks omitted]; *see Barron v Blasetti*, 187 AD3d 1550, 1551 [4th Dept 2020]; *Kavanagh v Singh*, 34 AD3d 744, 745-746 [2d Dept 2006]). With respect to plaintiff's alleged head injury, we conclude that defendants met their initial burden by submitting the affirmed report of an expert physician who examined plaintiff on defendants' behalf, wherein the physician opined that there is no definitive evidence that plaintiff has experienced significant cognitive issues or headaches as a result of the accident, and that there is no current evidence that plaintiff is experiencing any ongoing significant neurological dysfunction or symptoms as a result of the accident (*see Latini v Barwell*, 181 AD3d 1305, 1306 [4th Dept 2020]). We conclude, however, that plaintiff's submission in opposition to that portion of the motion raised issues of fact whether she sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff submitted certain medical records confirming plaintiff's continuing diagnosis of postconcussion syndrome, and establishing that plaintiff's headaches are daily, that they will last all day, and that the associated symptoms include vomiting, photophobia, blurred vision, and nausea. In addition, plaintiff submitted an affidavit, along with an impact statement, which provided, inter alia, that the headaches that she has had since the accident are localized and sometimes cause severe nausea and dizziness with visual disturbances including flashing and floating lights with severe photophobia. Viewing the evidence in the light most favorable to plaintiff, we conclude that issues of fact exist that preclude summary judgment (*see Latini*, 181 AD3d at 1307).

Finally, with respect to the 90/180-day category, we conclude that defendants failed to meet their initial burden of establishing that plaintiff was not prevented from performing substantially all of the material acts that constituted her usual and customary daily activities during no less than 90 days of the 180 days following the accident (*see generally* Insurance Law § 5102 [d]; *George v City of Syracuse*, 188 AD3d 1612, 1613 [4th Dept 2020]; *Cook v Peterson*, 137 AD3d 1594, 1598 [4th Dept 2016]). Because defendants failed to meet their initial burden on the motion with respect to the 90/180-day category, there is "no need to consider the sufficiency of plaintiff's opposition

thereto" (*Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

335

CA 19-02006

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

KULBACK'S INC., ON BEHALF OF ITSELF AND ALL
OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO STATE VENTURES, LLC, THOMAS MASASCHI,
JASON TELLER, TRAVIS MCVICKERS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered September 26, 2019. The order granted the motion of defendants Buffalo State Ventures, LLC, Thomas Masaschi, Jason Teller, and Travis McVickers to dismiss the 6th through 10th causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the sixth and eighth causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff is in the construction business, and it entered into a contract with defendant Buffalo State Ventures, LLC (BSV) to perform work on a commercial construction project on property owned by BSV. Plaintiff commenced this action against, inter alia, BSV and its representatives, defendants Thomas Masaschi, Jason Teller, and Travis McVickers (collectively, individual defendants), seeking damages based on allegations that plaintiff completed all of the contract work, but was not paid for it. The 6th through 10th causes of action were asserted against only BSV and the individual defendants. BSV and the individual defendants moved to dismiss those causes of action pursuant to CPLR 3211 (a) (1), (5), and (7). Supreme Court granted the motion, and plaintiff appeals.

We agree with plaintiff that the court erred in granting that part of the motion seeking to dismiss the sixth cause of action for enforcement of a trust under Lien Law § 77. We therefore modify the order accordingly. "[W]hen determining a motion to dismiss, the court

must ‘accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). “A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff’s] claim[s]” (*Lots 4 Less Stores, Inc. v Integrated Props., Inc*., 152 AD3d 1181, 1182 [4th Dept 2017] [internal quotation marks omitted]). “On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable” (*Rakusin v Miano*, 84 AD3d 1051, 1052 [2d Dept 2011]). A Lien Law § 77 cause of action has a one-year statute of limitations (§ 77 [2]), and it is well established that “ ‘[t]he one-year period does not begin to run from the date of substantial completion, but from the date of completion of all work’ ” (*Holt Constr. Corp. v Grand Palais, LLC,* 108 AD3d 593, 596 [2d Dept 2013], *lv denied* 22 NY3d 853 [2013]; *see Northern Structures v Union Bank*, 57 AD2d 360, 368 [4th Dept 1977], *amended* 58 AD2d 1042 [4th Dept 1977]). Here, although BSV and the individual defendants met their initial burden on their motion by submitting documentary evidence that the work was completed in October 2017 and that plaintiff did not commence the action until February 13, 2019, plaintiff submitted documentary evidence raising a question of fact with respect to when all the work on the project was completed, i.e., whether plaintiff’s work on the project continued through February 14, 2018 (*cf. Losco Group v Yonkers Residential Ctr*., 276 AD2d 532, 533 [2d Dept 2000]).

We also agree with plaintiff that the allegations in the complaint with respect to the sixth cause of action are sufficient to impose personal liability on the individual defendants (*see* CPLR 3211 [a] [7]). In the sixth cause of action, plaintiff alleged, inter alia, that BSV executed mortgages to secure funds to pay for the construction work, that those funds were “ ‘trust funds’ ” and BSV and the individual defendants were the “ ‘trustees’ ” as those terms are used in the Lien Law, that BSV and the individual defendants, as trustees, used the trust funds for purposes other than the payment of the claims of contractors, construction managers, subcontractors, laborers and materialmen, and that therefore “BSV and the Individual Defendants have unlawfully expended and diverted such trust funds in violation of the New York Lien Law.” According plaintiff the benefit of every possible favorable inference, as we must, we conclude that the allegations are sufficient to impose personal liability on the individual defendants inasmuch as “[c]orporate officers . . . may be personally liable for trust funds . . . wrongfully diverted by their corporation, provided that they knowingly participated in the diversion by the corporation” (*Edgewater Constr. Co. v 81 & 3 of Watertown* [appeal No. 2], 1 AD3d 1054, 1057 [4th Dept 2003]).

Contrary to plaintiff’s contention, the court properly granted the motion with respect to the seventh cause of action, for breach of

fiduciary duty. Even accepting plaintiff's allegations under the seventh cause of action as true, we conclude that plaintiff's common-law breach of fiduciary duty cause of action is duplicative of the sixth cause of action (*see generally Hylan Elec. Contr., Inc. v MasTec N. Am., Inc*., 74 AD3d 1148, 1150 [2d Dept 2010]; *Wildman & Bernhardt Const., Inc. v BPM Assoc.*, 273 AD2d 38, 39 [1st Dept 2000]).

We agree with plaintiff, however, that the court erred in granting that part of the motion seeking to dismiss the eighth cause of action, for money had and received, on the ground that the existence of a written contract precluded such a cause of action. We therefore further modify the order accordingly. "Although the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract . . . , where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*Goldman v Simon Prop. Group., Inc*., 58 AD3d 208, 220 [2d Dept 2008]).

Contrary to plaintiff's contention, the court did not err in granting those parts of the motion seeking to dismiss the 9th cause of action, for fraud, and the 10th cause of action, for aiding and abetting fraud. With respect to the cause of action for fraud, "[a] mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud" (*Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012]). Here, the alleged misrepresentations by BSV and the individual defendants "amounted only to a misrepresentation of the intent or ability to perform under the contract" (*id.*), and therefore the cause of action for fraud is duplicative of the first cause of action, for breach of contract (*see East2West Constr. Co., LLC v First Republic Corp. of Am.*, 115 AD3d 1206, 1207 [4th Dept 2014]; *Gorman*, 97 AD3d at 727; *Hylan Elec. Contr., Inc.*, 74 AD3d at 1149-1150; *Jan Sparka Travel v Hamza*, 182 AD2d 1067, 1067-1068 [4th Dept 1992]; *cf. Pike Co., Inc. v Jersen Constr. Group, LLC*, 147 AD3d 1553, 1555-1556 [4th Dept 2017]). Furthermore, plaintiff alleges the same amount of damages for the fraud and breach of contract causes of action, which further establishes that "[p]laintiff seeks to be placed in the same position that it would have been in had [BSV] performed (i.e., made payment) under the contract" (*Triad Intl. Corp. v Cameron Indus., Inc*., 122 AD3d 531, 532 [1st Dept 2014]; *see Wells Fargo Bank, N.A. v Zahran*, 100 AD3d 1549, 1550 [4th Dept 2012], *lv denied* 20 NY3d 861 [2013]). We likewise conclude that the court properly granted the motion with respect to the 10th cause of action inasmuch as a cause of action for aiding and abetting fraud requires " 'the existence of an underlying fraud' " (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]; *see generally Gallagher v Ruzzine*, 147 AD3d 1456, 1458 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

336

CA 20-00558

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

THOMAS KOWALAK, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEYSTONE MEDICAL SERVICES OF NEW YORK, P.C., ALSO KNOWN AS KEYSTONE MEDICAL SERVICES OF NY, P.C., DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (SCOTT M. PHILBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARK R. UBA, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 6, 2020. The order and judgment granted plaintiff's motion for summary judgment on his first cause of action and for summary judgment dismissing the counterclaims.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied and the counterclaims are reinstated.

Memorandum: Plaintiff, a physician specializing in emergency medical services, entered into a contract with defendant, which is in the business of providing hospitals with staffing and management in emergency medicine, whereby plaintiff would provide services to hospitals under contract with defendant. Pursuant to the contract between plaintiff and defendant as well as a separate contract between defendant and nonparty Eastern Niagara Hospital, Inc. (ENH), plaintiff provided emergency medical services at ENH. After the contract between ENH and defendant was terminated and ENH began receiving emergency medical services from another provider, defendant terminated its contract with plaintiff. The contract between plaintiff and defendant contained a noncompete clause with a duration of one year, and plaintiff commenced this action seeking, inter alia, a declaration that he would not be in breach of the contract if he continued to provide emergency medical services to ENH. Defendant answered and asserted four counterclaims, for, inter alia, breach of contract and a declaration that the restrictive covenants in the contract are valid and enforceable, based on allegations that the unambiguous language in the noncompete clause of the contract prevented plaintiff from continuing to work with ENH. Plaintiff moved for summary judgment seeking the dismissal of defendant's counterclaims and a declaration

that his continuing to provide services to ENH would not constitute a breach of plaintiff's contract with defendant. Supreme Court granted the motion, and defendant appeals.

We agree with defendant that the court erred in granting plaintiff's motion with respect to whether continuing to provide services to ENH constituted a breach of the contract. It is well settled that "[t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017] [internal quotation marks omitted]). Here, plaintiff did not meet that burden.

It is undisputed that the resolution of this issue depends on the interpretation of the noncompete clause, which provides, in relevant part, that plaintiff "agrees during the terms of this Agreement or any extension of it and for a one . . . year period after termination, regardless of the cause of such termination, to refrain from directly or indirectly . . . practicing Emergency Medicine . . . at the Hospitals or other medical institutions to which [defendant] provides services." The term "Hospitals" is defined in the contract as "any and all hospitals where [plaintiff] provides professional emergency medical services . . . as set forth on Exhibit A," and ENH is a hospital listed in Exhibit A. Plaintiff contends that the noncompete clause should be interpreted to mean that plaintiff cannot work at hospitals where defendant currently provides services and, because defendant no longer provides services to ENH, the noncompete clause does not prevent plaintiff from practicing emergency medicine at ENH. We conclude, however, that plaintiff's interpretation of the noncompete clause ignores the contract's definition of the term "Hospitals" to include the facilities listed on Exhibit A, i.e., to include ENH. Thus, the provision in the noncompete clause that plaintiff shall refrain from working at "Hospitals or other medical institutions to which [defendant] provides services" could be reasonably interpreted to mean that plaintiff shall refrain from working at "[ENH] or other medical institutions to which [defendant] provides services." Inasmuch as plaintiff failed to establish that his interpretation of the noncompete clause is the only reasonable interpretation thereof, summary judgment is inappropriate because a " 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " (*Maven Tech., LLC*, 147 AD3d at 1378; *see Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1597 [4th Dept 2019]; *Mohawk Val. Water Auth. v State of New York*, 159 AD3d 1548, 1550 [4th Dept 2018]).

We further agree with defendant that plaintiff's reliance on the doctrine of "allowing ambiguities in a contractual instrument to be

resolved against the drafter, is misplaced" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 448 [1st Dept 2017]). While plaintiff is correct that the doctrine applies " 'against the party who prepared [the contract], and favorably to a party who had no voice in the selection of its language' " (*Coliseum Towers Assoc. v County of Nassau*, 2 AD3d 562, 565 [2d Dept 2003], *lv denied* 2 NY3d 707 [2004]), the doctrine is inapplicable where the record establishes that both parties participated in negotiating the terms of the contract (*see id.*). Here, there is a question of fact whether the doctrine applies inasmuch as defendant submitted evidence that plaintiff participated in negotiating the terms of the contract.

We further agree with defendant that the court erred in granting those parts of plaintiff's motion seeking summary judgment dismissing the counterclaims. Defendant's counterclaims covered three separate provisions of the contract: (1) the noncompete clause; (2) the non-solicitation clause; and (3) the confidentiality clause. Inasmuch as there is a question of fact regarding the interpretation of the noncompete clause, we conclude that plaintiff is not entitled to summary judgment dismissing the counterclaims to the extent that they rely on that clause. Furthermore, given the parties' differing interpretations of the contract and the fact that none of the parties in this case have been deposed and discovery of written documents is not complete, we conclude that those parts of plaintiff's motion seeking summary judgment dismissing the counterclaims with respect to the non-solicitation and confidentiality clauses are premature (*see* CPLR 3212 [f]; *Groves v Land's End Hous. Co.*, 80 NY2d 978, 980 [1992]; *Smith v Bailey*, 171 AD3d 1511, 1512 [4th Dept 2019]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

352

CA 20-01465

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

RON B. AND JENNIFER B., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, C.B., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SHIRLEY W. AND JEFFREY A.W., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, D.W., AND D.W., INDIVIDUALLY, DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 29, 2020. The order, among other things, denied in part defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking summary judgment dismissing the defamation cause of action insofar as it is based on defendant D.W.'s statements to the police and the malicious prosecution cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, individually and on behalf of their minor child, C.B., commenced this action seeking, inter alia, damages based on allegations that, among other things, then-15-year-old defendant D.W. made defamatory statements about C.B. in connection with an incident that occurred between C.B. and D.W. at a birthday party. Defendants moved for summary judgment dismissing the complaint, and they now appeal from an order that, inter alia, denied the motion with respect to the malicious prosecution cause of action, portions of the defamation cause of action, and the claim for punitive damages. We note that, although the order did not address that part of the motion seeking summary judgment dismissing the negligence cause of action, that part of the motion is deemed denied (*see Kelly D. v Niagara Frontier Tr. Auth.*, 177 AD3d 1261, 1262 [4th Dept 2019]).

We agree with defendants that Supreme Court erred in denying the motion with respect to the defamation cause of action to the extent that it is based on D.W.'s statements to the police. In the complaint, plaintiffs failed to set forth the " 'particular words complained of,' " as required by CPLR 3016 (a) (*Wegner v Town of*

Cheektowaga, 159 AD3d 1348, 1349 [4th Dept 2018]; *see Massa Constr., Inc. v George M. Bunk, P.E., P.C.*, 68 AD3d 1725, 1725 [4th Dept 2009]). We therefore modify the order accordingly.

Defendants also contend that the court erred in denying the motion with respect to the defamation cause of action insofar as it is based on statements that D.W. made to mutual friends of C.B. and D.W. because those statements are protected by the qualified common interest privilege. That contention, however, is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We agree with defendants' further contention that the court erred in denying the motion with respect to the cause of action for malicious prosecution. Defendants established that D.W. merely furnished information to the police and did not " 'play[ ] an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act' " (*Fleming v Sangster*, 148 AD3d 1798, 1798 [4th Dept 2017]; *see Moorhouse v Standard, N.Y.*, 124 AD3d 1, 11 [1st Dept 2014]; *Quigley v City of Auburn*, 267 AD2d 978, 980 [4th Dept 1999]), and plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore further modify the order accordingly.

We have reviewed defendants' remaining contentions and conclude that they do not warrant further modification or reversal of the order.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

355

CA 20-01393

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

JEANNIE-MARIE MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC; KATHLEEN MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC; AND MICHAEL MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC, DEFENDANT-RESPONDENT,

MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR DEFENDANT-RESPONDENT F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR

DEFENDANTS-RESPONDENTS MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 24, 2020. The order, inter alia, granted the motion of defendant F. James McGuire for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant F. James McGuire, reinstating the fifth and sixth causes of action, and vacating subdivision one of the ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: This case centers on a dispute over ownership interests in defendant McGuire Development Company, LLC (MDC). MDC was formed in 2006 by F. James McGuire (defendant) to provide real estate development and property management services for other constituent parts of the McGuire family business empire. Despite their at times tumultuous relationship, defendant invited five of his siblings—the three plaintiffs and nonparties Kelly McGuire (Kelly) and Jackie McGuire Gurney—to join MDC as members. At its creation, the siblings each had equal membership interests in MDC. By 2011, however, the membership interests were no longer equally held; defendant's membership interest in MDC was five percent more than the other members, reflecting his role as general manager. Defendant also acted as general manager for the other entities that make up the McGuire family business, which are the remaining defendants in this action (company defendants). Plaintiffs are members of most of the company defendants. Unlike plaintiffs, Gurney was employed by MDC.

In 2017, Kelly exited MDC, which resulted in her membership interest being distributed, pro rata, among the remaining siblings. Thus, at the start of 2018, defendant had an approximate 24.8% membership interest in MDC with the remaining members each having approximately an 18.8% membership interest. At around the same time as Kelly's exit, plaintiffs were in the process of negotiating with defendant a buyout of their own interests in MDC. During that same time period, however, i.e., throughout 2018 and early 2019, defendant and Gurney made a series of capital calls for MDC that had the practical effect of diluting plaintiffs' membership interest percentages to approximately 9.98% each. Defendant or Gurney purported to have given plaintiffs notice of each of the MDC capital calls by email.

Plaintiffs did not respond or take any other action with respect to those capital calls, except to object in mid-2019 that a capital call request made earlier in the year was procedurally defective. During the relevant time period, the only capital contributions to MDC were made by defendant and Gurney in November 2018 and by defendant in

February 2019. Plaintiffs' failure to supply additional capital to MDC during that period is what resulted in the aforementioned dilution of their membership interests.

Consequently, in May 2020, plaintiffs commenced this action alleging, inter alia, breaches of contract and fiduciary duty, and the improper dilution of their membership interests in MDC. Specifically, they allege that, under the terms of MDC's operating agreement, they did not receive proper notice of the capital calls in 2018 and 2019 that resulted in the dilution of their membership interests and, accordingly, plaintiffs seek a declaration of the membership interest percentages of all members of MDC. They also seek an equitable accounting of MDC's assets and the company defendants based on the alleged failure of those defendants to provide plaintiffs with access to their financial records. Shortly after the action commenced, the parties entered a stipulated standstill order that prevented defendant from selling all or substantially all of MDC's assets, making requests for additional capital contributions, or engaging in conduct "outside the ordinary course of business," until "further order of the [c]ourt."

In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted defendant's motion for partial summary judgment and dismissed the fifth and sixth causes of action, alleging that defendant breached the MDC operating agreement's notice requirement with respect to the capital calls that resulted in the dilution of plaintiffs' membership interests, determined that plaintiffs' membership interest percentages in MDC are 9.98% each, and denied plaintiffs' cross motion for, inter alia, summary judgment on the fifth cause of action, for breach of contract, and seeking an accounting of transactions involving the assets of MDC and the company defendants. In appeal No. 2, plaintiffs appeal from an order granting defendants' motion to vacate the stipulated standstill order in light of Supreme Court's determination of each party's membership interest percentage in MDC.

With respect to appeal No. 1, we conclude that the court erred in granting defendant's motion for partial summary judgment dismissing the fifth and sixth causes of action and in determining the membership interests in MDC, and we therefore modify the order in appeal No. 1 accordingly. The operating agreement provides, in relevant part, that all "notices, demands or requests provided for or permitted to be given pursuant to this [a]greement must be in writing," and requires that such notices "to be sent to any or all of the [m]embers shall be personally delivered or sent by first class mail, postage prepaid." There is no dispute that the challenged capital calls from 2018 and 2019 were sent only by email and thus did not strictly comply with that provision. In their briefs, the parties contend that the principal dispute is whether plaintiffs waived strict compliance with the notice provision through their course of conduct, and consequently whether email notice of the capital calls was sufficient.

In our view, however, defendant did not meet his initial burden

on the motion because his own submissions raise issues of fact whether plaintiffs received any notice of the capital calls that resulted in dilution of their membership interests, and whether the calls that were noticed by email were actually responsible for the dilution of plaintiffs' membership interests in MDC (*see generally Winegrad v New York Univ. Med., Ctr.*, 64 NY2d 851, 853 [1985]; *Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333-1334 [4th Dept 2020]; *Parton v Piscitello*, 2 AD3d 1382, 1383 [4th Dept 2003]). Specifically, based on defendant's own submissions, the precise amounts, timing, and method of the capital calls do not support the court's calculations of plaintiffs' membership interests in MDC or the court's conclusion about which capital calls actually diluted plaintiffs' membership interests in MDC. For example, although the emails to plaintiffs regarding requests for capital were made in February and July 2018, defendant's submissions establish that the dilution of plaintiffs' interest in MDC did not occur until November of that year. Further, based on defendant's own submissions, the value of the dilution in plaintiffs' interest in November 2018 is not comparable to the value of the capital calls purportedly noticed in the emails dated February and July 2018. Consequently, there are issues of fact with respect to whether plaintiffs had *any notice at all* of the capital call that actually resulted in the dilution of their membership interests in MDC (*see generally Matter of Jacobs v Cartalemi*, 156 AD3d 635, 639-640 [2d Dept 2017], *lv denied* 32 NY3d 903 [2018]; *Davis v Jerry*, 107 AD3d 1553, 1554-1555 [4th Dept 2013]; *MNY 260 Park Ave. S., LLC v Max 260 Park Ave. S., LLC*, 63 AD3d 628, 629 [1st Dept 2009]). For the same reasons, we conclude that the court erred in determining the respective membership interests in MDC, and that the court properly denied that part of plaintiffs' cross motion seeking summary judgment with respect to the fifth cause of action.

We also conclude that neither defendant nor plaintiffs is entitled to summary judgment because there are issues of fact whether plaintiffs, via course of conduct, waived strict compliance with the notice requirement with respect to MDC's capital calls. "[W]aiver requires . . . the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982], *rearg denied* 57 NY2d 674 [1982]; *see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). Specifically, the abandonment of a contractual right " 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage' " (*Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104). We may not infer a waiver "from mere silence" (*Coniber v Center Point Transfer Sta., Inc.*, 137 AD3d 1604, 1606 [4th Dept 2016] [internal quotation marks omitted]).

Of course, "a waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual provision" (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1531 [4th Dept 2017] [internal quotation marks omitted]). "Generally the existence of an intent to forgo such a right is a question of fact" (*Fundamental Portfolio Advisors, Inc.*, 7

NY3d at 104; *see Town of Mexico v County of Oswego*, 175 AD3d 876, 878 [4th Dept 2019]), and "[a] waiver, not express, but found in the acts, conduct or language of a party is rarely established as a matter of law" (*Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917]).

Here, to the extent that it is preserved for our review, we reject plaintiffs' contention that the nonwaiver clause and written amendment provision of MDC's operating agreement preclude a determination that plaintiffs waived the notice provision of the operating agreement. Even where a contract specifically contains a nonwaiver clause or a provision that it cannot be modified without a writing, a waiver may be established by the parties' course of conduct and actual performance (*see Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464, 1465 [4th Dept 2015]; *Stassa v Stassa*, 123 AD3d 804, 806 [2d Dept 2014], *lv dismissed* 25 NY3d 960 [2015]; *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 245 [1st Dept 2013]).

Nevertheless, on this record, defendant did not meet his burden of establishing that plaintiffs' conduct constituted a waiver of the notice provision. Critically, in ascertaining whether plaintiffs' conduct in relation to capital call requests evidenced a waiver of the notice provision, their actions must be considered in the unique business context of the contested capital calls—i.e., that they were all made at a time when plaintiffs were in active negotiations with defendant about a buyout where plaintiffs would exit MDC. There is no dispute that the purported February 2018 capital call was MDC's first ever request for capital contributions, and therefore, there is no historical pattern of conduct that would support the conclusion that plaintiffs waived the notice requirement prior to any of the capital calls at issue here. Moreover, plaintiffs' emails from the time of the capital calls express surprise that MDC required additional capital from them, despite defendant's participation in the ongoing buyout negotiations, and do not reflect any intent to waive the notice requirement.

We further conclude that plaintiffs' conduct with respect to capital calls made by other entities that comprise the McGuire family business is irrelevant to waiver of the notice requirement for MDC because any waiver by plaintiffs with respect to a separate contract or agreement cannot be imputed as a waiver of the notice requirement in MDC's operating agreement. Cases relied on by defendant are inapposite because they involve the prior conduct of parties as it related to the specific agreement at issue in the litigation (*see e.g. Matter of Murphy v Murphy*, 140 AD3d 1168, 1170-1171 [2d Dept 2016]). Ultimately, within the unique context of the ongoing negotiations of plaintiffs' buyout from MDC, and the lack of any history of capital calls for that entity, we conclude that defendant did not establish, as a matter of law, that plaintiffs intended to waive the operating agreement's notice requirement with respect to the capital calls at issue here.

We agree with plaintiffs that the doctrine of tax estoppel does not preclude them from taking a position adverse to that stated in

MDC's tax forms for the year 2018, which purportedly established that plaintiffs' membership interest percentages in MDC were approximately 16.15% each. Tax estoppel does not apply where, as here, the relevant tax documents are neither sworn nor signed by the party against whom they are used (*see generally Matter of Sunburst Assoc., Inc.*, 106 AD3d 1224, 1226-1227 [3d Dept 2013]). Further, that doctrine does not apply because the relevant documents were not prepared by plaintiffs, but rather by a third party at the direction of MDC, which is managed by defendant (*see Matter of Cusimano v Strianese Family Ltd. Partnership*, 97 AD3d 744, 745 [2d Dept 2012], *lv dismissed in part and denied in part* 20 NY3d 1001 [2013]). It would distort the doctrine of tax estoppel beyond recognition to conclude that plaintiffs are precluded from taking a position contrary to a tax document they did not swear to or sign, and which was, in effect, prepared by their opponents (*cf. Rizzo v National Vacuum Corp.*, 186 AD3d 1094, 1095 [4th Dept 2020]; *Matter of Ansonia Assoc. L.P. v Unwin*, 130 AD3d 453, 454 [1st Dept 2015]).

We reject plaintiffs' contention that the court erred in denying that part of their cross motion seeking an accounting of transactions involving assets of MDC and the company defendants. Plaintiffs did not establish that defendants breached a fiduciary duty owed to plaintiffs with respect to their right to inspect and access the relevant financial records (*see generally Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1095-1096 [4th Dept 2018]). Specifically, the record contradicts plaintiffs' assertion that they were denied access to the relevant financial records inasmuch as defendants repeatedly offered to make those documents available to plaintiffs. Plaintiffs have not demonstrated that defendants were required to copy and forward the requested financial records to plaintiffs.

In light of our determination in appeal No. 1 that neither defendant nor plaintiffs are entitled to summary judgment, and that the court therefore erred in determining the respective membership interest percentages in MDC, we also conclude that, in appeal No. 2, the court erred in granting defendants' motion to vacate the stipulated standstill order. The court granted that motion on the ground that the order in appeal No. 1 determined the membership interests in MDC. Thus, because we are modifying the order in appeal No. 1 by, inter alia, vacating the court's determination of the membership interests in MDC, we consequently reverse the order in appeal No. 2, deny defendants' motion, and reinstate the stipulated standstill order.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

356

CA 20-01394

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

JEANNIE-MARIE MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC; KATHLEEN MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC; AND MICHAEL MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC, DEFENDANT-RESPONDENT,

MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR DEFENDANT-RESPONDENT F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR

DEFENDANTS-RESPONDENTS MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 21, 2020. The order granted the motion of defendants to vacate a stipulated standstill order.

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

Same memorandum as in *McGuire v McGuire* ([appeal No. 1] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

380.1

KAH 20-00666

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TRACI DECARR, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JULIE WOLCOTT, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, ET AL.,
RESPONDENTS-RESPONDENTS.

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (DAVID W. BENTIVEGNA OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Orleans County (Michael M. Mohun, A.J.), entered April 3, 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 commenced this proceeding pursuant to CPLR article 70 seeking a writ of habeas corpus on, inter alia, the ground that the Department of Corrections and Community Supervision lacked authority to place him in a Residential Treatment Facility (RTF) during his period of postrelease supervision based on his failure to locate a residence that complied with the requirements of the Sexual Assault Reform Act (*see* Executive Law § 259-c [14]). While this appeal was pending, however, petitioner was released from the RTF thereby rendering this appeal moot (*see People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020], *rearg dismissed* 36 NY3d 1087 [2021]; *People ex rel. McCurdy v Warden, Westchester County Corr. Facility*, 36 NY3d 251, 256 n 1 [2020]; *see also Matter of Gonzalez v Annucci*, 32 NY3d 461, 470-471 [2018]). Courts invoke the exception to the mootness doctrine "to consider substantial and novel issues that are likely to be repeated and will typically evade review" (*Gonzalez*, 32 NY3d at 470). In light of the recent Court of Appeals decisions in *Johnson* and *McCurdy* that petitioner concedes "settled many of the arguments" raised in his petition, we conclude that this appeal does not raise any substantial or novel issue, and the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-

715 [1980]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

388

KA 19-00380

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT COLLINS, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered February 28, 2018. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the second degree (two counts).

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

Memorandum: On February 28, 2018, County Court rendered a judgment convicting defendant upon a jury verdict of two counts of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]) and imposed a sentence of imprisonment. Defendant was later resentenced on January 23, 2019, upon the People's application, to a greater term of imprisonment than that originally imposed. Defendant now purports to appeal from a "judgment of conviction . . . rendered on January 23, 2019," but the only contention raised by defendant on appeal relates to the judgment rendered on February 28, 2018. We exercise our discretion in the interest of justice to treat the appeal as taken from the judgment rendered on February 28, 2018 (*see* CPL 460.10 [6]), and we note that defendant's appeal from that judgment is timely pursuant to CPL 440.40 (6).

Nevertheless, contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Baker*, 30 AD3d 1102, 1102-1103 [4th Dept 2006], *lv denied* 7 NY3d 846 [2006]). Although defendant contends that there were inconsistencies in the testimony of the victims, those " 'inconsistencies are not so substantial as to render the verdict against the weight of the evidence' " (*People v*

Carpenter, 187 AD3d 1556, 1558 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]; *see Baker*, 30 AD3d at 1102-1103).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

389

KA 18-01351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROSS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered June 19, 2018. The order denied the motion of defendant pursuant to CPL 440.10 to vacate a judgment of conviction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him, following a jury trial, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We affirmed the judgment of conviction on direct appeal (*People v Ross*, 118 AD3d 1321 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014], *reconsideration denied* 24 NY3d 1122 [2015]) and denied defendant's two subsequent motions for writs of error coram nobis (*People v Ross*, 151 AD3d 1782 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]; *People v Ross*, 129 AD3d 1556 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016], *reconsideration denied* 27 NY3d 1155 [2016]).

Defendant made the instant motion to vacate the judgment on the grounds of ineffective assistance of counsel and a denial of his right to counsel related to the alleged failure of Supreme Court to inquire at trial into his request for a substitution of his third assigned counsel (trial counsel). We conclude that defendant is entitled to a hearing with respect to his claim of ineffective assistance of counsel only.

With respect to his claim of ineffective assistance of counsel, defendant contends that trial counsel failed to interview or call two

exculpatory witnesses who defendant had identified and who were available and willing to testify. Those witnesses submitted affidavits in which they corroborated defendant's contention that he fired the .22 caliber rifle at issue into the air as warning shots and did not fire directly at the victim. The witnesses also averred that they were willing and able to testify at trial but were never contacted by trial counsel. Defendant also contends that trial counsel failed to inform him that the decision whether he would testify at trial was a decision for defendant, not trial counsel, to make.

As defendant correctly contends, his claim of ineffective assistance of counsel was properly raised on his CPL 440.10 motion inasmuch as it is based on matters outside the trial record (*see People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]; *see e.g. People v Williams* [appeal No. 2], 175 AD3d 980, 981-982 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]; *People v Dixon*, 147 AD3d 1518, 1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]). Here, defendant's submissions on the motion raise factual issues requiring a hearing concerning trial counsel's failure to interview and call the two exculpatory witnesses (*see People v Howard*, 175 AD3d 1023, 1025 [4th Dept 2019]; *see also People v Scott*, 181 AD3d 1220, 1221-1222 [4th Dept 2020]; *People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]), even in the absence of an affidavit from trial counsel (*see Scott*, 181 AD3d at 1221-1222). We thus conclude that defendant is entitled to a hearing on his entire claim of ineffective assistance of counsel inasmuch as " 'such a claim constitutes a single, unified claim that must be assessed in totality' " (*Wilson*, 162 AD3d at 1592), and we therefore reverse the order and remit the matter to Supreme Court to conduct a hearing pursuant to CPL 440.30 (5) on that claim.

Defendant further contends that the court erred in denying without a hearing that part of his motion that was based on his claim that the court failed to inquire at trial into his complaints regarding trial counsel (*see generally People v Sides*, 75 NY2d 822, 824-825 [1990]). We reject that contention. The allegations of fact essential to support that part of the motion were made solely by defendant, and we conclude that "there is no reasonable possibility that such allegation[s are] true" (CPL 440.30 [4] [d]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

399

CA 20-01361

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

CASSIE SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL COUSINS, DEFENDANT-APPELLANT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered September 17, 2020. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: In this action in which plaintiff seeks damages for injuries she allegedly sustained as a result of exposure to lead paint as a child, defendant appeals from an order denying his motion for summary judgment dismissing the complaint. We affirm.

Contrary to defendant's contention, he failed to meet his initial burden on the motion. Although defendant submitted an affidavit in which a defense medical expert opined that plaintiff demonstrated an absence of cognitive deficits or mental health issues causally connected to lead exposure (*see generally Hamilton v Miller*, 23 NY3d 592, 602-603 [2014]), defendant also submitted a report in which plaintiff's expert opined, based on scientific data and plaintiff's medical history, that plaintiff suffered from cognitive deficits that were most likely caused by childhood lead exposure (*see generally Parker v Mobil Oil Corp.*, 7 NY3d 434, 448-449 [2006], *rearg denied* 8 NY3d 828 [2007]). "It is well established that conflicting expert opinions may not be resolved on a motion for summary judgment" (*Fonseca v Cronk*, 104 AD3d 1154, 1155 [4th Dept 2013] [internal quotation marks omitted]). Thus, Supreme Court properly denied defendant's motion regardless of the sufficiency of plaintiff's opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

We have considered defendant's remaining contentions and conclude

that they are without merit or rendered academic by our determination.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

400

CA 19-01887

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

IN THE MATTER OF QUINTIN A. NOWLIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

A. TITUS, DEPUTY SUPERINTENDENT OF PROGRAMS
AT GROVELAND CORRECTIONAL FACILITY AND
ANTHONY J. ANNUCCI, COMMISSIONER OF CORRECTIONS,
RESPONDENTS-RESPONDENTS.

QUINTIN A. NOWLIN, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered July 3, 2019 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. The determination involved two misbehavior reports, one of which stemmed from an incident in the facility library, and the other of which stemmed from the recovery of certain items discovered upon a search of petitioner's cell. As an initial matter, as respondents correctly concede, Supreme Court erred in dismissing the petition as time-barred. The applicable four-month statute of limitations pursuant to CPLR 217 did not begin to run until petitioner received notice of the determination, and respondents failed to meet their burden of establishing that petitioner received such notice more than four months before commencing this proceeding (*see Matter of Chrysler v Goord*, 49 AD3d 1342, 1343 [4th Dept 2008]). We thus address the substance of petitioner's contentions (*see Matter of Jackson v Fischer*, 67 AD3d 1207, 1208 [3d Dept 2009]), which we review de novo (*see generally Matter of Medina v Graham*, 71 AD3d 1598, 1598 [4th Dept 2010]; *Matter of Brown v Coughlin*, 210 AD2d 1006, 1006 [4th Dept 1994]).

Petitioner failed to preserve for our review his contentions that

the Hearing Officer was biased against him and improperly questioned the witness at the hearing (*see Matter of Madison v Cunningham*, 67 AD3d 1141, 1142 [3d Dept 2009]; *see generally Matter of Jones v Fischer*, 111 AD3d 1362, 1363 [4th Dept 2013]). Although petitioner preserved his contention that the Hearing Officer improperly restricted his ability to question the witness at the hearing, that contention lacks merit. Based on the specific charges and allegations against petitioner, the Hearing Officer properly limited petitioner's questions at the hearing to what was "material" (7 NYCRR 254.5 [a]; *see Matter of Williams v Annucci*, 162 AD3d 1530, 1531 [4th Dept 2018]).

To the extent that petitioner contends that the record lacks substantial evidence to support the determination related to violations arising from the search of his cell or the violation of inmate rule 101.22 (7 NYCRR 270.2 [B] [2] [v]) arising from the incident at the library, those contentions are moot based on the result of petitioner's administrative appeal and the subsequent administrative order reversing those aspects of the determination following the hearing (*see Matter of Henderson v Annucci*, 175 AD3d 976, 977 [4th Dept 2019]; *Matter of Smith v Annucci*, 173 AD3d 1685, 1685 [4th Dept 2019]). We reject petitioner's further contention that the record lacks substantial evidence to support the determination related to the remaining violations arising from the incident in the library. Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Green v Sticht*, 124 AD3d 1338, 1339 [4th Dept 2015], *lv denied* 26 NY3d 906 [2015] [internal quotation marks omitted]). We conclude that the relevant misbehavior report and the testimony at the hearing constitute substantial evidence that petitioner violated the charged inmate rules in question pertaining to that incident (*see id.*).

We likewise reject petitioner's contention that the timing of the administrative hearing violated 7 NYCRR 251-5.1 (a). Here, the record of the administrative hearing reflects that an extension of the relevant time period had been issued (*see generally Matter of Melendez v Goord*, 242 AD2d 881, 882 [4th Dept 1997]). In any event, "[a]bsent a showing that substantial prejudice resulted from the delay, the regulatory time limits are construed to be directory rather than mandatory" (*Matter of Sierra v Annucci*, 145 AD3d 1496, 1497 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of McMillian v Lempke*, 149 AD3d 1492, 1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017]), and any violation of 7 NYCRR 251-5.1 (a) would not, under the circumstances of this case, require reversal.

Petitioner's further contention that his rights were violated by the confiscation of a book from his cell is not properly before us on this appeal arising from the disciplinary determination (*see generally Matter of Bennefield v Annucci*, 122 AD3d 1329, 1330 [4th Dept 2014]). We have considered petitioner's remaining contentions and conclude

that they do not warrant reversal or modification of the judgment.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

402

CA 20-00334

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

IN THE MATTER OF THE MURAD IRREVOCABLE TRUST.

MARILEE M. MORGAN, AS EXECUTOR OF THE ESTATE OF RACHAEL D. MURAD, DECEASED, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DALE MURAD, RESPONDENT-APPELLANT.

ASSAF & SIEGAL PLLC, ALBANY (MICHAEL D. ASSAF OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Onondaga County (Mary Keib Smith, S.), entered January 30, 2020. The order denied the motion of respondent to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the petition is dismissed.

Memorandum: In this trust litigation, respondent appeals from an order denying his motion to dismiss the petition pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction. In the petition, the settlor and beneficiary of the trust (decedent) sought an accounting and removal of respondent, a Virginia resident, as trustee. The trust was created in 1996 in New Jersey. At the time the trust was created, decedent was a resident of Illinois and respondent was a resident of Georgia. Respondent administered the trust from Georgia until he relocated to Virginia, and he administered the trust from Virginia thereafter. Decedent relocated to New York in 2016. Solely as a consequence of decedent's choice of residence, respondent sent to New York occasional trust-related correspondence, including "five or six" checks disbursing trust assets.

Respondent contends that Surrogate's Court erred in denying the motion. We agree. "Due process requires that a nondomiciliary have 'certain minimum contacts' with the forum and 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice' " (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019], quoting *International Shoe Co. v Washington*, 326 US 310, 316 [1945]). A nondomiciliary has minimum contacts with New York if he or she "purposefully avails" himself or herself of "the privilege of

conducting activities within" New York (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000] [internal quotation marks omitted]), thereby " 'invoking the benefits and protections' " of New York's laws (*Williams*, 33 NY3d at 528, quoting *Hanson v Denckla*, 357 US 235, 253 [1958]). Our focus is on " 'the relationship among the [respondent], the forum, and the litigation' " (*Calder v Jones*, 465 US 783, 788 [1984], quoting *Shaffer v Heitner*, 433 US 186, 204 [1977]; *see Williams*, 33 NY3d at 529). We conclude that respondent lacks the requisite minimum contacts with the New York forum. He does not live, own property, or conduct business in New York. The first and only relationship that New York had to the subject trust was 20 years after its creation, when decedent became domiciled in New York and respondent disbursed trust assets to her in New York (*see Hanson*, 357 US at 252). Therefore, we reverse the order, grant the motion, and dismiss the petition (*see Barone v Bausch & Lomb, Inc.*, 191 AD3d 1365, 1366 [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

421

CA 20-01481

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

STEVE HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TESMER BUILDERS, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT R. ORNDOFF, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered March 10, 2020. The order granted that part of the motion of plaintiff seeking partial summary judgment on the issue of liability pursuant to Labor Law §§ 240 (1) and 241 (6) against defendant Tesmer Builders, Inc.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from a ladder while working on a construction project. Plaintiff's employer had been hired by Tesmer Builders, Inc. (defendant), the property owner. At the time of the accident, plaintiff was descending a ladder that, as established on this record, lacked the appropriate feet. Plaintiff fell from the ladder when it slid to the side and caught on a portion of the building frame he had been working on, throwing him from the ladder. Plaintiff asserted causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Defendant now appeals from an order granting that part of plaintiff's motion seeking partial summary judgment on the issue of defendant's liability under sections 240 (1) and 241 (6). We affirm.

With respect to plaintiff's Labor Law § 240 (1) claim, we reject defendant's contention that plaintiff was the sole proximate cause of the accident. Plaintiff met his initial burden on the motion of establishing that the ladder was "not so placed . . . as to give proper protection to [him]," and the burden thus shifted to defendant to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident" (*Kin v State of New York*, 101 AD3d 1606, 1607 [4th Dept 2012] [internal quotation marks omitted]; *see*

also Woods v Design Ctr., LLC, 42 AD3d 876, 877 [4th Dept 2007]). Defendant failed to meet that burden.

With respect to plaintiff's Labor Law § 241 (6) claim, defendant contends that there are issues of fact as to the condition of the ladder plaintiff fell from and whether other adequate ladders or safety devices were present and provided for plaintiff's use. We reject that contention. Plaintiff met his initial burden of establishing a violation of 12 NYCRR 23-1.21 (b) (3) (iv) and, on this record, defendant failed to raise an issue of fact in opposition (*see Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]). We also reject defendant's contention that plaintiff's motion was premature and that defendant should be granted an additional opportunity to conduct discovery in order to challenge plaintiff's unrebutted testimony and other proof regarding the broken state of the ladder he fell from, as well as the broken state of the other ladders on the work site. Defendant failed to demonstrate that discovery "might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of plaintiff," and defendant's "[m]ere hope that somehow the [defendant] will uncover evidence that will [help its] case provides no basis . . . for postponing a determination of a summary judgment motion" (*Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019] [internal quotation marks omitted]; *see generally Aldridge v Rumsey*, 275 AD2d 897, 897 [4th Dept 2000]). Although defendant contends that it has not received all medical records requested from plaintiff and may in the future be entitled to a further deposition of plaintiff regarding those records, defendant established only that it may receive additional discovery on the issue of damages, not liability, and defendant offered only speculation that any identified outstanding discovery would have any bearing on the motion presently before us.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

424

CA 20-01050

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

WILLIE DANFORD, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 114743.)

WILLIE DANFORD, CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered July 19, 2019. The order granted defendant's motion to dismiss the claim.

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

Memorandum: In this action seeking damages for false arrest and false imprisonment, claimant appeals from an order granting defendant's motion to dismiss the claim on statute of limitations grounds. We affirm.

Claimant was arrested and held in jail on charges of, inter alia, criminal possession of a controlled substance in the third degree after he admitted to owning drugs that were discovered by a New York State Trooper during a traffic stop that occurred in late April 2006. On May 4, 2006, claimant was released on his own recognizance. The charges against claimant were dismissed on January 23, 2007, after the evidence obtained during the traffic stop was suppressed. On July 26, 2006, claimant served a notice of intention to file a claim against defendant. Claimant served his verified claim on the Attorney General's Office on January 24, 2008, and filed it on January 25, 2008.

We conclude that the Court of Claims properly granted defendant's motion to dismiss the claim on statute of limitations grounds. Claimant's false arrest and imprisonment cause of action is governed by a one-year statute of limitations (*see* CPLR 215 [3]). Inasmuch as that cause of action accrued when claimant was released from custody on May 4, 2006 (*see Conkey v State of New York*, 74 AD2d 998, 998-999 [4th Dept 1980], *lv denied* 50 NY2d 803 [1980]), it is time-barred because the claim was not filed until over a year later,

in January 2008. Claimant's contention that his cause of action sounds in negligence is without merit because it is well settled that he "must proceed by way of the traditional remedies of false arrest and imprisonment and malicious prosecution" (*Heath v State of New York*, 229 AD2d 912, 912 [4th Dept 1996] [internal quotation marks omitted]; *see Boose v City of Rochester*, 71 AD2d 59, 62 [4th Dept 1979]). We reject claimant's contention that he asserted a cause of action for malicious prosecution, and we note that any such claim would also have been subject to dismissal on the ground that it was interposed outside the applicable one-year statute of limitations (*see* CPLR 215 [3]; *Boose*, 71 AD2d at 65).

To the extent claimant contends that he asserted a cause of action premised on 42 USC § 1983, that cause of action was properly dismissed because defendant is not a "person" within the meaning of that statute (*see Brown v State of New York*, 89 NY2d 172, 185 [1996]; *see generally Will v Michigan Dept. of State Police*, 491 US 58, 63-65 [1989]). Moreover, the Court of Claims lacks jurisdiction to adjudicate federal constitutional torts (*see Bottom v State of New York*, 142 AD3d 1314, 1316 [4th Dept 2016], *appeal dismissed* 28 NY3d 1177 [2017]).

Finally, any alleged procedural infirmities with respect to defendant's motion to dismiss were not raised below and therefore are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

425

CA 20-01056

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

IN THE MATTER OF JOSEPH SAPIENZA, AFFORDABLE ELECTRICAL SERVICES BY SAPIENZA ELECTRIC, INC., AND RUPP BAASE PFALZGRAF CUNNINGHAM LLC, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (WILLIAM P. MATHEWSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CHAD A. DAVENPORT OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 5, 2020 in a proceeding pursuant to CPLR article 78. The judgment awarded petitioners attorney's fees and costs.

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

Memorandum: In this CPLR article 78 proceeding to compel respondent to comply with petitioners' requests pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6), respondent appeals from a judgment determining that petitioners substantially prevailed in the proceeding and awarding petitioners attorney's fees and costs. We affirm.

Contrary to respondent's contention, we conclude that petitioners properly brought this proceeding after respondent failed to meet its anticipated date for producing documents in response to one of petitioners' FOIL requests and ignored petitioners' additional FOIL requests. Respondent's failure to timely respond to petitioners' FOIL requests constituted a denial of access (*see* Public Officers Law § 89 [3] [a]; [4] [a]) and gave petitioners grounds to commence an article 78 proceeding for review thereof (*see Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 406 [1st Dept 2013], *appeal dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854 [2013]).

We reject respondent's contention that petitioners failed to exhaust their administrative remedies prior to commencing the instant proceeding. The Public Officers Law provides that "any person denied

access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body" (§ 89 [4] [a]). Here, petitioners exhausted their administrative remedies by timely sending letters to respondent objecting to its denial of their requests and asking it to consider their letter appeals pursuant to Public Officers Law § 89 (4) (a) (*see Matter of Purcell v Jefferson County Dist. Attorney*, 77 AD3d 1328, 1329 [4th Dept 2010]).

We reject respondent's contention that petitioners were not entitled to attorney's fees because they did not "substantially" prevail within the meaning of FOIL's fee-shifting provision (Public Officers Law § 89 [4] [c] [i]). To the contrary, petitioners received a complete response to their requests only after commencing the instant proceeding (*see Matter of Whitehead v Warren County Bd. of Supervisors*, 165 AD3d 1452, 1453-1454 [3d Dept 2018]; *Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195 [3d Dept 2011]). Finally, we see no reason to disturb Supreme Court's award of attorney's fees and costs.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

436

KA 18-01832

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REBECCA RUIZ, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (MARILYN FIORE-LEHMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered June 19, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and a new trial is granted on the second count of the indictment.

Memorandum: On appeal from a judgment convicting her upon a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in denying her request to instruct the jury on the defense of temporary and lawful possession of a firearm. We agree, and we therefore reverse.

To establish entitlement to a charge for temporary and lawful possession of a firearm, " 'there must be proof in the record showing a legal excuse for having the [firearm] in [one's] possession as well as facts tending to establish that, once possession [was] obtained, the [firearm was not] used in a dangerous manner' " (*People v Banks*, 76 NY2d 799, 801 [1990], quoting *People v Williams*, 50 NY2d 1043, 1045 [1980]; *see People v Williams*, 36 NY3d 156, 161 [2020]; *People v Graham*, 148 AD3d 1517, 1518 [4th Dept 2017]). A court must grant a defendant's request for a jury charge when, viewing the evidence in the light most favorable to the defendant, the charge is supported by a reasonable view of the evidence (*see Williams*, 36 NY3d at 160; *cf. People v Sinkler*, 112 AD3d 1359, 1360 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]).

Here, viewed in the light most favorable to defendant, we conclude that the evidence adduced at trial was sufficient to justify

the requested charge. Defendant testified that she had inadvertently discovered the firearm while attempting to protect herself in the face of an imminent threat, i.e., a person forcibly trying to enter her home. Specifically, she thought that her estranged husband, who had previously attacked her in her home, was the person attempting to forcibly enter the home. She discovered the firearm while trying to find in her kitchen an object to defend herself, and she did not know beforehand that the firearm was there. When the person at the door continued trying to enter the home, defendant shot through the door to scare him away. Thereafter, defendant saw that she had shot the victim—her boyfriend. She then dropped the firearm, and started to provide first aid. The firearm was not recovered after the shooting, and defendant did not know what happened to it.

Even assuming, arguendo, that the court expressly decided that defendant's initial possession of the firearm was not legally excusable, thereby not precluding our review of that contention by *People v Concepcion* (17 NY3d 192, 197-198 [2011]; *see People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we conclude that there is a reasonable view of the evidence, when viewed in the light most favorable to defendant, that she came into possession of the firearm in a legally excusable manner that was not " 'utterly at odds with [any] claim of innocent possession' " (*People v Robinson*, 63 AD3d 1634, 1635 [4th Dept 2009], *lv denied* 13 NY3d 799 [2009]; *see People v LaPella*, 272 NY 81, 82-83 [1936]; *People v Mack*, 177 AD3d 1155, 1156 [3d Dept 2019]; *People v Holes*, 118 AD3d 1466, 1468 [4th Dept 2014]; *cf. People v Myers*, 265 AD2d 598, 600 [3d Dept 1999]).

We also conclude that, viewing the evidence in the light most favorable to defendant, there is a reasonable view thereof that defendant's use of the firearm did not require a finding that she had used it in a dangerous manner, such that she was per se ineligible for a temporary and lawful possession charge (*see e.g. People v Almodovar*, 62 NY2d 126, 129-130 [1984]; *People v Bonilla*, 154 AD3d 160, 164-165 [1st Dept 2017], *lv denied* 30 NY3d 1017 [2017]; *People v Sackey-El*, 149 AD3d 1104, 1106 [2d Dept 2017]; *People v Singleteary*, 54 AD2d 1088, 1088 [4th Dept 1976]). We note that the court instructed the jury on a justification defense for the homicide charges of which defendant was ultimately acquitted, and therefore "the fact that defendant shot the decedent did not constitute a 'dangerous use' barring the court from giving a temporary lawful possession charge" (*Bonilla*, 154 AD3d at 164; *see People v Fletcher*, 166 AD3d 796, 798-799 [2d Dept 2018]; *Sackey-El*, 149 AD3d at 1106).

To the extent that the People argue as alternative grounds for affirmance that defendant was not entitled to the requested jury instruction because she constructively possessed the firearm that was in her home before the incident and because parts of her testimony were incredible as a matter of law, we conclude that those contentions are unpreserved inasmuch as they are raised for the first time on appeal (*see* CPL 470.05 [2]; *People v Pescara*, 162 AD3d 1772, 1774 [4th Dept 2018]). Regardless, because the court did not deny defendant's request for the temporary and lawful possession instruction on those

grounds, we are precluded from affirming the judgment on those grounds (*see Concepcion*, 17 NY3d at 192; *LaFontaine*, 92 NY2d at 474).

To the extent that the relevant pattern jury instruction for temporary and lawful possession of a weapon does not cover all possible fact patterns in cases in which a valid defense is asserted (*see generally* CJI2d[NY] Possession—Temporary and Lawful Possession n 4), we note that "[t]he trial court[] should, where necessary, expand on or alter the pattern charge[] set forth in the CJI section so as to make the charge on this defense appropriate to the facts of the case" (*People v Whitehead*, 123 AD2d 895, 896-897 [2d Dept 1986]).

In light of our decision, defendant's remaining contention is academic.

All concur except NEMOYER, J., who dissents and votes to affirm in the following memorandum: Defendant stands convicted of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) for illegally possessing the loaded firearm with which she fatally shot her boyfriend. Notwithstanding her decision to seek out a weapon instead of calling 911 in the minutes before the shooting, defendant claims to have killed her boyfriend in a reasonable—albeit mistaken—act of self-defense. The majority now grants defendant a new trial on the possessory count because the jury was not instructed on the common-law defense of temporary lawful possession; according to the majority, defendant was entitled to such an instruction because there was a reasonable view of the evidence in which her *use* of the subject weapon was justified within the meaning of Penal Law article 35. In my view, the majority's analysis conflates temporary lawful possession with justification and ignores a body of binding authority from the Court of Appeals. I therefore respectfully dissent and, seeing no reason to reduce defendant's sentence, I vote to affirm.

As I read it, the Court of Appeals' recent decision in *People v Williams* (36 NY3d 156 [2020]) is entirely dispositive of defendant's temporary lawful possession claim. In *Williams*, the majority squarely rejected the defendant's argument "that he was entitled to the temporary and lawful possession charge because he took possession of the weapon with the intent to use it only in self-defense and because his eventual firing of the gun was justified" (*id.* at 161). As the *Williams* majority explained, it is well established that "the defense of justification—which may render the *use* of a firearm lawful—is not a defense to the unlawful *possession* of the weapon" (*id.*, citing *People v Almodovar*, 62 NY2d 126, 130 [1984]). Thus, because Mr. Williams "armed himself in anticipation of a potential confrontation . . . , the law is clear that [he] 'may not avoid the criminal [possession] charge by claiming that he possessed the weapon for his protection' " (*id.* at 162-163, quoting *Almodovar*, 62 NY2d at 130).

Defendant's argument in this case is, to my mind, indistinguishable from the argument rejected by the Court of Appeals in *Williams*. By her own account, this defendant illegally armed herself in anticipation of a potential confrontation with another person (i.e., the boyfriend that she would later claim to have

mistaken for her estranged husband), but she insists that her illegal conduct should be excused because she took possession of the loaded firearm only as an instrument of self-defense. In short, defendant's "contention that h[er] possession should be legally excused on the grounds of self-defense amounts to a claim that [s]he was entitled to possess the weapon for h[er] protection" (*id*. at 162). And *that* claim—as the Court of Appeals reiterated just last year in *Williams*—has no basis in New York law (*see id.* at 161-163). We need go no further to resolve this appeal.

In any event, it is well established that the common-law defense of temporary lawful possession is categorically unavailable to any defendant who " 'used [the subject weapon] in a *dangerous manner*' " (*id.* at 161, quoting *People v Williams*, 50 NY2d 1043, 1044-1045 [1980] [emphasis added]). Here, it is undisputed that defendant used the subject gun to shoot through a closed door and thereby killed the person standing on the other side. I cannot fathom a more quintessentially "dangerous" use of a weapon. If this defendant did not "use" this weapon in a "dangerous manner," then that term has no meaning. Thus, as the People correctly argued below, defendant's manifestly "dangerous" use of the subject weapon definitively foreclosed any temporary lawful possession instruction in this case (*see e.g. People v Williams*, 172 AD3d 637, 637 [1st Dept 2019], *affd* 36 NY3d 156 [2020]; *People v Aracil*, 45 AD3d 401, 401-402 [1st Dept 2007], *lv denied* 9 NY3d 1030 [2008]).

Unlike the majority, I would not follow the First Department's contrary (and pre-*Williams*) decision in *People v Bonilla* (154 AD3d 160, 164-165 [1st Dept 2017], *lv denied* 30 NY3d 1017 [2017]). Under *Bonilla*'s rule, any *justifiable* use of a weapon—even one that results in death or grievous bodily harm to another person—is deemed a *non-dangerous* use of that weapon for purposes of the temporary lawful possession defense (*see id.*). And that judicial legerdemain makes no sense either doctrinally or logically, for it improperly conflates a "dangerous" use of a weapon with a "justified" use of a weapon.

Doctrinally, *Bonilla*'s redefinition of "dangerous" to mean "dangerous *and* unjustified" cannot be reconciled with the Court of Appeals' governing framework for temporary lawful possession, which bars the defense whenever the defendant puts an illegally-possessed weapon to dangerous use—irrespective of whether that dangerous use was legally justified or not (*see Williams*, 36 NY3d at 161; *Williams*, 50 NY2d at 1044-1045). To my knowledge, a majority of the Court of Appeals has never suggested, much less held, that the temporary lawful possession defense could avail a defendant that used an illegally-possessed weapon to maim or kill another person so long as that maiming or killing was justified. Quite the opposite; the Court of Appeals has consistently held that justification is *not* a cognizable defense to possessory offenses (*see Williams*, 36 NY3d at 161-163; *Almodovar*, 62 NY2d at 130), and *Bonilla*'s novel premise—i.e., that justification negates dangerousness for purposes of the temporary lawful possession defense—is simply a backdoor mechanism for introducing justification as a cognizable defense to possessory

offenses in derogation of the Court of Appeals' longstanding edict to the contrary.

Bonilla's rule fares no better logically, for it ignores the fact that a weapon can be used in a manner that is simultaneously dangerous and justified. This case perfectly exemplifies that duality. By shooting a person through a door, defendant obviously used the subject weapon in a "dangerous manner." After all, her use of that weapon caused the death of another person, and that is the very epitome of using a weapon dangerously. The fact that such use might have been "justified" within the meaning of Penal Law article 35 does not in any way negate the inherent and self-evident dangerousness of defendant's conduct. Put simply, a finding of justification means only that the defendant's use of a weapon was not criminal, not that such use was not dangerous. And for purposes of the defense of temporary lawful possession, what matters is the dangerousness of the weapon's use, not the justification for the weapon's use. In holding otherwise, *Bonilla* should be rejected.

In closing, I emphasize that this defendant has already received every benefit and right to which she was entitled under the circumstances, namely, a justification instruction on the homicide counts stemming from her *use* of the loaded firearm that she illegally possessed (*see Almodovar*, 62 NY2d at 130-131). The jury even acquitted her of those homicide counts, presumably in reliance on the justification instruction. But defendant's undeniably dangerous use of her illegally-possessed weapon—even if justified—necessarily precluded any temporary lawful possession defense on the lone possessory count of which she was convicted (*see Williams*, 36 NY3d at 161-163). I see no reason in law, logic, or substantial justice to grant defendant the windfall of a new trial simply because the judge refused to give a temporary lawful possession instruction that was squarely forbade by the governing caselaw.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

459

CA 20-00085

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

DINAH LEE JARGIELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AYER DEVELOPMENT, LLC, DENNIS AYER, BONITA AYER, DEFENDANTS-RESPONDENTS-APPELLANTS, EVENSONG MANAGEMENT, INC., DEFENDANT-RESPONDENT, THE ESTATE OF NATHAN BENDERSON, DECEASED, AND BENDERSON DEVELOPMENT COMPANY, LLC, DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CHRISTOPHER R. BITAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

NASH CONNORS, P.C., BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered January 3, 2020. The order, among other things, denied the cross motion of defendants Estate of Nathan Benderson and Benderson Development Company, LLC for summary judgment dismissing the amended complaint and all cross claims against them, and denied that part of the motion of defendants Ayer Development, LLC, Dennis Ayer and Bonita Ayer for an order compelling defendant Evensong Management, Inc. to indemnify defendant Ayer Development, LLC.

It is hereby ORDERED that said appeal by defendants the Estate of Nathan Benderson and Benderson Development Company, LLC from the order insofar as it granted those parts of the motion of defendants Ayer Development, LLC, Dennis Ayer, and Bonita Ayer and the cross motion of defendant Evensong Management, Inc. seeking summary judgment dismissing the amended complaint against them is unanimously dismissed, and the order is modified on the law by denying that part of the motion of defendants Ayer Development, LLC, Dennis Ayer and Bonita Ayer seeking summary judgment dismissing the cross claim of defendants the Estate of Nathan Benderson and Benderson Development Company, LLC against defendant Ayer Development, LLC and reinstating that cross claim against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for

injuries she allegedly sustained when she tripped and fell on a defect in the pavement in the alley between 46 Main Street and 52 Main Street in the Town of Hamburg. Defendants the Estate of Nathan Benderson and Benderson Development Company, LLC (collectively, Benderson defendants) own 46 Main Street, and defendant Ayer Development, LLC (Ayer), which is owned by defendants Dennis Ayer and Bonita Ayer (collectively, Ayer defendants), owns 52 Main Street. Defendant Evensong Management Inc. (Evensong) leased the lower portion of 52 Main Street from Ayer for use as a restaurant, and Ayer maintained a group of apartments in the upper portion. At the time she fell, plaintiff was using the alley to visit a resident of one of the apartments at 52 Main Street.

The Benderson defendants and the Ayer defendants appeal from an order that granted that part of the Ayer defendants' motion seeking summary judgment dismissing the amended complaint and cross claims against them, denied that part of the Ayer defendants' motion seeking summary judgment on their cross claim against Evensong for the indemnification of Ayer, denied the Benderson defendants' cross motion seeking summary judgment dismissing the amended complaint against them, and granted Evensong's cross motion seeking summary judgment dismissing the amended complaint and all cross claims against it.

On their appeal, the Benderson defendants contend that Supreme Court erred in denying their cross motion, and in granting those parts of the motion of the Ayer defendants and the cross motion of Evensong seeking summary judgment dismissing the amended complaint and the Benderson defendants' cross claims against them. Although the Benderson defendants are aggrieved by the court denying their cross motion and granting those parts of the motion and cross motion of the other defendants seeking dismissal of the Benderson defendants' cross claims, the Benderson defendants are not aggrieved by the order insofar as it granted those parts of the Ayer defendants' motion and Evensong's cross motion seeking to dismiss plaintiff's amended complaint against them (*see Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2d Dept 2010]; *see generally Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1385 [4th Dept 2019]). We therefore dismiss the Benderson defendants' appeal from the order insofar as it granted those parts of the Ayer defendants' motion and Evensong's cross motion (*see Tariq S.*, 177 AD3d at 1385). Further, by failing to raise the issue on appeal, the Benderson defendants abandoned any contention with respect to the order insofar as it granted those parts of the Ayer defendants' motion seeking to dismiss the Benderson's defendants' cross claim against Dennis Ayer and Bonita Ayer (*see generally Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

We reject the Benderson defendants' further contention that the court erred in denying their cross motion for summary judgment dismissing the amended complaint against them. Contrary to their contention, the Benderson defendants failed to meet their initial burden of establishing that the defect in the pavement on which plaintiff allegedly tripped was trivial as a matter of law (*see Jaques v Brez Props., LLC*, 162 AD3d 1665, 1666 [4th Dept 2018]).

We agree with the Benderson defendants, however, that the court erred in granting that part of the motion of the Ayer defendants seeking summary judgment dismissing the Benderson defendants' cross claim against Ayer, and we therefore modify the order accordingly. Although the Ayer defendants met their initial burden on their motion by establishing that the defect in the pavement was located on a portion of the alley owned by the Benderson defendants, the Benderson defendants raised an issue of fact in opposition with respect to whether Ayer could nevertheless be found responsible for plaintiff's injury under application of the special use doctrine (*see generally Kaufman v Silver*, 90 NY2d 204, 207-209 [1997]). Specifically, the Benderson defendants' submissions established that the defect in the pavement was located close to the property line, that an entrance to Ayer's apartments was near the defect, and that fixtures attached to the building on Ayer's property encroached over the property line near the defect. Therefore, the Benderson defendants raised an issue of fact as to whether Ayer had the requisite "access to, and control of," the alley where plaintiff fell to give rise to a duty of care (*id.* at 208). The Benderson defendants' contention that Evensong also made special use of their property, or that Evensong's special use created the defect in the pavement, however, is not properly before us because it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

With respect to the Ayer defendants' appeal, we reject their contention that the court erred in denying that part of their motion seeking summary judgment on their cross claim against Evensong for the indemnification of Ayer. Contrary to the Ayer defendants' contention, they failed to establish that the terms of Ayer's lease with Evensong rendered Evensong liable for the indemnification of Ayer (*see generally Jewett v M.D. Fritz, Inc.*, 83 AD3d 1572, 1573 [4th Dept 2011]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

462

CA 20-01244

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

IN THE MATTER OF PARKWAY ELDERLY HOUSING
DEVELOPMENT FUND CO., INC.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR OF CITY OF CORNING,
RESPONDENT-RESPONDENT.

CORNING-PAINTED POST AREA SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

WELCH & ZINK, CORNING (JEFF N. EVANS OF COUNSEL), FOR PETITIONER-APPELLANT.

BRYAN J. MAGGS LAW OFFICES, PLLC, ELMIRA (BRYAN J. MAGGS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (DANIEL J. PALERMO OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Daniel J. Doyle, J.), entered December 9, 2019. The order granted the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to RPTL article 7 seeking review of the 2019 real property tax assessment for petitioner's property in the City of Corning (City). Respondent moved to dismiss the petition pursuant to, inter alia, CPLR 3211 (a) (5), and petitioner appeals from an order granting the motion. We affirm.

Contrary to petitioner's contention, Supreme Court properly granted the motion on the ground that the petition was untimely. RPTL 702 (2) provides that a proceeding to review an assessment of real property "shall be commenced within thirty days after the final completion and filing of the assessment roll containing such assessment." The statute further provides that, "[f]or the purposes of this section an assessment roll shall not be considered finally completed and filed until the last day set by law for the filing of such assessment roll or until notice thereof has been given as

required by law, whichever is later" (*id.*). Here, section C9-49 of the Corning City Charter (City Charter) designates June 1 as the last day for filing and publishing the final property tax assessment roll. In 2019, June 1 fell on a Saturday, and thus the final assessment roll for the City was required to be filed and published on the next succeeding business day, i.e., Monday, June 3, 2019 (*see* General Construction Law § 25-a [1]; *see generally Matter of Mandel v Board of Assessors for Town of Woodbury*, 60 AD3d 1063, 1065 [2d Dept 2009]). The record establishes that respondent filed and published the final property tax assessment roll for the City on June 3, 2019, which means the 30-day limitations period for challenging an assessment expired on July 3, 2019 (*see* RPTL 702 [2]). Petitioner, however, did not commence this proceeding until July 11, 2019.

Petitioner contends that the petition was timely because the deadline for filing the petition was 30 days after July 1. Specifically, petitioner contends that RPTL 516 requires tax assessors to file the final assessment roll on or before July 1, and therefore that date is "the last day set by law" for filing such an assessment (RPTL 702 [2]). We reject that contention.

The City has the power to adopt and amend local laws with respect to "[t]he preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law" (Municipal Home Rule Law § 10 [1] [ii] [c] [2]). "[C]ity charter provisions describing form and procedure should be preferred to the general provisions of the tax laws; only when the city charter is silent as to form and procedure is resort to be made to the general tax laws" (*Matter of Stevens Med. Arts Bldg. v City of Mount Vernon*, 72 AD2d 177, 181 [2d Dept 1980]).

Thus, the City Charter provision regarding the deadline for filing the tax assessment roll is controlling (*see generally id.*), and therefore the court properly determined that, under RPTL 702 (2), the "last date set by law" for the filing of the assessment roll is the date set forth in the City Charter. We note that the legislature did not express an intention to designate the date set forth in RPTL 516 as the "last date set by law" under section 702 (2) inasmuch as section 702 (2) does not include the language of section 516 or make reference to section 516.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

467

CA 20-01604

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

JOSEPH MUNNO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, AND MAYOR LOVELY WARREN, INDIVIDUALLY AND AS MAYOR OF THE CITY OF ROCHESTER, DEFENDANTS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (PATRICK BEATH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered May 12, 2020. The order, insofar as appealed from, denied in part defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff, the founder and former president of the University Preparatory Charter School of Young Men (school), commenced this action asserting causes of action for defamation and tortious interference with contract. Plaintiff alleged, inter alia, that defendants falsely stated that plaintiff acted with racial motivations when he did not allow a student, i.e., the school's first African American valedictorian, to give a speech at the school's graduation ceremony. Plaintiff further alleged that defendants willfully and intentionally interfered with his business contract or expectancy with the school by disparaging plaintiff and falsely accusing him of racism and bigotry, thereby forcing plaintiff to leave his position as president of the school. Defendants moved for summary judgment dismissing the complaint. Supreme Court granted the motion in part and dismissed the defamation cause of action, and defendants now appeal from the order to the extent that it denied their motion with respect to the tortious interference cause of action.

We agree with defendants that the court erred in denying the motion with respect to the tortious interference cause of action, and we therefore reverse the order insofar as appealed from, grant the motion in its entirety, and dismiss the complaint. To establish a tortious interference cause of action, a plaintiff must establish "(1) that [the plaintiff] had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally

interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the [plaintiff's] relationship with the third party" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part and denied in part* 14 NY3d 736 [2010]). Thus, plaintiff is required to demonstrate that defendants "acted with the sole purpose of harming the plaintiff[] or by using unlawful means" (*American Recycling & Mfg. Co., Inc. v Kemp*, 165 AD3d 1604, 1605-1606 [4th Dept 2018] [internal quotation marks omitted]; *see generally Zetes v Stephens*, 108 AD3d 1014, 1020 [4th Dept 2013]). Defendants established their entitlement to judgment as a matter of law by submitting plaintiff's General Municipal Law § 50-h hearing testimony, as well as a transcript of the statements made by defendant Mayor Lovely Warren, which were published on defendant City of Rochester's YouTube channel (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff testified that he did not allow the student to speak at the graduation ceremony, and the record establishes that Warren's statements, i.e., that "[the student's] school did not allow him to give his valedictorian speech. For some reason, his school, in a country where freedom of speech is a constitutional right, in the city of Frederick Douglass[,] turned his moment of triumph into a time of sorrow, and pain," that the student would "never get that moment back," and that "[t]his is not a time to punish a child because you may not like what they say," were substantially true (*see American Recycling*, 165 AD3d at 1606). Moreover, in her statements, Warren did not mention plaintiff by name and referred only to the conduct of the "school," and the statements were made during Warren's introduction of the student in the context of providing him with an opportunity to present publicly the valedictory speech that the student was not permitted to give at his graduation ceremony. On that evidence, it cannot be said that defendants "acted solely out of malice" toward plaintiff (*Amaranth LLC*, 71 AD3d at 47; *see Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1661 [4th Dept 2009]), or that the statements amounted " 'to a crime or an independent tort' " (*Cooper v Hodge*, 28 AD3d 1149, 1151 [4th Dept 2006]), and we therefore conclude that defendants met their initial burden on the motion. In opposition to the motion, plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

477

KA 15-01892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE L. JENKINS, DEFENDANT-APPELLANT.

THE LEGAL AID SOCIETY OF BUFFALO, INC., BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDRE L. JENKINS, DEFENDANT-APPELLANT PRO SE.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered October 21, 2015. The judgment convicted defendant upon a jury verdict of murder in the first degree, murder in the second degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), two counts of murder in the second degree (§ 125.25 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from the execution-style killing of two members of a motorcycle club.

We note at the outset that those parts of the judgment convicting defendant of murder in the second degree must be reversed and those counts dismissed because they are inclusory concurrent counts of the count of murder in the first degree (*see* CPL 300.40 [3] [b]; *People v Ashline*, 124 AD3d 1258, 1258 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]). We therefore modify the judgment accordingly.

Defendant contends in his main brief that the failure to record certain bench conferences violated his right to a fair trial. Defendant does not, however, raise any substantive contentions concerning the content of those bench conferences. The entirety of

his argument is that an unrecorded trial is an unfair trial and that the lack of a complete record deprived him of effective assistance of appellate counsel. There is no indication that defendant was not present at any of the conferences, and there were no objections on the record to any issues discussed at the conferences (*see generally* CPL 470.05 [2]). In any event, under these circumstances, defendant has failed to overcome the presumption of regularity (*see People v Velasquez*, 1 NY3d 44, 48 [2003]). Any contention involving matters outside the record must be raised in a proceeding pursuant to CPL article 440 and specifically, to the extent that defendant contends that improper and prejudicial conduct occurred during these unrecorded conferences, he is relegated to a motion pursuant to CPL 440.10 (1) (f) (*see generally People v Larrabee*, 201 AD2d 924, 924 [4th Dept 1994], *lv denied* 83 NY2d 855 [1994]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude, contrary to defendant's contention in his main and pro se supplemental briefs, that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends in his main and pro se supplemental briefs that he was denied a fair trial by prosecutorial misconduct. Although this contention is unpreserved, defendant also contends that he was denied effective assistance of counsel based on defense counsel's failure to object to certain questions posed by the prosecutor to prospective jurors. We conclude that "[t]he prosecutor merely engaged in the standard trial tactic of giving the panel [of prospective jurors] a preview of the weaknesses in [his] case and gauging the reaction . . . and that defense counsel was thus not ineffective in failing to object to the prosecutor's questions" (*People v Farrington*, 171 AD3d 1538, 1540-1541 [4th Dept 2019], *lv denied* 34 NY3d 930 [2019] [internal quotation marks omitted]; *see People v Evans*, 242 AD2d 948, 949 [4th Dept 1997], *lv denied* 91 NY2d 834 [1997]). We reject the contention of the defendant, raised in his pro se supplemental brief, that counsel was ineffective for failing to move for a change of venue after a newspaper article was published about the case. A motion to change venue is premature when made prior to jury selection (*see People v Hardy*, 38 AD3d 1169, 1169-1170 [4th Dept 2007], *lv denied* 9 NY3d 865 [2007]; *People v Mateo*, 239 AD2d 965, 965 [4th Dept 1997]; *see also People v Culhane*, 33 NY2d 90, 110 n 4 [1973]) and counsel is not ineffective for failing to make a motion with no chance of success (*see People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we further conclude, contrary to the remaining claims of ineffective assistance of counsel raised in defendant's main and pro se supplemental briefs, that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). The test for effective assistance of counsel is " 'reasonable competence, not perfect representation' " (*People v Pavone*, 26 NY3d 629, 647 [2015]).

We reject the contentions of defendant, presented in his pro se

supplemental brief, that he was improperly denied access to *Rosario* materials. Here, the materials sought by defendant were in possession of the Federal Government, and it is well established that "the right to *Rosario* material must yield to the rights of the Federal Government under 28 CFR 16.22 in this State prosecution" (*People v Button*, 276 AD2d 229, 232 [4th Dept 2000], *lv denied* 96 NY2d 757 [2001]; *see People v Santorelli*, 95 NY2d 412, 421-423 [2000]).

Defendant's sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

483

CA 20-00777

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

COREEN N. THOMPSON, INDIVIDUALLY AND C.T.A. OF THE ESTATE OF DAVID C. PETERS, DECEASED, THE ESTATE OF DAVID C. PETERS, AND KRISTEN PETERS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THOMAS PETERS, ET AL., DEFENDANTS, AND BANK OF AMERICA CORPORATION, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Henry J. Nowak, J.), entered May 21, 2020. The order and judgment, among other things, denied in part the motion of defendant Bank of America Corporation to dismiss the complaint against it.

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

Memorandum: Plaintiffs commenced this action to recover funds fraudulently transferred from the business bank accounts of David C. Peters (decedent), which were maintained at a branch of defendant Bank of America Corporation (Bank), into a new account opened by defendant Thomas Peters (Thomas) at the Bank. The Bank refused plaintiffs' demand to repay the funds to decedent's accounts. Supreme Court, inter alia, denied in part the motion to dismiss the first cause of action, for breach of contract, insofar as asserted against the Bank. We affirm.

Applying the appropriate standards on a motion to dismiss (*see Myers v Schneiderman*, 30 NY3d 1, 11 [2017], *rearg denied* 30 NY3d 1009 [2017]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that, contrary to the contention of the Bank, the first cause of action states a valid claim for breach of implied contract against the Bank. It is well settled that "the relation between a bank and its depositors is that of debtor and creditor[, and the bank] . . . is

bound by an implied contract to repay the deposit on the depositor's demand or order" (*Gibraltar Realty Corp. v Mount Vernon Trust Co.*, 276 NY 353, 356 [1938]; *see Stella Flour & Feed Corp. v National City Bank of N.Y.*, 285 App Div 182, 184 [1st Dept 1954], *affd* 308 NY 1023 [1955]; *see also Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153, 164 [1989]). Given our conclusion, we necessarily reject the Bank's related contention that the first cause of action should be dismissed as a matter of law because plaintiffs have failed to specify any contractual term breached by the Bank. The very purpose of a theory of liability based on implied contract is to afford an aggrieved party an equitable remedy where the parties have not established the existence of a legal remedy based on a valid and enforceable written contract governing their dispute (*see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

We reject the Bank's further contention that plaintiffs have failed to plead the first cause of action with the particularity required by CPLR 3013. Plaintiffs identified the affected accounts of decedent, provided an estimate of losses from those accounts based on financial records and bank statements, submitted the allegedly fraudulent business certificate that Thomas used to open his new account at the Bank within days of decedent's death, submitted the bank records of Thomas's new account from September 2011 through March 2012, and asserted that "[t]he overall fraudulent scheme continue[d]" to the day of the complaint, dated November 21, 2018. In our view, the complaint and its exhibits are sufficient to give the Bank "notice of the transactions, occurrences, or series of transactions or occurrences" that plaintiffs intend to prove (CPLR 3013).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

488.1

CA 19-01987

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

U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF9 MASTER PARTICIPATION TRUST,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH H. PIERI, KENSU-1, L.P.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

LAW OFFICE OF GARY R. EBERSOLE, GRAND ISLAND (GARY R. EBERSOLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment of the Supreme Court, Erie County (M. William Boller, A.J.), entered September 27, 2019. The order and judgment, inter alia, ordered that the mortgaged property be sold at public auction.

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

Memorandum: Plaintiff commenced this mortgage foreclosure action against, among others, Kenneth H. Pieri and KenSu-1, L.P. (defendants). Plaintiff moved for, inter alia, summary judgment on the amended complaint and the appointment of a referee, and defendants cross-moved for, inter alia, summary judgment dismissing the amended complaint against them. Supreme Court granted the motion and denied the cross motion. We affirm.

Defendants contend that plaintiff failed to meet its burden on the motion of demonstrating its standing to commence the foreclosure action because it failed to establish that it was the holder or assignee of the original consolidated note secured by the consolidated mortgage. We reject that contention. "Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016] [internal quotation marks omitted]; *see HSBC Bank USA, N.A. v Spitzer*, 131 AD3d 1206, 1206-1207 [2d Dept 2015]). Where, as here, "the plaintiff's

standing has been placed in issue by reason of the defendant[s'] answer, the plaintiff additionally must prove its standing as part of its prima facie showing" (*HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773, 774 [2d Dept 2015]). "In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note" (*NNPL Trust Series 2012-1 v Lunn*, 149 AD3d 1552, 1553 [4th Dept 2017] [internal quotation marks omitted]). "[P]hysical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*id*. at 1553-1554 [internal quotation marks omitted]; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-361 [2015]). Where "the note is endorsed in blank, the plaintiff may establish standing by demonstrating that it had physical possession of the original note at the time the action was commenced . . . The plaintiff may do so through an affidavit of an individual swearing to such possession following a review of admissible business records" (*Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]; *see DLJ Mtge. Capital, Inc. v Huzair*, 158 AD3d 1143, 1144 [4th Dept 2018]). Here, plaintiff established standing in its moving papers by demonstrating, inter alia, that it possessed the consolidated note at the time it commenced the action (*see DLJ Mtge. Capital, Inc.*, 158 AD3d at 1144; *NNPL Trust Series 2012-1*, 149 AD3d at 1554; *JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]). The presence of a second, unendorsed copy of the consolidated note attached as an exhibit to the consolidation, extension, and modification agreement did not create a triable issue of fact warranting denial of the motion (*see HSBC Bank USA, N.A. v Chabot*, 191 AD3d 648, 650 [2d Dept 2021]).

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

493

KA 18-00164

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

JOSEPH T. BARTHEL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 18, 2016. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the directive that the sentence imposed run consecutively to the sentence imposed under indictment No. 2015-0954, and as modified the judgment is affirmed.

Opinion by NEMOYER, J.:

A sentencing court has no power to dictate whether its sentence will run concurrently or consecutively to another sentence that has not yet been imposed. When a sentencing court violates that rule and purports to direct the relationship between its present sentence and an anticipated forthcoming sentence, the proper remedy is usually to strike the improper directive, not to remit for a new sentencing proceeding at which the court could exercise the very power it lacked originally.

FACTS

On the night of August 16, 2015, five men – armed with a loaded AK-47 rifle – got into a vehicle and went on a brutal crime spree across the west side of the City of Rochester. The AK-47 accompanied the crew in the vehicle's passenger compartment; given its size, the firearm would have been readily apparent to any person inside the vehicle. During the first installment of their crime spree, several crew members brandished the AK-47 as they robbed and beat a man on Aberdeen Street. In another incident, a crew member used the AK-47 to shoot into a home on Flanders Street. And in a third episode, a

different crew member aimed the AK-47 out of the car and shot a female pedestrian on Genesee Street multiple times, nearly killing her.

Defendant was among the five men implicated in the foregoing crime spree, and they were indicted on various counts of criminal possession of a weapon (CPW), robbery, reckless endangerment, attempted murder, and assault. Defendant was tried separately by County Court (Randall, J.) without a jury, and he was ultimately convicted of only one count of CPW in the second degree (Penal Law § 265.03 [3]) for possessing the AK-47. County Court later explained that the CPW conviction was based on the doctrine of constructive possession.

County Court thereafter sentenced defendant on the CPW conviction to, inter alia, a determinate term of 5½ years' imprisonment. Notably, County Court directed that such sentence run consecutively to "whatever" sentence was eventually imposed on an unrelated burglary charge to which defendant had pleaded guilty in Supreme Court (Renzi, J.). One day after County Court sentenced defendant on the CPW conviction, Supreme Court sentenced defendant on the burglary conviction to, inter alia, a determinate term of 9 years' imprisonment. Supreme Court, however, explicitly declined to specify whether the burglary sentence would run concurrently or consecutively to defendant's previously-imposed CPW sentence.

Defendant now appeals from County Court's judgment.[1]

DISCUSSION

I

A person is guilty of CPW in the second degree as charged in the indictment when he or she "possesses any loaded firearm" (Penal Law § 265.03 [3]). Defendant now argues that the verdict convicting him of that crime is not supported by legally sufficient evidence and is against the weight of the evidence.

Defendant's legal sufficiency argument is unpreserved for appellate review (*see People v Gray*, 86 NY2d 10, 19 [1995]). With respect to the weight of the evidence, defendant does not dispute that the AK-47 at issue constituted a "loaded firearm" for purposes of Penal Law § 265.03 (3). Rather, defendant argues that the People failed to prove, beyond reasonable doubt, that he "possesse[d]" the AK-47 as required by section 265.03 (3). We disagree; the verdict is not against the weight of the evidence with respect to the possessory element of CPW in the second degree.

A person may "possess a firearm through actual, physical possession or through constructive possession" (*People v McCoy*, 169

---

[1] By separate order entered herewith, we unanimously affirmed Supreme Court's judgment (*see People v Barthel* [appeal No. 2], — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

AD3d 1260, 1262 [3d Dept 2019], *lv denied* 33 NY3d 1033 [2019]). Contrary to the People's intimation, the absence of a formal constructive possession instruction at this bench trial does not preclude us from upholding defendant's CPW conviction on a constructive possession theory. "Trial judges . . . 'are presumed to know the law and to apply it in making their decisions' " (*People v Stewartson*, 63 AD3d 966, 967 [2d Dept 2009], *lv denied* 13 NY3d 749 [2009], quoting *Lambrix v Singletary*, 520 US 518, 532 n 4 [1997]; *see People v Chestnut*, 19 NY3d 606, 611 n 2 [2012]); thus, when the judgment on appeal was rendered at a bench trial, the Appellate Division exercises its unique factual review power (*see* CPL 470.15 [5]) by independently weighing the evidence *in light of the challenged elements of the crime as defined by law* (*see People v Jones*, 192 AD3d 1656, 1657 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *People v Ponder*, 191 AD3d 1409, 1410 [4th Dept 2021]; *People v Holes*, 118 AD3d 1466, 1467-1468 [4th Dept 2014]; *see generally People v Delamota*, 18 NY3d 107, 116-117 [2011]; *People v Danielson*, 9 NY3d 342, 349 [2007]). The doctrine of constructive possession, in turn, is part of the statutory definition of the possessory element at issue in this appeal (*see* Penal Law § 10.00 [8]). Indeed, constructive possession is a deeply-rooted legal paradigm through which the core possessory element may be proven in any prosecution for a possessory offense (*see People v Sierra*, 45 NY2d 56, 60 [1978]; *People ex rel. Darling v Warden of City Prison*, 154 App Div 413, 414 [1st Dept 1913]). It follows that, when reviewing a possessory conviction rendered at a bench trial, the Appellate Division properly considers the doctrine of constructive possession in analyzing a weight-of-the-evidence argument directed at the core possessory element, irrespective of whether the trial court formally instructed itself on that doctrine.[2]

"To meet their burden of proving defendant's constructive possession of [a gun], the People had to establish that [he] exercised dominion or control over [the gun] by a sufficient level of control over the *area* in which . . . the gun was located" (*People v Lawrence*, 141 AD3d 1079, 1082 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016] [emphasis added and internal quotation marks omitted]; *see People v Wilkins*, 104 AD3d 1156, 1156 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]; *People v Ortiz*, 61 AD3d 779, 780 [2d Dept 2009], *lv denied* 13 NY3d 748 [2009]; *People v King*, 264 AD2d 428, 429 [2d Dept 1999], *lv denied* 94 NY2d 881 [2000]). Here, it is undisputed that the subject AK-47 was plainly visible inside the passenger compartment of the vehicle that transported the group of men along their crime spree on the night of August 16, 2015. It is also undisputed that defendant drove that vehicle – with the gun inside – at one point during the

---

[2] The analytical framework might be different if, during a bench trial, the judge explicitly refused to consider the doctrine of constructive possession or explicitly founded the verdict exclusively upon a legal theory other than constructive possession (*see generally People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]). In this case, however, County Court explicitly founded defendant's conviction upon a theory of constructive possession.

crime spree (namely, to and from the Aberdeen Street robbery). The trial evidence thus establishes, beyond a reasonable doubt, that defendant "exercised dominion or control over [the subject AK-47] by a sufficient level of control over the area" – i.e., the vehicle – "in which . . . the gun was located" (*Lawrence*, 141 AD3d at 1082 [internal quotation marks omitted]), and it necessarily follows that County Court correctly convicted defendant of CPW in the second degree on a theory of constructive possession (*see* Penal Law § 10.00 [8]; *People v Watkins*, 151 AD3d 1913, 1914 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]; *People v Nelson*, 139 AD3d 436, 437 [1st Dept 2016], *lv denied* 28 NY3d 972 [2016]; *People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]). Contrary to defendant's assertion, the fact that the gun was physically held and used by a rotating assortment of his codefendants at various points during the crime spree "does not preclude a finding of constructive possession by defendant because possession may be joint" (*People v Archie*, 78 AD3d 1560, 1561 [4th Dept 2010], *lv denied* 16 NY3d 856 [2011]).[3]

II

Defendant next challenges the consecutive aspect of County Court's sentence.[4] To refresh, County Court sentenced defendant on the CPW conviction one day *before* Supreme Court sentenced him on the burglary conviction. Thus, when County Court imposed the CPW sentence, there was no existing burglary sentence to which the CPW sentence could be either concurrent or consecutive. Nevertheless, anticipating that Supreme Court would soon be sentencing defendant on the burglary conviction, County Court preemptively directed that its CPW sentence run consecutively to "whatever" sentence Supreme Court would later impose for burglary. And when Supreme Court subsequently imposed sentence on the burglary conviction, it pointedly and explicitly declined to make any direction as to whether that sentence would run concurrently or consecutively to the previously-imposed CPW sentence.

We must now decide whether County Court had the power to fix the relationship between its present sentence and a future sentence that had not yet been imposed. And if County Court did not have that power, we must then decide how to remedy that error.

---

[3] Because the verdict is supported by the weight of the evidence on a theory of constructive possession, we need not consider whether the evidence would support a conviction under either the automobile presumption or the principles of accomplice liability (*see People v Conroy*, 53 AD3d 438, 441 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008], *cert denied* 555 US 1013 [2008]).

[4] Defendant's contention is exempt from the preservation requirement "because it involves the essential nature of the right to be sentenced as provided by law" (*People v Hakes*, 32 NY3d 624, 628 n 3 [2018] [internal quotation marks omitted]; *see People v Samms*, 95 NY2d 52, 54-58 [2000]; *People v Consalvo*, 89 NY2d 140, 146 [1996]; *People v Fuller*, 57 NY2d 152, 156 [1982]).

A

On the threshold issue, we agree with both defendant and the People that County Court's consecutive-sentencing directive was illegal. "[W]hen a person who is subject to any undischarged term of imprisonment imposed at a *previous* time . . . is sentenced to an *additional* term of imprisonment, the sentence . . . imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term . . . in such manner as the court directs at the time of sentence" (Penal Law § 70.25 [1] [emphasis added]). Because the statute empowers sentencing judges to decide whether newly-imposed – i.e., "additional" – custodial terms will run consecutively or concurrently to undischarged custodial terms "imposed at a previous time" (*id.*), it is well established that the "sentencing discretion afforded by [section] 70.25 (1) devolves upon the *last judge in the sentencing chain*" (*Matter of Murray v Goord*, 1 NY3d 29, 32 [2003] [emphasis added]). Here, the last judge in the sentencing chain was Supreme Court, and it thus follows that County Court "had no authority to direct that the sentence for [CPW] be served consecutively to the [burglary] sentence[] that had not yet been imposed" (*People v Clapper*, 133 AD3d 1036, 1036 [3d Dept 2015] [*Clapper I*]; *see also Matter of Oquendo v Quinones*, 291 AD2d 593, 594 [3d Dept 2002]).[5]

Up to this point, the analysis is straightforward: County Court had no power to usurp Supreme Court's prerogative to determine whether the subsequent burglary sentence would run concurrently or consecutively with the antecedent CPW sentence. But how should we remedy County Court's improper exercise of a sentencing prerogative reserved to Supreme Court? On that issue, the parties disagree and the law is scarce.

B

Defendant asks us to simply vacate County Court's improper directive concerning consecutive sentencing. For all practical purposes, defendant's proposed remedy would make his two sentences concurrent by default. After all, Supreme Court explicitly declined to fix any relationship between the burglary sentence and the previously-imposed CPW sentence, and (absent certain inapplicable exceptions) a sentencing court's "silence on this issue" – i.e., whether a newly-imposed sentence will run concurrently or consecutively to a prior undischarged sentence – "render[s] those sentences concurrent by operation of law under Penal Law § 70.25 (1) (a)" (*People v Richardson*, 100 NY2d 847, 852 [2003]; *see e.g. People v Allende*, 78 AD3d 553, 553 [1st Dept 2010], *lv denied* 16 NY3d 827 [2011]; *People v Pitts*, 75 AD2d 719, 720 [4th Dept 1980]).

---

[5] Nothing in Penal Law § 70.25 (1) or *Murray* bars a mid-chain sentencing judge from making a formal *recommendation* to the end-chain sentencing judge in order to assist that jurist in fashioning an appropriate relationship between the various sentences.

Consequently, in light of Supreme Court's intentional silence on the subject, the presumption of concurrency set forth in section 70.25 (1) (a) would be immediately triggered by vacating County Court's improper consecutive directive.

The People, on the other hand, ask us to vacate the CPW sentence in its entirety and remit the matter to County Court for resentencing on that conviction. As a practical matter, the People's proposed remedy would preserve the *possibility* of consecutive sentencing on remittal. That is because County Court would necessarily become the last judge in the sentencing chain at any *future* resentencing hearing, and County Court's newly-acquired status in that regard would invest it with the statutory prerogative to decide whether the *resentence* on the CPW conviction would run concurrently or consecutively to Supreme Court's *now-antecedent* sentence on the burglary conviction (*see People v Clapper*, 153 AD3d 1452, 1453 [3d Dept 2017] [*Clapper II*], *lv denied* 30 NY3d 1059 [2017]).

We hold that vacating the illegal consecutive directive is the only proper remedy under these circumstances. The People's proposal to vacate the CPW sentence and remit for resentencing is procedurally untenable, would perversely incentivize trial judges to usurp the sentencing powers of their colleagues, and is inconsistent with the statutory guideposts through which our remedial discretion in criminal cases must be channeled.

C

Analysis begins with CPL 470.20, the statutory basis of the Appellate Division's remedial powers in criminal appeals. CPL 470.20 initially prescribes the following standard:

> "[u]pon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent."

The foregoing prescription functions as a default rule, because CPL 470.20 goes on to enumerate six specific "rules" that "govern[] in part" the corrective action to be taken by the Appellate Division in certain frequently-encountered scenarios. Not surprisingly, none of those six specific "rules" offer any guidance in selecting an appropriate remedy for the unusual situation present here, i.e., a partially illegal sentence attributable to the sentencing judge's improper exercise of a statutory power reserved to a different judge. We are thus left with only the default rule, which obligates us to fashion a "necessary and appropriate" remedy that will "both" "rectify any injustice" that defendant suffered as a result of the illegal consecutive directive and "protect the rights of the [People]" (CPL 470.20).

The default rule of CPL 470.20 does not prescribe a rigid, one-size-fits-all approach for remedying sentences infected with illegal

concurrent/consecutive directives (*see People v LaSalle*, 95 NY2d 827, 829 [2000]). In *LaSalle*, the People argued that the Appellate Division, upon finding a sentence to be illegally consecutive, had no power under CPL 470.20 to reform the illegality on its own and was instead obligated to vacate the sentence and remit for resentencing by the trial court (*id.*). The Court of Appeals disagreed, holding that "an intermediate appellate court, in exercising its responsibility under CPL 470.20 to take 'such corrective action as is necessary and appropriate,' has the discretion, upon reversing or modifying a sentence, either to remit to the trial court for resentencing or to substitute its own legal sentence for the illegally imposed sentence" (*id.*). And under the circumstances presented in *LaSalle*, the Court of Appeals continued, "[t]he Appellate Division did not abuse its discretion by choosing the latter option" (*id.*).

Given the wide variety of scenarios and procedural postures in which an improperly consecutive or concurrent sentence could be imposed, the flexibility of the *LaSalle* rule affords the Appellate Division the discretion necessary to tailor the remedy to the unique circumstances of each case. A sentence can be illegally consecutive or concurrent for a multitude of distinct reasons, and not every illegally consecutive or concurrent sentence will necessarily call for the same remedy. Illegally structured sentences imposed after a trial on a multi-count indictment, for example, present different remedial considerations than illegally structured sentences imposed in accordance with a carefully calibrated (albeit technically improper) plea bargain. Likewise, illegally consecutive sentences traceable to the defect discussed in *People v Laureano* (87 NY2d 640, 642-644 [1996]) (i.e., where the underlying crimes were "committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other" [Penal Law § 70.25 (2)]) implicate different remedial considerations than, for example, an illegally concurrent sentence traceable to a sequentiality defect (i.e., where the current crime was committed after the imposition of a prior undischarged sentence [*see* Penal Law § 70.25 (2-a)]). And given their unusually procedural nature, illegally consecutive sentences traceable to a *Murray* error (i.e., the last-in-time judge dilemma present here [*see* 1 NY3d at 32]) implicate yet a different set of remedial considerations than would apply to more common scenarios in which the challenged sentence is substantively illegal irrespective of any particular judge's spot in the sentencing chain. Ultimately, in each of the foregoing categories, the Appellate Division must balance the relevant remedial considerations in order to fashion a remedy that "both" "rectif[ies] any injustice" suffered by the defendant and "protect[s] the rights of the [People]" (CPL 470.20).

D

The Third Department's rulings in *Clapper* are the only appellate decisions to have confronted, within the procedural context of a direct appeal, an illegally consecutive sentence traceable to the precise *Murray* error that infects the sentence in this case. In that case, the defendant (Scott A. Clapper) initially pleaded guilty to

several crimes in Schoharie County and thereafter pleaded guilty to a separate crime in Schenectady County (*Clapper I*, 133 AD3d at 1036). When Mr. Clapper was later sentenced on his Schenectady plea, the judge directed that such sentence run consecutively to the Schoharie sentences (*id.*). Mr. Clapper had not yet been sentenced in Schoharie when the Schenectady judge issued his consecutive directive, however (*id.*). And when Mr. Clapper was subsequently sentenced in Schoharie, the Schoharie judge did not specify whether the Schoharie sentences would run consecutively or concurrently to the previously-imposed Schenectady sentence (*see Clapper v Yelich*, 2019 WL 185684, *2 [ND NY Jan. 14, 2019, No. 9:18-CV-0102 (LEK)]). The foregoing sequence of events is remarkably similar to those at bar; in our case, County Court occupies the same position as the Schenectady judge, and Supreme Court occupies the same position as the Schoharie judge.

On appeal from the Schenectady judgment, the Third Department held that the consecutive directive was illegal because, at the time it was issued, Mr. Clapper had not yet been sentenced in Schoharie (*Clapper I*, 133 AD3d at 1036-1037). Quoting *Murray*, the Third Department explained that the " 'last judge in the sentencing chain' " – i.e., the Schoharie judge – had the power to determine the relationship between the Schoharie sentences and the previously-imposed Schenectady sentence (*id.* at 1037, quoting 1 NY3d at 32). After completing its substantive analysis of the Schenectady sentence's illegality, the Third Department pivoted to the question of remedy with this sentence: "Accordingly, the sentence here must be vacated and the matter remitted for resentencing" (*id.*). The Third Department cited no authority for its remedial determination, and it did not explain how or why it had selected resentencing as the proper remedy under these circumstances. Mr. Clapper did not seek leave to appeal to challenge the Third Department's chosen remedy (*see generally* CPL 450.90 [2] [b]; CPL 470.35 [2] [c]).

The Schenectady judge subsequently reimposed the same sentence on remittal, and he ran that resentence consecutively to the now-antecedent Schoharie sentences (*Clapper II*, 153 AD3d at 1453). Mr. Clapper appealed and challenged the resentence, which was identical in all respects to the original sentence that the Third Department had vacated as illegal. The Third Department upheld the resentence, however. In so doing, the Third Department suggested that, because Mr. Clapper was resentenced in Schenectady *after* he was sentenced in Schoharie, the Schenectady judge had, on remittal, become the last judge in the sentencing chain. As such, the Third Department concluded, the Schenectady judge had the authority, on remittal, to decide whether the *resentence* on the Schenectady conviction would run concurrently or consecutively to the *now-antecedent* Schoharie sentences (*id.*).

E

We decline the People's invitation to follow *Clapper I*'s remedial determination under the circumstances at bar. Our reasoning is as follows.

Had County Court adhered to the statutory limitation on its sentencing authority and deferred to the last judge in the sentencing chain – i.e., Supreme Court – to set the relationship between the various sentences, then defendant would have served his sentences concurrently in light of Supreme Court's subsequent refusal to specify whether the burglary sentence would run consecutively or concurrently to the CPW sentence (*see Richardson*, 100 NY2d at 852, citing Penal Law § 70.25 [1] [a]). The People would have had no avenue to appeal, and there would have been no legal grounds to alter County Court's sentence in any respect. But County Court did not adhere to the relevant statutory limitation on its sentencing authority, and if we remedy that error by vacating defendant's CPW sentence and remitting for resentencing before County Court, then County Court will leap-frog Supreme Court and become the last judge in the sentencing chain at the resentencing hearing – just as the Schenectady judge leap-frogged the Schoharie judge to become the last judge in the sentencing chain in *Clapper II*. County Court would thereby possess, at the resentencing hearing, the very power that it lacked originally, i.e., the prerogative to decide whether the CPW sentence will be consecutive or concurrent to the burglary sentence. And County Court would only have that prerogative at a future resentencing hearing because it disregarded the limitations on its power at the original sentencing hearing and triggered a successful appeal.

In short, remittal would in no way "rectify [the] injustice to [defendant] resulting from the error or defect which is the subject of the reversal or modification" (CPL 470.20). To the contrary, by empowering County Court to make the precise direction on remittal that it had no authority to make originally (*see Clapper II*, 153 AD3d at 1453), remitting for resentencing would effectively reward the People for County Court's legal error at the original sentencing hearing.

Rather than remitting for resentencing, the proper remedy under these circumstances is to simply vacate County Court's improper directive with respect to consecutive sentencing. That remedy will put defendant in the same position as if County Court had not issued that illegal directive in the first place. Such a remedy will also adequately "protect" the People's interests, since it will place them in the exact position they would have occupied had County Court not issued its illegal directive. Indeed, because the People had no legitimate right or interest in County Court's original illegal sentence, the People have no right or interest that could be "protected" with a remittal order calculated only to achieve the very outcome – consecutive sentencing – that they had no right to obtain in the first place.[6]

---

[6] As an aside, we note that Mr. Clapper pleaded guilty in Schenectady with the understanding that his sentence for that crime would be served consecutively to his Schoharie sentences (*Clapper II*, 153 AD3d at 1453; *Clapper I*, 133 AD3d at 1036). Thus, unlike the Monroe County District Attorney in this case, the Schenectady County District Attorney had some legitimate interest in consecutive sentencing that arguably warranted

F

People v Rodriguez (18 NY3d 667 [2012]) is consistent with our remedial determination. In that case, the defendant was convicted by a jury on five felony counts, and the trial judge carefully selected and structured the five ensuing sentences so as to produce an aggregate determinate term of 40 years' imprisonment (*id.* at 669). It turned out, however, that the judge had illegally run two particular sentences consecutively to each other (*id.*), and that simply correcting that discrete illegality would reduce the aggregate custodial term far below the 40 years deemed appropriate by the trial judge. Accordingly, the First Department *both* ran the two problematic sentences concurrently to each other *and* "remand[ed] the matter to the trial court so that it may restructure the sentences to arrive lawfully at the aggregate sentence which it clearly intended to impose" (*People v Rodriguez*, 79 AD3d 644, 645 [1st Dept 2010], *affd* 18 NY3d 667 [2012]). The Court of Appeals affirmed, holding that the First Department's remedy was consistent with CPL 470.20 and was not barred by CPL 430.10 (*see* 18 NY3d at 670-671).

Given the fundamental differences between *Rodriguez*'s remedy and *Clapper I*'s remedy, the Court of Appeals' explicit endorsement of the former does not implicitly validate the latter, much less the broad application of the latter that the People seek here. Unlike the remedy selected by the Third Department in *Clapper I*, the remedy selected by the First Department in *Rodriguez* did not by itself grant the trial judge the power to do something on remittal that he could not have done lawfully at the original sentencing hearing. Rather, the First Department's chosen remedy in *Rodriguez* merely afforded the trial judge an opportunity, after learning that his original sentences were partially illegal, to re-exercise a power that he unquestionably possessed at the original sentencing hearing, i.e., the prerogative to structure the relationship between multiple sentences imposed "at the same time" (Penal Law § 70.25 [1]).

Reasonable minds could disagree about the wisdom and legality of the remedy selected in *Rodriguez*, but one cannot deny the qualitative difference between a remedy that facilitates a trial judge's re-exercise of an undisputed pre-existing power (as in *Rodriguez*) and a remedy that purports to cure an unlawful judicial act by authorizing the repetition of that very act (as in *Clapper I*). In our view, absent unusual circumstances or considerations not present here, an error cannot be effectively remedied with a procedure that itself makes lawful the repetition of that error on remittal. Error

---

"protect[ing]" in *Clapper I* (CPL 470.20; *cf. People v Backus*, 14 NY3d 876, 877 [2010]; *People v Thompson*, 60 NY2d 513, 519-520 [1983]). We need not and do not decide whether we would adopt *Clapper I*'s remedy had the People possessed a comparable interest in consecutive sentencing in this case (*cf. generally People v Moquin*, 77 NY2d 449, 451-455 [1991], *rearg denied* 78 NY2d 952 [1991]; *Matter of Budelmann v Leone*, 122 AD3d 1271, 1272-1273 [4th Dept 2014]).

laundering, after all, cannot be what the Legislature had in mind when it commanded the Appellate Division to fashion "necessary and appropriate" remedies that "rectify any prejudice" to aggrieved appellants (CPL 470.20).

III

Finally, we reject defendant's contention that his 5½-year term of imprisonment is "unduly harsh or severe" (CPL 470.15 [6] [b]). Defendant criminally possessed the subject AK-47 in the midst of an unnerving crime spree that visited random acts of violence upon multiple people who posed no threat to him or his codefendants. Less than a month later, defendant burglarized a stranger's home and stole various items inside. Defendant has a prior federal conviction for trafficking firearms as well as a prior youthful offender adjudication for an assault in which he punched the victim several times in the face, and he subsequently violated the terms of his probation on that adjudication by failing to report, getting arrested multiple times, failing to pay restitution, and possessing a handgun. Contrary to defendant's assertions, his commission of the instant offense at the age of 19 and his purported skills as a football player are veritably inconsequential when arrayed against his demonstrated penchant for violating the social contract. We perceive no reason to reduce defendant's sentence (*see generally People v Thomas*, 194 AD3d 1405, 1406 [4th Dept 2021]; *People v Suitte*, 90 AD2d 80, 83-89 [2d Dept 1982]).

CONCLUSION

Accordingly, in light of the foregoing, we modify the judgment by vacating County Court's directive regarding consecutive sentencing. As so modified, the judgment is affirmed.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

498

KA 18-00163

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH T. BARTHEL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 19, 2016. The judgment convicted defendant, upon a plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). We affirm. The sentence is not unduly harsh or severe. Defendant's challenge to the purported restitution order is unpreserved for appellate review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Schmiege*, 172 AD3d 1897, 1898 [4th Dept 2019]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

507

CA 20-01397

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

IN THE MATTER OF THE APPLICATION OF SENECA MEADOWS, INC., PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF SENECA FALLS AND TOWN OF SENECA FALLS TOWN BOARD, RESPONDENTS-DEFENDANTS-RESPONDENTS.

CONCERNED CITIZENS OF SENECA COUNTY, INC. AND DIXIE D. LEMMON, INTERVENORS-RESPONDENTS.

NIXON PEABODY LLP, ROCHESTER (RICHARD A. MCGUIRK OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

BOYLAN CODE LLP, ROCHESTER (DAVID K. HOU OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

DOUGLAS H. ZAMELIS, COOPERSTOWN, FOR INTERVENORS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered May 5, 2020 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment granted the motions of respondents-defendants and intervenors to dismiss the petition-complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motions are denied, and the petition-complaint is reinstated.

Memorandum: Petitioner-plaintiff (petitioner) has operated a solid waste disposal facility in respondent-defendant Town of Seneca Falls (Town) for several decades pursuant to lawfully-issued permits issued by the New York State Department of Environmental Conservation (DEC). Respondent-defendant Town of Seneca Falls Town Board (Town Board) enacted the Town of Seneca Falls Local Law #3 of 2016 (2016 Law), effective December 30, 2016, which prohibited solid waste disposal facilities in the Town but permitted existing facilities that operate pursuant to a valid DEC permit to continue to operate for the duration of the permit, but not beyond December 31, 2025. In February 2017, petitioner commenced a proceeding/action challenging the 2016 Law (first proceeding). On May 5, 2017, the Town Board enacted the Town of Seneca Falls Local Law No. 2 of 2017 (2017 Law), which rescinded the 2016 Law. Believing that the first proceeding was now moot, petitioner voluntarily discontinued it without prejudice. In

the meantime, however, a third party commenced a CPLR article 78 proceeding challenging the 2017 Law and, in an order dated October 16, 2017, Supreme Court (Kocher, A.J.) granted the petition and annulled the 2017 Law, thus effectively reinstating the 2016 Law. Petitioner then commenced the instant proceeding/action on November 15, 2017 (second proceeding). Intervenors and the Town and Town Board moved to dismiss the second proceeding pursuant to CPLR 3211 (a) (1), (5), and (7). Supreme Court (Doyle, J.) granted the motions, and we now reverse.

We agree with petitioner that the court erred in granting those parts of the motions seeking to dismiss the first, second, and fourth causes of action as untimely. It is well settled that a CPLR "[a]rticle 78 proceeding[] must be commenced within four months after the determination to be reviewed becomes 'final and binding' upon the petitioner" (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165 [1991], quoting CPLR 217 [1]). The 2016 Law was enacted and filed with the New York State Department of State on December 30, 2016, which was a final and binding determination that began the running of the statute of limitations (*see Matter of Clear Channel Outdoor, Inc. v Town Bd. of Town of Windham*, 9 AD3d 802, 804 [3d Dept 2004]), and petitioner commenced the first proceeding within four months of that date. We reject the contention of intervenors and the Town and Town Board, however, that the second proceeding was untimely because it was commenced more than four months after December 30, 2016. We conclude that the Town Board, by enacting the 2017 Law that repealed the 2016 Law, created "ambiguity and uncertainty" as to when the statute of limitations began to run with respect to the 2016 Law (*Mundy v Nassau County Civ. Serv. Commn.*, 44 NY2d 352, 358 [1978]; *see New York State Assn. of Counties*, 78 NY2d at 166; *Matter of Musilli v New York State & Local Police & Fire Dept. Sys.*, 249 AD2d 826, 827 [3d Dept 1998]).

"The burden is on the administrative agency to demonstrate the existence of a final and binding determination . . . and any ambiguity or uncertainty created by the agency must be construed against it" (*Matter of Turner v Bethlehem Cent. School Dist.*, 265 AD2d 640, 641 [3d Dept 1999]; *see Mundy*, 44 NY2d at 358). The enactment of the 2017 Law rendered the first proceeding moot, and it was properly discontinued by petitioner (*see generally Bergstol v Town of Monroe*, 305 AD2d 348, 348-349 [2d Dept 2003]; *Bergstol v Town of Monroe*, 296 AD2d 431, 431 [2d Dept 2002], *lv denied* 98 NY2d 614 [2002]). When the 2016 Law was effectively reinstated after the 2017 Law was annulled by the court, petitioner had four months from that time to commence the second proceeding. Although intervenors and the Town and Town Board contend that the limitations period began to run when the 2016 Law was enacted, and that petitioner failed to protect its rights with respect to the 2016 Law because there were other steps petitioner could have taken instead of voluntarily discontinuing the first proceeding, we conclude that the blame must be cast upon the Town Board for creating the uncertainty regarding the finality of the 2016 Law by enacting the 2017 Law, and we must resolve the ambiguity against it and not deny petitioner its day in court (*see Mundy*, 44 NY2d at 358).

We further agree with petitioner that the court erred in granting

those parts of the motions seeking to dismiss its third cause of action, alleging a deprivation of substantive due process. "To state a substantive due process claim in the land-use context, petitioner must allege (1) the deprivation of a protectable property interest and (2) that the governmental action was wholly without legal justification" (*Matter of Upstate Land & Props., LLC v Town of Bethel*, 74 AD3d 1450, 1452 [3d Dept 2010] [internal quotation marks omitted]; *see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627-628 [2004]; *Town of Orangetown v Magee*, 88 NY2d 41, 52-53 [1996]; *Jones v Town of Carroll*, 122 AD3d 1234, 1239 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015]). With respect to the first prong, in its pleading petitioner stated a vested property interest in continuing to operate its solid waste disposal facility inasmuch as petitioner alleged that it had "a vested property right arising from substantial expenditures pursuant to a lawful permit" (*Bower Assoc.*, 2 NY3d at 628), i.e., that it had made substantial investments and improvements to the facility, which it operated for decades pursuant to lawfully-issued permits issued by the DEC (*see Jones v Town of Carroll*, 15 NY3d 139, 145-146 [2010], *rearg denied* 15 NY3d 820 [2010]).

With respect to the second prong of the substantive due process claim, " 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense' " (*Bower Assoc.*, 2 NY3d at 628). Applying the appropriate standard of review on a motion to dismiss pursuant to CPLR 3211 (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that petitioner made sufficient allegations that the 2016 Law was "without legal justification and motivated entirely by political concerns" to state a cause of action for deprivation of substantive due process (*Magee*, 88 NY2d at 53; *see generally Acquest Wehrle, LLC v Town of Amherst*, 129 AD3d 1644, 1648 [4th Dept 2015], *appeal dismissed* 26 NY3d 1020 [2015]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

512

TP 21-00090

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

IN THE MATTER OF ALEX SHOGA, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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, Wyoming County [Michael M. Mohun, A.J.], entered January 11, 2021) to review a determination of respondent. The determination revoked petitioner's release to parole supervision.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his parole release and remanding him to serve another 25 months of incarceration. We note at the outset that Supreme Court erred in transferring the matter to this Court inasmuch as petitioner did not allege in his amended petition that the determination is not supported by substantial evidence (*see* CPLR 7804 [g]; *Matter of Rodriguez v Annucci*, 120 AD3d 1579, 1580 [4th Dept 2014]). We nevertheless review the merits of the amended petition in the interest of judicial economy (*see Matter of Horace v Annucci*, 133 AD3d 1263, 1264 [4th Dept 2015]; *Rodriguez*, 120 AD3d at 1580).

As a preliminary matter, petitioner correctly contends that his subsequent release to parole does not render this proceeding moot inasmuch as his status as a parole violator "may have lasting consequences" (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]; *see Matter of Putnam County Probation Dept. v Dimichele*, 120 AD3d 820, 820 [2d Dept 2014]). Petitioner's release to parole does, however, render moot his contention that the penalty was excessive (*see Matter of Gray v Travis*, 239 AD2d 631, 632 [3d Dept

1997]; *see also Matter of Darnell v David*, 300 AD2d 766, 767 [3d Dept 2002]).

" '[I]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination' " (*Matter of Wilson v Evans*, 104 AD3d 1190, 1190 [4th Dept 2013]; *see Matter of Lozada v New York State Div. of Parole*, 61 AD3d 1393, 1394 [4th Dept 2009]). Although petitioner raises a substantial evidence issue in the brief presented to this Court, "we are unable to address th[at] issue[] because he failed to raise [it] on his administrative appeal and thus failed to exhaust his administrative remedies with respect to [that issue]" (*Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362 [4th Dept 2003]; *cf. Matter of Adams v New York State Dept. of Corr. & Community Supervision*, 151 AD3d 1770, 1771 [4th Dept 2017], *appeal dismissed* 30 NY3d 1007 [2017]).

With respect to petitioner's remaining contentions, we conclude that all of the procedural requirements were followed and that he was not denied due process. There is no support in the record for "the contention of petitioner that the . . . determination [of the Administrative Law Judge (ALJ)] was influenced by any alleged bias against petitioner" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011]; *see Matter of Hampton v Kirkpatrick*, 82 AD3d 1639, 1639-1640 [4th Dept 2011]). In addition, there is no support in the record for petitioner's contention that the ALJ "usurped the role of the prosecution, thereby depriving him of due process" (*Rodriguez*, 120 AD3d at 1580), or imposed a higher penalty "in retaliation for petitioner exercising his right to a hearing" (*Matter of Rago v Alexander*, 60 AD3d 1123, 1124 [3d Dept 2009]).

Finally, we reject petitioner's contention that the ALJ denied petitioner his right to counsel. "A parolee receives . . . effective assistance of counsel when the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*Matter of Bond v Stanford*, 171 AD3d 1320, 1321 [3d Dept 2019], *lv denied* 34 NY3d 902 [2019] [internal quotation marks omitted]; *see Matter of Wilson v Evans*, 104 AD3d 1190, 1191 [4th Dept 2013]). Petitioner's contention that he was denied the right to confer with counsel and was thus denied effective assistance of counsel "is belied by the record, which reflects that petitioner was afforded meaningful representation" (*Matter of Partee v Stanford*, 159 AD3d 1294, 1295 [3d Dept 2018]; *see Matter of Rosa v Fischer*, 108 AD3d 1227, 1228 [4th Dept 2013], *lv denied* 22 NY3d 855 [2013]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

517

KA 19-00587

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HEATH EDMEAD, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

HEATH EDMEAD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 8, 2019. The judgment convicted defendant upon a jury verdict of grand larceny in the third degree and 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 a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]) and grand larceny in the fourth degree (§ 155.30 [1]), arising from an incident in which he gave two checks to the victims as payment for a tractor and trailer, and the checks were dishonored. Contrary to defendant's contention in his main and pro se supplemental briefs, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude beyond a reasonable doubt that defendant had the intent to steal the property when he took the tractor and trailer from the victims (*People v Delamota*, 18 NY3d 107, 113 [2011]; *see generally People v Abeel*, 67 AD3d 1408, 1409-1410 [4th Dept 2009]). We reject defendant's contention in his pro se supplemental brief that, because he issued post-dated checks, that negated the requisite intent to steal, thereby rendering the evidence legally insufficient. There was evidence from which the jury could have concluded that the checks were not post-dated, and even assuming, arguendo, that the jury concluded that the checks were post-dated, we conclude that "[t]he jury was entitled to infer that defendant had the requisite intent to commit . . . larceny" based on the evidence at

trial (*People v Reed*, 163 AD3d 1446, 1448 [4th Dept 2018], *lv denied* 32 NY3d 1067 [2018]; *see also Abeel*, 67 AD3d at 1409-1410). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends in his main brief that he was denied his constitutional and statutory rights to a speedy trial. Upon our review of the relevant factors (*see People v Taranovich*, 37 NY2d 442, 445 [1975]), we conclude that defendant was not deprived of his constitutional right to a speedy trial (*see People v Hewitt*, 144 AD3d 1607, 1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]), and we note in particular that "there is a complete lack of any evidence that the defense was impaired by reason of the delay" (*People v Benjamin*, 296 AD2d 666, 667 [3d Dept 2002]; *see People v Schillawski*, 124 AD3d 1372, 1373 [4th Dept 2015], *lv denied* 25 NY3d 1207 [2015]; *see generally People v Pulvino*, 115 AD3d 1220, 1222-1223 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]). In addition, we note that the majority of the delay is attributable to adjournments granted at defendant's request to permit him to address charges in other jurisdictions (*see generally People v Mack*, 126 AD3d 657, 657 [1st Dept 2015], *lv denied* 25 NY3d 1167 [2015]).

We further conclude that defendant's statutory right to a speedy trial was not violated (*see* CPL 30.30 [1] [a]). We conclude that defendant met his initial burden "of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]), and that the burden therefore shifted to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]). Nevertheless, we reject defendant's contention that County Court erred in concluding that the People established that sufficient time was excludable from the speedy trial calculation. With respect to defendant's challenge to the delay prior to arraignment in local court, in computing the time within which the People must be ready for trial, the court must exclude, inter alia, the period of delay resulting from defendant's absence (*see* CPL 30.30 [4] [c] [i]). "A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence" (*id.*), and " '[t]he police are not required to search for a defendant indefinitely' " (*People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]; *see People v Butler*, 148 AD3d 1540, 1541 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]). Here, the People established that they undertook sufficient efforts to locate defendant until such time as he was eventually located after his arrest under a different name in New York City. Thus, we conclude that the People exercised due diligence in attempting to locate defendant during the time period at issue, and therefore the time that defendant challenges prior to his arraignment in local court was properly excluded from the speedy trial calculation (*see People v Anderson*, 188 AD3d 1699, 1700-1701 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]; *cf. Williams*, 137

AD3d at 1710-1711).

Several other periods of time are properly charged to the People for speedy trial purposes. The 45 days between defendant's arraignment in local court on November 20, 2015, and the People's written statement of readiness on January 4, 2016, is not excludable (*see generally People v Brown*, 28 NY3d 392, 403-404 [2016]). Similarly, the two-week adjournment that the People requested on March 28, 2016 to respond to previously served motions, and the 21 days between September 6, 2016 and September 27, 2016 that the People requested for the same reason, are chargeable to them for speedy trial purposes (*see e.g. People v Figueroa*, 15 AD3d 914, 915 [4th Dept 2005]; *see generally People v Anderson*, 66 NY2d 529, 536-538 [1985]). Defendant's challenge to the period between April and July 2016, however, lacks merit because the record reflects that defendant's standby defense counsel requested an adjournment of part of that time (*see People v Yannarilli*, 191 AD3d 1327, 1329 [4th Dept 2021], *lv denied* 37 NY3d 961 [2021]; *People v Williams*, 41 AD3d 1252, 1254 [4th Dept 2007]), and because that period of delay was the result of defendant's motion for a *Wade* hearing. In other words, the delay was completely "attributable to defense motions" (*People v Piquet*, 46 AD3d 1438, 1439 [4th Dept 2007], *lv denied* 10 NY3d 770 [2008]). Defendant failed to preserve his contention that the People are responsible for a delay in providing the grand jury minutes because he did not challenge any specific time period in the motion court (*see People v Beasley*, 16 NY3d 289, 292-293 [2011]). In any event, the record establishes that the People provided those minutes within a reasonable time (*see People v Rucker*, 132 AD2d 968, 969 [4th Dept 1987], *lv denied* 70 NY2d 803 [1987]; *see generally People v Harris*, 82 NY2d 409, 413 [1993]) and therefore that period of time is not chargeable to the People.

Thus, after taking into consideration excludable periods of time, we conclude that the People announced readiness for trial well within the statutory six-month time frame (*see People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]). Contrary to defendant's further contention, the filing of the superseding indictment did not render the People's prior announcements of readiness invalid. To the contrary, "[t]he People's announcement of readiness for trial with respect to the first indictment satisfied CPL 30.30 with respect to . . . that indictment. It also satisfied the People's obligation with respect to the second indictment" (*People v Stone*, 265 AD2d 891, 892 [4th Dept 1999], *lv denied* 94 NY2d 907 [2000]; *see People v McCullars*, 126 AD3d 1469, 1470 [4th Dept 2015], *lv denied* 25 NY3d 1167 [2015]; *see generally People v Sinistaj*, 67 NY2d 236, 239-240 [1986]). Nor did the filing of the superseding indictment render the People's statements of readiness on the first indictment illusory. It is well settled that a statement of readiness is not illusory where, as here, the People are able to proceed to trial upon the original indictment at the time the statement is made (*see People v Brown*, 269 AD2d 809, 809 [4th Dept 2000], *affd* 96 NY2d 80 [2001]; *People v Hewitt*, 144 AD3d 1607, 1607-1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Watkins*, 17 AD3d 1083, 1083 [4th Dept 2005], *lv denied* 5 NY3d 771

[2005]).

We reject defendant's contention in his main and pro se supplemental briefs that the court erred in permitting the People to amend the theory of the prosecution from larceny by issuing a bad check to larceny by false promises and false pretenses. The superseding indictment and the pertinent bill of particulars did not specify a theory of larceny. Additionally, " '[t]he People are not required to specify any particular theory of larceny in the indictment . . . [, and t]he present indictment and discovery provided sufficient information to prepare and present a defense' " (*People v Francis*, 78 AD3d 1559, 1559 [4th Dept 2010]; *see generally People v Pillich*, 207 AD2d 1004, 1004 [4th Dept 1994], *lv denied* 84 NY2d 938 [1994]). Contrary to defendant's further contention in his main brief, we conclude that the court's charge on the law concerning the requisite intent, viewed in its entirety, "fairly instructed the jury on the correct principles of law to be applied to the case and does not require reversal" (*People v Ladd*, 89 NY2d 893, 896 [1996]). We reject defendant's contention in his main brief that the court erred in denying his request that the jury be instructed on the definition of a check inasmuch as the superseding indictment did not limit the theory of the prosecution to larceny by check, and thus no such definition was required (*cf. People v Termotto*, 155 AD2d 965, 965 [4th Dept 1989], *lv denied* 75 NY2d 925 [1990]; *see generally Abeel*, 67 AD3d at 1409-1410).

We reject defendant's contention in his main and pro se supplemental briefs that the court abused its discretion in admitting evidence that he obtained two other vehicles from other victims by executing a similar plan on two separate occasions. "Evidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity . . . Where there is a proper nonpropensity purpose, the decision whether to admit [such] evidence . . . rests upon the trial court's discretionary balancing of probative value and unfair prejudice" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Here, the court minimized the potential prejudice to defendant by limiting the evidence to those two instances, rather than the five incidents concerning which the People sought to introduce evidence, and by providing curative instructions throughout the *Molineux* testimony as well as when charging the jury (*see People v Holmes*, 104 AD3d 1288, 1289 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]). The court properly concluded that the evidence that it admitted was relevant for a purpose other than defendant's criminal propensity, i.e., to show his intent, the absence of mistake, and common scheme or plan (*see generally Dorm*, 12 NY3d at 19), and we conclude that its admission was not an abuse of discretion.

We similarly reject defendant's contention in his main brief that the court abused its discretion in its *Sandoval* ruling, pursuant to which the People were permitted to question defendant, if he chose to testify, about two of his 15 prior theft-related convictions. The convictions "involved acts of dishonesty and thus were probative with respect to the issue of defendant's credibility" (*People v Thomas*, 165 AD3d 1636, 1637 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert*

denied — US —, 140 S Ct 257 [2019] [internal quotation marks omitted]). We also reject defendant's claim that the court's ruling improperly deterred him from testifying in support of his defense. Defendant's testimony was not " 'the *only* available source of material testimony in support of his defense' " (*People v Scott*, 189 AD3d 2062, 2063 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), and the absence of his testimony did not deprive the jury of "significant material evidence" inasmuch as defendant's grand jury testimony regarding the incident was admitted at trial (*People v Grant*, 7 NY3d 421, 424 [2006]).

Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

528

CA 20-01541

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

CHRISTOPHER W. WALKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF WEBSTER, ET AL., DEFENDANTS,
AND DAVID J. OSBORN, DEFENDANT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered November 12, 2020. The order granted the motion of defendant David J. Osborn for summary judgment and dismissed the complaint and all cross claims against said defendant.

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 and all cross claims are reinstated against defendant David J. Osborn.

Memorandum: In this personal injury action arising from a motor vehicle collision, plaintiff appeals from an order granting the motion of defendant David J. Osborn for summary judgment dismissing the complaint and all cross claims against him. This action arises from an incident in which a vehicle operated by plaintiff was struck by a vehicle operated by defendant Robert J. Buck, while Buck was being pursued by police officers. Insofar as relevant to this appeal, plaintiff commenced this action against Osborn under a theory that he is vicariously liable for plaintiff's injuries pursuant to Vehicle and Traffic Law § 388, and Osborn moved for summary judgment on the ground that he was not an owner of the vehicle within the meaning of the statute because he had purportedly transferred ownership of the vehicle to Buck several months before the collision. We agree with plaintiff that Osborn failed to meet his initial burden on the motion, and therefore we reverse.

Vehicle and Traffic Law § 388 (1) provides in relevant part that every "owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner" (*see Murdza v Zimmerman*, 99 NY2d

375, 379 [2003]). The statute further provides that an " 'owner' shall be as defined in section one hundred twenty-eight" of the Vehicle and Traffic Law (§ 388 [3]; *see Oscier v Musty*, 138 AD3d 1402, 1404 [4th Dept 2016]), which in turn states that an owner is a "person, other than a lien holder, having the property in or title to a vehicle or vessel" (§ 128; *see Monette v Trummer*, 105 AD3d 1328, 1329 [4th Dept 2013], *affd* 22 NY3d 944 [2013]). Generally, "ownership is in the registered owner of the vehicle or one holding the documents of title[,] but a party may rebut the inference that arises from [those] circumstances" (*Fulater v Palmer's Granite Garage*, 90 AD2d 685, 685 [4th Dept 1982], *appeal dismissed* 58 NY2d 826 [1983]; *see* § 2108 [c]; *see also Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010]).

Here, in support of his motion, Osborn submitted evidence establishing that the vehicle at issue was registered to Buck, but also submitted a New York State Department of Motor Vehicles record establishing that the vehicle was titled to Osborn. Consequently, because "there is conflicting evidence of ownership, the issue must be resolved by a trier of fact" (*Martin v Lancer Ins. Co.*, 133 AD3d 1219, 1220 [4th Dept 2015]; *see Sosnowski v Kolovas*, 127 AD2d 756, 758 [2d Dept 1987]; *Fulater*, 90 AD2d at 685). Thus, Osborn failed to "make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) and, because he did not meet his initial burden on the motion, "the burden never shifted to [plaintiff], and denial of the motion was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad*, 64 NY2d at 853).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

530

CA 20-01482

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

IN THE MATTER OF SAMID GRAVES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MVAIC, RESPONDENT-APPELLANT,
AND STATE FARM INSURANCE COMPANY,
RESPONDENT-RESPONDENT.

KORNFELD, REW, NEWMAN & SIMEONE, SUFFERN (WILLIAM S. BADURA OF COUNSEL), FOR RESPONDENT-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (JOSEPH A. TODORO OF COUNSEL), FOR PETITIONER-RESPONDENT.

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 5, 2020. The order granted petitioner's application for leave to file a lawsuit for his personal injury claim against respondent MVAIC.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and that part of the application seeking leave to proceed with an action against respondent MVAIC is denied.

Memorandum: In this proceeding petitioner, allegedly the victim of a hit-and-run accident, made an application for, inter alia, leave to proceed with an action against respondent MVAIC pursuant to Insurance Law § 5218. MVAIC appeals from an order granting the application to that extent. We agree with MVAIC that Supreme Court erred in granting that part of the application. Petitioner failed to meet his burden of demonstrating that "the accident was one in which the identity of the owner and operator was unknown or not readily ascertainable through reasonable efforts" (*Matter of Acosta-Collado v Motor Veh. Acc. Indem. Corp.*, 103 AD3d 714, 716 [2d Dept 2013]; *see* § 5218 [b] [5]; *Matter of Yi Song He v Motor Veh. Acc. Indem. Corp.*, 128 AD3d 525, 525 [1st Dept 2015]). In support of his application, petitioner submitted photographs of the white van that he believed to have run over his foot, one of which clearly depicts the license plate number, as well as correspondence from MVAIC and respondent State Farm Insurance Company identifying the owner and presumed operator of the

van by name and policy number. Petitioner was required to exhaust his remedies against the owner in a personal injury action before seeking relief from MVAIC (*see Acosta-Collado*, 103 AD3d at 716; *Hauswirth v American Home Assur. Co.*, 244 AD2d 528, 529 [2d Dept 1997]). Only if such an action ultimately fails due to lack of proof of the identity of the owner or operator may the court grant leave to proceed with an action against MVAIC (*see Acosta-Collado*, 103 AD3d at 716; *see also Hauswirth*, 244 AD2d at 529).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

531

CA 20-01473

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

DEBORAH ANN RAY-ROSEMAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RONALD L. ROSEMAN, DECEASED, DEBORAH ANN RAY-ROSEMAN AND MICHAEL K. RAY, AS SUCCESSORS AND CO-TRUSTEES OF THE RONALD L. ROSEMAN REVOCABLE TRUST DATED DECEMBER 8, 2004, ITS SUCCESSORS AND OR ASSIGNS, 5380 FRONTIER AVENUE ENERGY CO., LLC, AND FLORIDA ASSET VENTURES, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LIPPES MATHIAS WEXLER FRIEDMAN, LLP, ALAN S. WEXLER, PAUL F. WELLS, THOMAS J. GAFFNEY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 4, 2020. The order, insofar as appealed from, granted that part of the motion of defendants-respondents seeking to dismiss plaintiffs' claim for legal malpractice with respect to a 2014 loan transaction.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion of defendants-respondents with respect to the legal malpractice claim insofar as that claim is predicated on the 2014 loan transaction is denied, and that claim against defendants-respondents is reinstated to that extent.

Memorandum: Plaintiffs commenced this action against defendants-respondents (defendants) alleging, inter alia, legal malpractice arising from their representation of plaintiffs with respect to a 2014 business loan transaction and subsequent foreclosure litigation. Thereafter, defendants moved, inter alia, to dismiss as time-barred the legal malpractice claim against them insofar as it is predicated on the 2014 loan transaction. Plaintiffs, as limited by their brief, appeal from an order insofar as it granted defendants' motion to that

extent, and we now reverse the order insofar as appealed from.

Ronald L. Roseman, who resided in Florida prior to his death, was advised by his Florida attorney about a business opportunity that involved him investing in a struggling power plant in Niagara Falls, New York. Defendants were engaged as New York counsel in June 2014 to prepare loan documents between the Ronald L. Roseman Revocable Trust (Roseman Trust) and the borrowers, who were owners and officers of the power plant. In July 2015, the borrowers defaulted on the loan. In August 2015, defendants commenced a foreclosure action on behalf of the Roseman Trust in Supreme Court, Niagara County, and represented the Roseman Trust until sometime in August 2016.

The statute of limitations for a legal malpractice claim is three years (*see* CPLR 214 [6]; *McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Here, plaintiffs correctly concede that defendants met their initial burden of establishing that the malpractice claim insofar as it related to the 2014 loan transaction was commenced beyond the three-year statute of limitations (*see generally Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]; *U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020]). Thus, the burden shifted to plaintiffs to raise a triable issue of fact whether "the statute of limitations was tolled or otherwise inapplicable, or whether . . . plaintiff[s] actually commenced the action within the applicable limitations period" (*U.S. Bank N.A.*, 186 AD3d at 1039 [internal quotation marks omitted]; *see generally Rider*, 192 AD3d at 1562).

We conclude that plaintiffs, in opposition, raised a triable issue of fact whether the continuous representation doctrine applied to toll the statute of limitations with respect to the malpractice claim insofar as it related to the 2014 loan transaction (*see generally Carbone v Brenizer*, 148 AD3d 1806, 1807 [4th Dept 2017]). The continuous representation doctrine tolls the limitations period "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy*, 99 NY2d at 306), and " 'where the continuing representation pertains specifically to [that] matter' " (*International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1513 [4th Dept 2010], quoting *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). Here, plaintiffs submitted communication between the Florida attorney and defendants in which the Florida attorney indicated that defendants' role as New York counsel included *"enforcement"* of the 2014 loan transaction documents. Moreover, the 2014 loan transaction and the foreclosure proceedings were close in time, as evidenced by plaintiffs' submission of defendants' supplemental billing invoices for legal services, which demonstrated a representation from the loan transaction to the foreclosure proceeding without a break. Thus, we conclude that questions of fact exist regarding the extent of defendants' representation of plaintiffs and, more specifically, whether "enforcement" of the loan documents contemplated a continued representation until the loan was paid in full and the transaction completed.

In light of our determination, we need not reach plaintiffs' remaining contention.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

532

CA 20-00974

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

ROBERT JEFFERY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

QUEEN CITY FOODS, LLC, AND MARIA FARINACCI,
DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., BUFFALO (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE FIRM, BUFFALO (JOHN B. LICATA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered July 31, 2020. The order granted the motion of plaintiff for summary judgment on the issues of negligence, proximate cause and serious injury and denied the cross motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when the vehicle he was operating was rear-ended by a vehicle operated by defendant Maria Farinacci, an employee of defendant Queen City Foods, LLC. Plaintiff alleged, inter alia, that he sustained a serious injury to his shoulder under the permanent consequential limitation of use and significant limitation of use categories set forth in Insurance Law § 5102 (d). Plaintiff thereafter moved for partial summary judgment on the issues of negligence, proximate cause, and serious injury, and defendants cross-moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. Defendants appeal from an order that granted plaintiff's motion and denied defendants' cross motion. We affirm.

Initially, we note that, inasmuch as defendants do not challenge that part of the order granting plaintiff's motion with respect to the issue of negligence, they have abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We further note that, even though Supreme Court granted plaintiff's motion with respect to the issue of serious injury, it

failed to specify under which category of serious injury plaintiff is entitled to recover. This case involved a competing summary judgment motion and cross motion, and the court chose not to write. This is an unacceptable practice (*see generally Kopp v Rhino Room, Inc.*, 192 AD3d 1690, 1692 [4th Dept 2021]; *Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020]; *Doucette v Cuviello*, 159 AD3d 1528, 1528 [4th Dept 2018]). To maximize effective appellate review, we must remind our colleagues in the trial courts to provide their reasoning instead of simply issuing orders.

With respect to the merits, we nevertheless conclude that, contrary to defendants' contention, the court properly denied the cross motion and granted the motion with respect to the issues of serious injury and proximate cause. Defendants do not contest that plaintiff established as a matter of law that he sustained a serious injury to his shoulder under the categories of permanent consequential limitation of use and significant limitation of use. Instead, defendants contend only that the alleged shoulder injury was not caused by the accident. To support that argument, defendants rely exclusively on the expert opinion of a biomechanical expert. It is well settled, however, that biomechanical experts are not qualified to render opinions regarding injury causation (*see Gates v Longden*, 120 AD3d 980, 981 [4th Dept 2014]). Defendants' reliance on *Cardin v Christie* (283 AD2d 978 [4th Dept 2001]) is misplaced because the biomechanical expert in that case was also a medical doctor. Putting aside the opinion of defendants' biomechanical expert, as we must, there is no conflict between the remaining physicians that the accident caused the shoulder injury. "Inasmuch as plaintiff established a serious injury as a matter of law, []he 'is entitled to recover damages for all injuries causally related to the accident, even those that do not meet the serious injury threshold' " (*Maurer v Colton* [appeal No. 3], 180 AD3d 1371, 1374 [4th Dept 2020]).

In light of the foregoing, defendants' remaining contentions are academic (*see Swed v Pena*, 65 AD3d 1033, 1034 [2d Dept 2009]).

Mark W. Bennett

Entered: August 26, 2021

Clerk of the Court

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

547

CAF 19-01537

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

IN THE MATTER OF KATALINA M., JAMIR M., AND JAKIR M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LAKIRA C., RESPONDENT-APPELLANT, AND JULIUS M., RESPONDENT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DOUGLAS P. STILLER, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 31, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the youngest subject child and derivatively neglected the two oldest subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order, issued following a fact-finding hearing, that determined, inter alia, that she neglected the youngest of the subject children and derivatively neglected the other two subject children.

We reject the mother's contention that petitioner failed to prove by a preponderance of the evidence that she neglected the youngest child. We accord great weight and deference to Family Court's determinations, including its drawing of inferences and assessment of credibility, and will not disturb those determinations where they are supported by the record (*see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]). Here, the record supports the court's finding that the child was in imminent danger of impairment as a result of the mother's failure to provide for her medical needs although offered the assistance to do so (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Mia G. [William B.]*, 146 AD3d 882, 883 [2d Dept 2017]; *Matter of Richard S. [Lacey P.]*, 130 AD3d 630, 633 [2d Dept 2015], *lv denied* 26 NY3d 906 [2015]). The evidence established, inter alia, that the mother failed to take

certain steps necessary to address the youngest child's serious health challenges and that, when offered daycare assistance for her two older children, which would have enabled the mother to be present and available to address the medical needs of her youngest child, the mother refused that assistance to the detriment of the youngest child's care and treatment.

Contrary to the mother's contention that the court erred in determining that she derivatively neglected the two older children, we conclude that the record supports the court's determination that "the evidence of . . . neglect of [the youngest] child indicates a fundamental defect in [the mother's] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [her] care" (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 774 [2d Dept 2017] [internal quotation marks omitted]; *see Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1513-1514 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Dayshaun W. [Jasmine G.]*, 133 AD3d 1347, 1348 [4th Dept 2015]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

553

CA 20-01621

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

MAXWELL B. COHEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEANNE D. BROTEN, DEFENDANT-APPELLANT.

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

GROSS SHUMAN, P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered September 24, 2020. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he was struck by a vehicle operated by defendant. In the complaint, as amplified by the bill of particulars, plaintiff alleged that, as a result of the accident, he suffered a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of section 5102 (d) that was causally related to the accident. Plaintiff cross-moved for, inter alia, summary judgment on the issue of negligence. Supreme Court denied the motion and granted the cross motion. We agree with defendant that the court erred in denying her motion for summary judgment dismissing the complaint. We therefore reverse the order insofar as appealed from, grant defendant's motion, and dismiss the complaint.

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]). With respect to plaintiff's

alleged injury to his lumbar spine under the significant limitation of use and permanent consequential limitation of use categories, we agree with defendant that she met her initial burden on her motion by submitting the affirmed report of a physician, who opined that plaintiff suffered from a preexisting, degenerative condition in his spine and did not suffer a traumatic injury as a result of the accident, and that plaintiff failed to raise a triable issue of fact with respect thereto (*see Green v Repine*, 186 AD3d 1059, 1060-1061 [4th Dept 2020]; *Malesa v Burg*, 105 AD3d 1410, 1410 [4th Dept 2013]). Regarding the 90/180-day category of serious injury, we conclude that defendant met her burden by submitting plaintiff's deposition testimony, which established that he was not prevented "from performing substantially all of the material acts which constituted his usual daily activities" for at least 90 out of the 180 days following the accident (*Licari v Elliott*, 57 NY2d 230, 238 [1982]), and that plaintiff failed to raise a triable issue of fact in opposition (*see Jones v Leffel*, 125 AD3d 1451, 1452 [4th Dept 2015]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

557

KA 17-01058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE L. BOSWELL, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 22, 2016. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking suppression of the weapon he was charged with possessing as well as statements he made to the police following his arrest. We affirm.

Defendant was the passenger in a vehicle that was lawfully stopped for a traffic infraction. When a police officer detected the odor of marihuana emanating from the vehicle, the officer removed defendant from the vehicle and attempted to conduct a pat frisk of his person. Defendant fled and, in the course of his flight, discarded a handgun.

According to defendant, the odor of marihuana, without more, did not justify the pat frisk. It is well established, however, that "the odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Jemison*, 158 AD3d 1310, 1310 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018] [internal quotation marks omitted]; *see People v Chestnut*, 36 NY2d 971, 973 [1975]). Although defendant asks us to "revisit" the rule that the odor of marihuana provides probable

cause to search a vehicle's occupants, contending that it is inconsistent with federal constitutional law, the rule was established by the Court of Appeals in *Chestnut*, and "it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals" (*Hernandez v City of Syracuse*, 164 AD3d 1609, 1609 [4th Dept 2018] [internal quotation marks omitted]).

Defendant further contends that the People failed to establish that the officer was qualified by training and experience to recognize the odor of marihuana. That specific contention is not preserved for our review inasmuch as defendant failed to raise it in his motion papers, at the suppression hearing, or in his posthearing submission (*see People v Burden*, 191 AD3d 1260, 1261 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Russ*, 183 AD3d 1238, 1239 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

558

KA 19-01416

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MOSES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER OF COUNSEL), 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 (Gordon J. Cuffy, A.J.), rendered May 3, 2019. The judgment convicted defendant upon a jury verdict of assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We affirm.

Initially, defendant contends that, during deliberations, Supreme Court failed to provide a meaningful response to a note from the jury with respect to the justification defense. Under the circumstances here, we conclude that the court did not abuse its discretion in the manner in which it responded to the jury note (*see People v Santi*, 3 NY3d 234, 248-249 [2004]; *People v Malloy*, 55 NY2d 296, 302-304 [1982], *cert denied* 459 US 847 [1982]; *People v Abdul-Jaleel*, 142 AD3d 1296, 1298 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]; *People v Mobley*, 118 AD3d 1339, 1340 [4th Dept 2014], *lv denied* 24 NY3d 1121 [2015]).

We also reject defendant’s contention that the People impaired the integrity of the grand jury proceedings by failing to charge the grand jury with the defense of justification, failing to present exculpatory evidence, and allowing the victim to provide false testimony. Concerning the failure to instruct the grand jury with respect to justification, we note that “[t]here is no requirement that the [g]rand [j]ury must be charged with every potential defense suggested in evidence,” and the People are required to charge “only

those defenses that the evidence will reasonably support" (*People v Angona*, 119 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015] [internal quotation marks omitted]). Here, we conclude the testimony before the grand jury did not support the theory that defendant was legally justified in stabbing the victim—i.e., there was insufficient evidence before the grand jury that the victim was committing or attempting to commit a burglary at the time of the stabbing (*see* Penal Law § 35.20 [3]; *People v Mitchell*, 82 NY2d 509, 514-515 [1993]; *People v Almeida*, 128 AD3d 1451, 1451 [4th Dept 2015], *lv denied* 26 NY3d 1006 [2015]).

We also reject the contention that the People failed to provide the grand jury with certain exculpatory evidence. "[T]he People maintain broad discretion in presenting their case to the grand jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused" (*Mitchell*, 82 NY2d at 515). Thus, the People were not obligated to provide the grand jury with the exculpatory portions of defendant's statements to the police, especially because they did not provide the grand jury with any inculpatory portions of those statements—indeed, they provided the grand jury with no portion of those statements (*see People v Morel*, 131 AD3d 855, 859-860 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]; *Almeida*, 128 AD3d at 1451; *People v Falcon*, 204 AD2d 181, 181-182 [1st Dept 1994], *lv denied* 84 NY2d 825 [1994]). We further reject the contention that the People presented false testimony by the victim to the grand jury. The testimony in question, which pertained to the injuries that the victim sustained during the stabbing, was corroborated by the 185-page certified medical record also submitted by the People to the grand jury.

Defendant's contention that the evidence is legally insufficient to support the conviction of assault in the first degree with respect to the elements of intent and serious physical injury is unpreserved because defendant did not specifically raise those issues in his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Snyder*, 100 AD3d 1367, 1367-1368 [4th Dept 2012], *lv denied* 21 NY3d 1010 [2013]). He did preserve, however, his sufficiency contention with respect to the defense of justification by raising it in his motion for a trial order of dismissal, which he renewed at the close of his own case (*see People v Hines*, 97 NY2d 56, 61-62 [2001], *rearg denied* 97 NY2d 678 [2001]). Nevertheless, that contention is without merit because, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the victim's testimony that he had not attacked defendant or entered his room provided a valid line of reasoning and permissible inferences from which a rational jury could conclude that defendant was not justified to use deadly force to prevent or terminate a burglary (*see* Penal Law § 35.15; *People v Lermineau*, 224 AD2d 985, 985 [4th Dept 1996], *lv denied* 88 NY2d 850 [1996]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

We further conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at

349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude the jury did not fail to give the evidence the weight it should be accorded (*see id.*). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]). "The jury was entitled to credit the testimony of the People's witnesses . . . over the testimony of defendant's witnesses, including that of defendant [himself]," and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]).

Defendant contends that the prosecutor's remarks during summation about the blood evidence were improper because they were not supported by expert testimony. We reject that contention because the prosecutor's remarks constituted "fair comment" on the evidence at trial, and any impropriety was not "so egregious as to deprive defendant of a fair trial" (*People v Santiago*, 101 AD3d 1715, 1716, 1717 [4th Dept 2012], *lv denied* 21 NY3d 946 [2013] [internal quotation marks omitted]). Moreover, an expert witness is not necessary to opine on the blood evidence, where, as here, it was within the ken of a typical juror to make a determination and reasonable inferences with respect to the source and location of the blood found at the crime scene (*see People v Mortillaro*, 143 AD2d 148, 149-150 [2d Dept 1988], *lv denied* 73 NY2d 788 [1988]; *see generally Santi*, 3 NY3d at 246-247).

Additionally, we conclude that the court properly precluded defense counsel from eliciting defendant's alleged exculpatory statements during the testimony of a police officer because the statements were "self-serving" and "constituted inadmissible hearsay" (*People v Hill*, 281 AD2d 917, 918 [4th Dept 2001], *lv denied* 96 NY2d 902 [2001]; *see People v Weston*, 249 AD2d 496, 496 [2d Dept 1998], *lv denied* 92 NY2d 931 [1998]).

Defendant failed to preserve for our review his contention that the court, "in determining the sentence to be imposed, penalized [him] for exercising [his] right to a . . . trial" (*People v Garner*, 136 AD3d 1374, 1374 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016]; *see People v Coapman*, 90 AD3d 1681, 1683-1684 [4th Dept 2011], *lv denied* 18 NY3d 956 [2012]). In any event, that contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [his] right to trial," and there is no indication in the record before us that the court acted in a vindictive manner based on defendant's exercise of the right to a trial (*Garner*, 136 AD3d at 1374 [internal quotation marks omitted]).

Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

561

KA 19-00777

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYDISCI MARTIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 22, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that County Court erred in admitting in evidence a swab containing DNA. The testimony at trial established that the change in the swab's packaging was not " 'a material and prejudicial change in the condition or nature of the [swab]' " (*People v Jordan*, 154 AD3d 1176, 1178 [3d Dept 2017], quoting *People v Julian*, 41 NY2d 340, 344 [1977]), and any deficiencies in the chain of custody went to the weight, not the admissibility, of the evidence (*see People v Cleveland*, 273 AD2d 787, 788 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]).

We likewise reject defendant's contention that the court erred in refusing to suppress evidence seized pursuant to a warrantless search of his vehicle. Contrary to defendant's contention, the record establishes that he voluntarily provided the police with written consent to search his vehicle (*see People v Fioretti*, 155 AD3d 1662, 1663 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence, notwithstanding the fact that the People's case was based largely on circumstantial proof (*see People v Hernandez*, 79 AD3d 1683, 1683 [4th Dept 2010], *lv denied* 16 NY3d 895 [2011]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342,

349 [2007]), we reject defendant's additional contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his contention that the court erred in failing to excuse for cause a prospective juror (*see People v Stepney*, 93 AD3d 1297, 1297-1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that the court improperly imposed an enhanced sentence lacks merit because the court did not impose an enhanced sentence (*cf. People v Burns*, 279 AD2d 586, 587 [2d Dept 2001]; *People v Campbell*, 271 AD2d 63, 69-71 [4th Dept 2000], *lv denied* 95 NY2d 967 [2000]). Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

563

KA 19-01437

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN M. TILLMON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 11, 2019. The judgment convicted defendant upon a jury verdict of assault in the second degree (two counts), assault in the third degree, unlawful imprisonment in the second degree, criminal obstruction of breathing or blood circulation, resisting arrest and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts three through eight of the indictment, and counts one and two of the indictment are dismissed, without prejudice to the People to re-present any appropriate charges with respect to such dismissed counts to another grand jury.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him after a jury trial of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [3]), and one count each of unlawful imprisonment in the second degree (§ 135.05) and criminal obstruction of breathing or blood circulation (§ 121.11). In appeal No. 2, he appeals from a judgment convicting him after a jury trial of, inter alia, criminal contempt in the first degree (§ 215.51 [b] [iv]). In appeal No. 1, contrary to defendant's contention, we conclude that the conviction of assault in the second degree as charged in count four of the indictment is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *see also People v Chiddick*, 8 NY3d 445, 447-448 [2007]; *People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]).

We further conclude that, contrary to defendant's contention in both appeals, County Court did not abuse its discretion in granting the People's motion to consolidate the indictments (*see People v*

Cooney [appeal No. 2], 137 AD3d 1665, 1666 [4th Dept 2016], *appeal dismissed* 28 NY3d 957 [2016]; *People v Bankston*, 63 AD3d 1616, 1616 [4th Dept 2009], *lv denied* 14 NY3d 885 [2010]; *see generally People v Lane*, 56 NY2d 1, 8 [1982]). The court properly determined that the indictments were joinable under CPL 200.20 (2) (b) on the basis of overlapping evidence because the charges in the first indictment arose from an incident in which defendant violently assaulted his ex-girlfriend and the police officers who tried to arrest him, and the charges in the second indictment arose from incidents in which defendant violated orders of protection issued after the assault and tried to dissuade witnesses from testifying (*see People v Smith* [appeal No. 1], 186 AD3d 1106, 1107 [4th Dept 2020]; *People v Perez*, 47 AD3d 409, 410-411 [1st Dept 2008], *lv denied* 10 NY3d 843 [2008]).

We agree with defendant, however, that the court erred in denying his challenge for cause to a prospective juror during voir dire, inasmuch as the court failed to obtain an unequivocal assurance of impartiality from the prospective juror in question. "It is well established that '[p]rospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused' " (*People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]; *see People v Strassner*, 126 AD3d 1395, 1395 [4th Dept 2015]). While no "particular expurgatory oath or 'talismanic' words [are required,] . . . [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362 [2001]).

Here, the prospective juror in question himself expressed "doubt [as to his] own ability to be impartial in the case at hand" (*People v Johnson*, 94 NY2d 600, 614 [2000]) when he stated during voir dire that he was "not sure" whether he could be fair and impartial due to his family members' experience with domestic violence (*see e.g. People v Rodriguez*, 172 AD3d 509, 509 [1st Dept 2019]; *People v Hickman*, 154 AD3d 493, 493 [1st Dept 2017]; *People v Malloy*, 137 AD3d 1304, 1305 [2d Dept 2016], *lv dismissed* 27 NY3d 1135 [2016]). The court erred when it did not obtain thereafter any "unequivocal assurance" from the prospective juror that he could render an impartial verdict (*People v Casillas*, 134 AD3d 1394, 1396 [4th Dept 2015] [internal quotation marks omitted]). "Inasmuch as defendant had exhausted all of his peremptory challenges before the completion of jury selection, the denial of defendant's challenge[] for cause" constitutes reversible error in each appeal (*Strassner*, 126 AD3d at 1396; *see* CPL 270.20 [2]; *Casillas*, 134 AD3d at 1396). In appeal No. 1, we therefore reverse the judgment and grant a new trial on counts three through eight of the indictment. Inasmuch as defendant was convicted of unlawful imprisonment as a lesser included offense under count one of the indictment in appeal No. 1 and convicted of criminal obstruction of breathing or blood circulation as a lesser included offense under count two of the indictment in that appeal, we dismiss those counts with leave to re-present any appropriate charges with respect thereto to another grand jury. In appeal No. 2, we therefore reverse the

judgment and grant a new trial.

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

564

KA 19-01438

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN M. TILLMON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 11, 2019. The judgment convicted defendant upon a jury verdict of criminal contempt in the first degree, criminal contempt in the second degree (nine counts) and tampering with a witness in the fourth degree (two counts).

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

Same memorandum as in *People v Tillmon* ([appeal No. 1] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

565

CA 20-01072

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

IN THE MATTER OF APPLICATION OF RYAN S.,
PETITIONER-APPELLANT,
FOR THE APPOINTMENT OF A GUARDIAN OF THE
PERSON AND PROPERTY OF DEANNA S., AN ALLEGED INCAPACITATED PERSON.

MEMORANDUM AND ORDER

SCOTT S., RESPONDENT-RESPONDENT.

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

HURWITZ & FINE, P.C., BUFFALO (AMBER E. STORR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 11, 2020. The order and judgment, among other things, granted the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, the appointment of a guardian of the person and property of his mother, an alleged incapacitated person (AIP). At the time, respondent, the AIP's other son, had already filed a petition in the Peacemakers' Court of the Seneca Nation of Indians (Peacemakers' Court) and obtained an order from that court granting him conservatorship over the AIP. Respondent moved to dismiss the petition in this proceeding pursuant to CPLR 3211 on the ground that the Peacemakers' Court had already decided the conservatorship of the AIP. Supreme Court, inter alia, granted respondent's motion, and petitioner appeals. We affirm.

Whereas Supreme Court had concurrent jurisdiction with the Peacemakers' Court over the subject matter of this proceeding (*see* Indian Law § 5), we conclude that, because the Peacemakers' Court had already acted on the same issue, Supreme Court did not abuse its discretion in declining to exercise its jurisdiction here (*cf. Seneca v Seneca*, 293 AD2d 56, 59 [4th Dept 2002]; *see generally Matter of Kawisiiostha N. v Arthur O.*, 170 AD3d 1445, 1446 [3d Dept 2019]). Although petitioner contends that he was not served with the petition that was filed in the Peacemakers' Court matter, the record reflects that he has been joined as an interested party in that matter, and

thus that forum is the appropriate forum for him to challenge the validity of that court's order.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

567

CA 20-01083

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

JOSEPH IANNAZZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH IANNAZZO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SHELBY, BAKSHI & WHITE, WILLIAMSVILLE (JUSTIN S. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mary L. Slisz, J.), entered June 18, 2020 in a divorce action. The order denied the motion of defendant seeking, among other things, attorney's fees.

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

Same memorandum as in *Iannazzo v Iannazzo* ([appeal No. 2] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

568

CA 20-01095

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

JOSEPH IANNAZZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH IANNAZZO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SHELBY, BAKSHI & WHITE, WILLIAMSVILLE (JUSTIN S. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Mary L. Slisz, J.), entered August 5, 2020 in a divorce action. The judgment, inter alia, granted plaintiff a divorce.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the fourth decretal paragraph, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: The parties were married in October 2006 and physically separated in 2014. In October 2014, defendant obtained an order from Family Court requiring plaintiff to pay weekly spousal support, which remained in effect throughout the instant divorce proceedings. Plaintiff commenced a divorce action later that month, although that action was dismissed in 2016 due to his failure to serve defendant with the complaint in that action and his lack of capacity to do so following a workplace injury sustained by plaintiff in 2015. Following the dismissal of the first divorce action, Supreme Court (Ward, J.) appointed a guardian for plaintiff pursuant to article 81 of the Mental Hygiene Law. Plaintiff then commenced the instant divorce action in 2019. Following a trial, Supreme Court (Slisz, J.) entered an order denying defendant's motion seeking, among other things, attorney's fees, and subsequently entered a judgment of divorce that, inter alia, granted plaintiff a divorce on the ground of irretrievable breakdown of the marriage.

In appeal No. 1, defendant appeals from the order that denied her motion. In appeal No. 2, defendant appeals from the judgment of divorce. As an initial matter, the right to appeal from the order in appeal No. 1 terminated upon entry of the final judgment of divorce and the appeal therefrom should be dismissed (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan*

Bank, N.A. v Roberts & Roberts, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]), although any appealable issues raised with respect to that order may be considered on the appeal from the judgment (*see Bohner v Bohner*, 186 AD3d 1481, 1481 [2d Dept 2020]).

Contrary to defendant's contention, the court did not err in denying her request for attorney's fees. "The award of reasonable counsel fees is a matter within the sound discretion of the trial court" (*Decker v Decker*, 91 AD3d 1291, 1291 [4th Dept 2012] [internal quotation marks omitted]). "[S]uch awards are intended to redress the economic disparity between the monied spouse and the non-monied spouse" (*Terranova v Terranova*, 138 AD3d 1489, 1489 [4th Dept 2016] [internal quotation marks omitted]). "In exercising its discretion to award such fees, a court may consider all of the circumstances of a given case, including the financial circumstances of both parties, the relative merit of the parties' positions . . . , the existence of any dilatory or obstructionist conduct . . . , and the time, effort and skill required of counsel" (*id.* at 1490 [internal quotation marks omitted]; *see Prochilo v Prochilo*, 165 AD3d 1304, 1304 [2d Dept 2018]). Pursuant to Domestic Relations Law § 237 (a), there exists "a rebuttable presumption that counsel fees shall be awarded to the less monied spouse." Here, the court's determination to deny defendant's request for attorney's fees was largely based on its assessment of defendant's credibility at trial regarding the state of her own finances, her failure to fully account for large sums of money that she had received, and her failure to fully account for assets belonging to plaintiff that she purportedly used for his benefit during the period they were separated. Giving due deference to the court's credibility determinations (*see generally Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015]), we conclude that the court did not abuse its discretion in denying defendant's request for attorney's fees.

Contrary to defendant's further contention, the court properly excluded the proceeds from plaintiff's pending personal injury action from the equitable distribution of the parties' property (*see D'Ambra v D'Ambra* [appeal No. 2], 94 AD3d 1532, 1535 [4th Dept 2012]; *see* Domestic Relations Law § 236 [B] [1] [d] [2]). Again giving due deference to the court's credibility determinations, we reject defendant's contention that the court erred in its allocation of the parties' debts and its refusal to reimburse defendant for funds she claimed to have expended for plaintiff's benefit (*see generally McPheeters v McPheeters*, 284 AD2d 968, 969 [4th Dept 2001]).

We agree with defendant, however, that the court erred in its calculation of post-divorce maintenance under the guidelines prescribed by Domestic Relations Law § 236 (B) (6). Specifically, when determining the amount of plaintiff's income for the purposes of fashioning a post-divorce maintenance award, the court excluded plaintiff's military pension. Although the court properly determined that the military pension was separate property and not subject to equitable distribution, that pension nevertheless should have been included as income for the purposes of determining post-divorce maintenance (*see Carl v Carl*, 58 AD3d 1036, 1037 [3d Dept 2009]). By

failing to include plaintiff's pension in its calculation of income for purposes of post-divorce maintenance, the court's initial calculation of the amount of maintenance under the guidelines (*see* § 236 [B] [6] [c]) was incorrect. We therefore modify the judgment by vacating the fourth decretal paragraph, and we remit the matter to Supreme Court for a recalculation of the amount of post-divorce maintenance under the guidelines (*see* § 236 [B] [6] [c]), after which the court may determine whether to adjust that amount pursuant to Domestic Relations Law § 236 (B) (6) (e), and determine the appropriate duration of maintenance based on the parties' marriage of 12 years and 4 months (*see* § 236 [B] [6] [f]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

573

KA 16-00641

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. WILSON, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 5, 2016. The appeal was held by this Court by order entered October 2, 2020, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (187 AD3d 1586 [4th Dept 2020]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court to determine whether defense counsel consented to the annotated verdict sheet (*People v Wilson*, 187 AD3d 1586, 1586 [4th Dept 2020]). Upon remittal, the court determined following a reconstruction hearing that defense counsel impliedly consented to the annotated verdict sheet, which included the language "lack of consent/totality of circumstances" with respect to count four charging defendant with rape in the third degree (Penal Law § 130.25 [3]). "Although generally 'the lack of an objection to the annotated verdict sheet by defense counsel cannot be transmuted into consent' (*People v Damiano*, 87 NY2d 477, 484 [1996]), it is well settled that consent to the submission of an annotated verdict sheet may be implied where defense counsel 'fail[s] to object to the verdict sheet after having an opportunity to review it' " (*People v Johnson*, 96 AD3d 1586, 1587 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]; *see People v Howard*, 167 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]). Here, the prosecutor testified at the reconstruction hearing that one or both of defendant's attorneys had been provided with a copy of the annotated verdict sheet at the close of proof and that defense counsel did not object to it. The mere fact that neither of defendant's attorneys recalled having received the annotated verdict sheet "does not directly contradict the [prosecutor's] testimony, which the court apparently credited" (*Johnson*, 96 AD3d at 1587).

Because defense counsel had an " 'opportunity to review' " the annotated verdict sheet before it was submitted to the jury and made no objection to it, we conclude that "the court properly determined that defendant impliedly consented to its submission to the jury" (*id.* at 1587-1588; *see Howard*, 167 AD3d at 1500-1501).

Defendant further contends that he was denied effective assistance of counsel. We reject that contention. Viewing the evidence, the law, and the circumstances of this case in their totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant next contends that he was denied a fair trial due to various instances of alleged prosecutorial misconduct. Defendant failed to object to most of those alleged instances, and thus he failed to preserve his contention for our review with respect to those instances. In any event, with respect to the alleged instances of misconduct, both preserved and unpreserved, we conclude that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]).

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

576

KA 16-02223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARVIS MOJENA, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON 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 April 18, 2016. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). As defendant correctly contends and the People do not dispute, the record does not establish that defendant validly waived his right to appeal. Supreme Court's oral waiver colloquy and the written waiver signed by defendant together " 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We thus conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559).

Even assuming, arguendo, that defendant preserved his contention that the People violated their obligation under *Brady v Maryland* (373 US 83 [1963]) when they failed to disclose certain grand jury testimony to him (*cf. People v Jones*, 90 AD3d 1516, 1517 [4th Dept

2011], *lv denied* 19 NY3d 864 [2012]; *People v Johnson*, 88 AD3d 1293, 1294 [4th Dept 2011]), we conclude that the grand jury testimony lacked exculpatory value and therefore that disclosure was not warranted (*see People v Garguilio*, 57 AD3d 797, 799 [2d Dept 2008]; *see also People v Wright*, 43 AD3d 1359, 1360 [4th Dept 2007], *lv denied* 9 NY3d 1011 [2007]; *People v Smith*, 273 AD2d 896, 897 [4th Dept 2000], *lv denied* 95 NY2d 938 [2000]). In any event, we also conclude that "defendant failed to make a prima facie showing of a reasonable possibility that the nondisclosure of the [grand jury testimony] contributed to his conviction" (*People v Boykins*, 160 AD3d 1348, 1349 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018] [internal quotation marks omitted]; *see People v Switts*, 148 AD3d 1610, 1611-1612 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

577

KA 18-01630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN S. HAFFA, DEFENDANT-APPELLANT.

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

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (EMILY A. WOODARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered April 30, 2018. The judgment convicted defendant upon a jury verdict of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05). Defendant contends that, because he was purportedly forced to move for a mistrial after his first trial due to prosecutorial misconduct, his second trial was barred by the double jeopardy clauses of either the Federal (US Const 5th Amend) or State Constitution (NY Const, art I, § 6). We reject that contention. "Where the defendant either requests a mistrial or consents to its declaration, the double jeopardy clauses do not ordinarily bar a second trial" (*People v Reardon*, 126 AD2d 974, 974 [4th Dept 1987]). However, "an exception exists where 'the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial' " (*People v Wirth*, 224 AD2d 1002, 1003 [4th Dept 1996], quoting *Oregon v Kennedy*, 456 US 667, 679 [1982]). Here, as noted, defendant moved for a mistrial, and the record does not support "defendant's claim that the mistrial motion was necessitated by a deliberate intent on the part of the prosecution to provoke a mistrial" (*Reardon*, 126 AD2d at 974).

Contrary to the further contention of defendant, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that he intended "to permanently deprive the victim of property by compelling the victim to give up property or quashing any resistance to that act" (*People v Miller*, 87 NY2d 211, 217 [1995]; *see*

generally People v Bleakley, 69 NY2d 490, 495 [1987]). The testimony adduced at trial established that, after defendant suggested to his girlfriend that they rob and kill the victim, a police officer, defendant pushed the victim to the ground, restrained her, and took her service weapon (*see generally People v Dawson*, 188 AD2d 1051, 1051 [4th Dept 1992], *lv denied* 81 NY2d 838 [1993]). Furthermore, defendant was apprehended three hours after the incident, and he was still in possession of the gun (*see generally Miller*, 87 NY2d at 217). We also reject defendant's contention that his intoxication negated the requisite element of intent (*see People v Felice*, 45 AD3d 1442, 1443 [4th Dept 2007], *lv denied* 10 NY3d 764 [2008]; *see also People v Reibel*, 181 AD3d 1268, 1270 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

578

KA 18-02187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PRINCE ROYAL-CLANTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER 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 September 4, 2018. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree and attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, and the amended indictment is dismissed without prejudice to the People to re-present any appropriate charges under counts one and two of the amended indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and attempted rape in the first degree (§§ 110.00, 130.35 [1]). Defendant contends that he was deprived of his right to testify before the grand jury and that the court (Brunetti, A.J.) thus erred in denying his motion to dismiss the amended indictment pursuant to CPL 190.50 (5) (c). We agree. "CPL 190.50 (5) (a) provides that a defendant's request to testify is timely as long as it is made prior to the filing of the indictment" (*People v White*, 147 AD3d 1492, 1493 [4th Dept 2017]). Here, defendant's June 8, 2017 notice, which " 'satisfied the statutory requirements for notifying the People of a request to appear before the grand jury' " (*id.*), was received by the District Attorney on the same day, prior to the filing of the amended indictment on June 9, 2017. Contrary to the contention of the People and the rationale of the court, it is of no moment under the statute that defendant had previously declined the opportunity to testify (*see People v Kellman*, 156 Misc 2d 179, 180-183 [Sup Ct, Kings County 1992]). "Where, as here, defendant's request to testify is received after the grand jury has voted, but before the filing of the indictment, defendant is entitled to a reopening of the proceeding to enable the grand jury to

hear defendant's testimony and to revote the case, if the grand jury be so advised" (*White*, 147 AD3d at 1493).

Defendant's contention that the suppression court failed to adequately set forth its findings of fact and conclusions of law at the end of the suppression hearing is unpreserved for appellate review (*see People v Junior*, 119 AD3d 1228, 1231 [3d Dept 2014], *lv denied* 24 NY3d 1044 [2014]; *People v Perez*, 89 AD3d 1393, 1395 [4th Dept 2011], *lv denied* 18 NY3d 961 [2012]; *People v Hunt*, 187 AD2d 981, 982 [4th Dept 1992], *lv denied* 81 NY2d 887 [1993]), and defendant's further contention regarding the voluntariness of his statements was, under the circumstances of this case, waived (*see generally* CPL 710.70 [3]; *People v Bostic*, 144 AD2d 477, 477-478 [2d Dept 1988], *lv denied* 73 NY2d 889 [1989]).

In light of our determination, we need not consider defendant's remaining contentions.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

581

KA 19-00545

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MILTON BURKE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DONALD R. GERACE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MILTON BURKE, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered February 28, 2019. The judgment convicted defendant upon a jury verdict of attempted assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Addressing first defendant's contentions in his main brief, we reject his contention that County Court erred in granting the People's motion to amend the bill of particulars to list one of the precise locations where defendant allegedly possessed a firearm. Because "the amendment was made by the People prior to jury selection[,] [it] was . . . statutorily permissible" (*People v Wright*, 13 AD3d 803, 804 [3d Dept 2004], *lv denied* 4 NY3d 857 [2005]; *see* CPL 1.20 [11]; 200.95 [8]). Additionally, inasmuch as the amendment merely narrowed the description of the location where the crime occurred, it did not expand or alter the People's theory of the case, cause defendant undue prejudice, or demonstrate that the People acted in bad faith by seeking the amendment (*see Wright*, 13 AD3d at 804; *People v Lewis*, 277 AD2d 1010, 1011 [4th Dept 2000], *lv denied* 96 NY2d 736 [2001]).

Defendant's contention that the court's ruling precluding him from eliciting certain testimony from one of his own witnesses violated his constitutional right to confrontation is unpreserved for

our review because defendant did not object on that basis at trial (*see People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941 [2007]; *People v Garcia*, 2 AD3d 321, 322 [1st Dept 2003], *lv denied* 2 NY3d 740 [2004]), 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]). To the extent that defendant contends that the court erred in precluding him from eliciting that testimony on the basis of hearsay, we conclude that the record is inadequate to permit appellate review of that contention (*see generally People v Dye*, 78 AD3d 1607, 1608 [4th Dept 2010], *lv denied* 16 NY3d 743 [2011]; *People v Belair*, 226 AD2d 1105, 1106 [4th Dept 1996]).

We reject defendant's contention that he was deprived of a fair trial because the prosecutor improperly acted as an unsworn witness on summation when he described the characteristics of and sound made by a .45 caliber firearm inasmuch as that isolated comment was not so egregious as to deny defendant a fair trial, especially given the instruction to the jury that an attorney's summation is not evidence (*see generally People v Ashwal*, 39 NY2d 105, 109-111 [1976]; *People v Warmley*, 179 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]).

By objecting to the People's request, defendant preserved his contention challenging the court's decision to give the jury a missing witness instruction with respect to an alibi witness mentioned by defendant during his trial testimony (*see* CPL 470.05 [2]; *People v Medina*, 18 NY3d 98, 104 [2011]). We nevertheless reject defendant's contention because "the People established that the [alibi witness] would have provided testimony on a material issue in the case and would have testified favorably for defendant" (*People v Carey*, 162 AD3d 1476, 1477 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]; *see People v Soto*, 297 AD2d 567, 567 [1st Dept 2002], *lv denied* 99 NY2d 564 [2002]).

To the extent that defendant argues that the court erred in denying his motion for a trial order of dismissal, we conclude that, viewing "the evidence in the light most favorable to the People," there is a valid line of reasoning that could lead a rational person to the conclusion reached by the jury (*People v Bay*, 67 NY2d 787, 788 [1986]; *see also People v Mansilla*, 143 AD3d 1263, 1263 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Although defendant contends that he was deprived of his constitutional right to a speedy trial, we note that "defendant moved to dismiss the indictment on statutory speedy trial grounds only and thus failed to preserve for our review his present contention that he was denied his constitutional right to a speedy trial" (*People v*

Walter, 138 AD3d 1479, 1479-1480 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016] [internal quotation marks omitted]; *see People v Schillawski*, 124 AD3d 1372, 1373 [4th Dept 2015], *lv denied* 25 NY3d 1207 [2015]; *People v Weeks*, 272 AD2d 983, 983 [4th Dept 2000], *lv denied* 95 NY2d 872 [2000]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We also reject defendant's contention that defense counsel was ineffective in failing to make that argument in the motion to dismiss because it had little or no chance of success (*see People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Sweet*, 98 AD3d 1252, 1253 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

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

We also reject defendant's contention in his main and pro se supplemental briefs that he was otherwise denied effective assistance of counsel. Defendant's contention with respect to defense counsel's failure to secure the testimony of an alibi witness involves matters outside the record and must be raised in a CPL 440.10 motion (*see e.g. People v Barksdale*, 191 AD3d 1370, 1371 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; *People v Scott*, 181 AD3d 1220, 1220 [4th Dept 2020]). Contrary to defendant's contention, we conclude that defense counsel was not ineffective in failing to provide defendant with notice of his right to testify before the grand jury or to have him testify before the grand jury. The record belies defendant's contention that he did not receive notice of the grand jury proceedings. Additionally, with respect to defendant's argument that defense counsel was ineffective for not facilitating defendant's testimony before the grand jury, defendant did not establish that he was prejudiced by that purported failure or that the outcome would have been different if he had testified (*see People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *People v Robinson*, 151 AD3d 1701, 1701 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Indeed, we note that defendant did testify at trial and was nonetheless found guilty (*see People v Hogan*, 26 NY3d 779, 787 [2016]).

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

583

CA 20-01006

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

IN THE MATTER OF MATTHEW FISCHIONE, TOWN OF LANCASTER CODE ENFORCEMENT OFFICER AND TOWN OF LANCASTER, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

PM PEPPERMINT, INC., PAUL MARINACCIO, RESPONDENTS-RESPONDENTS, ET AL., RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR PETITIONERS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JAMES R. O'CONNOR OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 10, 2020. The order, among other things, dismissed the petition seeking, inter alia, an order and judgment holding respondents in civil and criminal contempt.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying respondents-respondents' motion for costs, attorneys' fees, and sanctions in its entirety and vacating the fourth and fifth ordering paragraphs, and as modified the order is affirmed without costs.

Memorandum: Petitioners commenced this special proceeding seeking, inter alia, an order and judgment holding respondents in civil and criminal contempt for allegedly violating a 2016 consent order and judgment. The consent order and judgment had resolved a prior proceeding between respondent PM Peppermint, Inc. (Peppermint), and petitioner Matthew Fischione in his capacity as the Town of Lancaster Code Enforcement Officer. Pursuant to the consent order and judgment, "[n]o mulching, composting, or solid waste disposal" was permitted to occur at Peppermint's property.

Contrary to petitioners' contention, Supreme Court properly granted the motion of respondents-respondents (respondents) for a trial order of dismissal at the close of petitioners' proof at the hearing because the consent order and judgment "did not provide a clear and unequivocal mandate prohibiting the specific conduct" engaged in by respondents (*Dan's Hauling & Demo, Inc. v GMMM Hickling, LLC*, 193 AD3d 1404, 1409 [4th Dept 2021]; *see also Matter of Schmitt v*

Piampiano, 117 AD3d 1478, 1479 [4th Dept 2014]; *Halfond v White Lake Shores Assn., Inc.*, 114 AD3d 1315, 1316-1317 [4th Dept 2014]). A clear and unequivocal mandate is necessary for a finding of civil contempt under Judiciary Law § 753 (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *Riccelli Enters., Inc. v State of N.Y. Workers' Compensation Bd.*, 142 AD3d 1352, 1353 [4th Dept 2016]), and criminal contempt under Judiciary Law § 750 (*see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]; *Schmitt*, 117 AD3d at 1479). In this case, the consent order and judgment was ambiguous with respect to whether the challenged property maintenance performed by respondents over two days constituted the prohibited act of mulching, and "ambiguity should be resolved in favor of the alleged contemnor" (*Town of Virgil v Ford*, 184 AD2d 901, 903 [3d Dept 1992]; *see Salinger v Salinger*, 125 AD3d 747, 749 [2d Dept 2015]). Also, the hearing record is devoid of evidence that respondents acted with the requisite willfulness to support a finding of criminal contempt (*see generally Schmitt*, 117 AD3d at 1479).

Although we reject petitioners' contention that the court abused its discretion in denying their cross motion for costs, sanctions, and attorneys' fees against respondents, we agree with petitioners that the court erred in granting in part respondents' motion seeking the same relief by awarding costs in favor of respondent Paul Marinaccio pursuant to 22 NYCRR 130-1.1. We therefore modify the order accordingly. We conclude that the court abused its discretion in awarding those costs because petitioners' contempt petition was "not so clearly meritless as to be deemed frivolous, and the court failed to satisfy the procedural requirements of 22 NYCRR 130-1.2" (*Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 182 AD3d 506, 509 [1st Dept 2020]). Although petitioners were ultimately unsuccessful, they had a good faith belief that respondents had performed mulching in violation of the consent order and judgment (*see Tavella v Tavella*, 25 AD3d 523, 525 [1st Dept 2006]; *see also Matter of Petote*, 81 AD3d 1370, 1372 [4th Dept 2011]), and their inclusion of Marinaccio in the proceeding was appropriate inasmuch as he was the sole owner and principal of Peppermint and, thus, could be punished for Peppermint's disobedience of the consent order and judgment (*see 1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co., LLC*, 57 AD3d 340, 341 [1st Dept 2008]; *see also Tishman Constr. Corp. v United Hispanic Constr. Workers, Inc.*, 158 AD3d 436, 437 [1st Dept 2018]).

Finally, we decline respondents' request to award costs or impose sanctions against petitioners for petitioners' prosecution of this appeal. Insofar as respondents contend that the court erred by failing to impose sanctions against petitioners below, that request for affirmative relief is "not properly before us because [respondents] did not file a notice of appeal" (*Matter of Hennessy v Board of Elections of County of Oneida*, 175 AD3d 1777, 1778 [4th Dept

2019]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

584

CA 20-00673

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

JONI C., AS PARENT AND NATURAL GUARDIAN
OF M.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHEEKTOWAGA-SLOAN UNION FREE SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., BUFFALO (ARTHUR J. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BENDER LAW FIRM, PLLC, BUFFALO (PAUL A. BENDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 4, 2020. The order and judgment awarded plaintiff the sum of $130,502.16 together with costs and interest against defendant.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, defendant's motion for a directed verdict is granted and the complaint is dismissed.

Memorandum: On appeal from an order and judgment entered after a jury trial, defendant contends that Supreme Court erred in, among other things, denying its motion for a directed verdict. We agree.

Plaintiff initiated this personal injury action on behalf of her daughter, whom plaintiff alleged had been exposed to a loud noise during the administration of a test in the daughter's school auditorium. Plaintiff's proof at trial established that, at one point during the testing period, a school faculty member spoke into a microphone and instructed students to "be quiet," the loudness of which, according to plaintiff, caused her daughter's injury. The proof at trial also established, however, that plaintiff's daughter was 75 to 100 feet away from the speakers at the time, that many other students were closer to the speakers than she was, and that no one else in a room of over 100 persons suffered injury. Defendant moved for a directed verdict at the close of plaintiff's proof and at the conclusion of trial and, after the jury found in favor of plaintiff, defendant moved to set aside the verdict. The court denied each of defendant's motions.

We agree with defendant that the court erred in denying its

motion for a directed verdict. In order to prevail on a negligence claim, " 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom' " (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]). On appeal, defendant disputes the element of breach only. To that end, the standard to which defendant and its employees are held is "that degree of care which a reasonable [parent] of ordinary prudence would exercise under the circumstances, commensurate with the apparent risk involved" (*Mikula v Duliba*, 94 AD2d 503, 506 [4th Dept 1983]; *see Abrams v Bute*, 138 AD3d 179, 183-184 [2d Dept 2016], *lv denied* 28 NY3d 910 [2016]; *Norton v Canandaigua City School Dist.*, 208 AD2d 282, 285 [4th Dept 1995], *lv denied* 85 NY2d 812 [1995], *rearg denied* 86 NY2d 839 [1995]). Further, "[w]hen a duty exists, nonliability in a particular case may be justified on the basis that an injury is not foreseeable" (*Pulka v Edelman*, 40 NY2d 781, 786 [1976], *rearg denied* 41 NY2d 901 [1977]; *see Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928], *rearg denied* 249 NY 511 [1928]).

Here, although the proof at trial reflected that a school faculty member had "yelled" two words into a microphone and "was really loud" in doing so, there was no proof presented that those words were spoken in a manner or at a volume that was unreasonable, foreseeably unsafe, or in violation of any applicable standard of care. In other words, "[w]ithout knowing what is 'too loud'," "there [was] no standard of care by which a jury could determine on the evidence presented that defendant[] had breached a duty owed to plaintiff" (*Powell v Metropolitan Entertainment Co.*, 195 Misc 2d 847, 850 [Sup Ct, NY County 2003]). Because there was no "rational process by which the [jury] could base a finding in favor of [plaintiff]" on the element of breach, we conclude that the court erred in denying defendant's motion for a directed verdict (*Hubbard v New York State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr.*, 192 AD3d 1586, 1588 [4th Dept 2021]; *see* CPLR 4401).

In light of that conclusion, we do not address defendant's remaining contentions.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

587

CA 20-00625

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

CHS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAND O'LAKES PURINA FEED, LLC, AND COMMODITY RESOURCE CORP., DEFENDANTS-APPELLANTS.

HAWORTH BARGER GERSTMAN, LLC, NEW YORK CITY (BARRY L. GERSTMAN OF COUNSEL), FOR DEFENDANT-APPELLANT COMMODITY RESOURCE CORP.

FINAZZO COSSOLINI O'LEARY MEOLA & HAGER, LLC, NEW YORK CITY (ROBERT B. MEOLA OF COUNSEL), FOR DEFENDANT-APPELLANT LAND O'LAKES PURINA FEED, LLC.

Appeals from an order of the Supreme Court, Livingston County (J. Scott Odorisi, J.), dated April 22, 2020. The order denied the cross motions of defendants for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motions are granted and the claims for damages to the property of nonparty Mosaic Crop Nutrition, LLC are dismissed.

Memorandum: Plaintiff commenced this action for, inter alia, damages sustained after a fire at a bulk storage warehouse leased by defendant Commodity Resource Corp. and subleased to defendant Land O'Lakes Purina Feed, LLC. At the time of the fire, plaintiff was storing tons of bulk fertilizer it owned as well as bulk fertilizer owned by its nonparty customer, Mosaic Crop Nutrition, LLC (Mosaic). That fertilizer was destroyed by the fire. Plaintiff moved for leave to amend its complaint to, inter alia, join Mosaic as a plaintiff in the action, and defendants cross-moved for partial summary judgment dismissing plaintiff's claims for damages to the Mosaic property. In support of their cross motions, defendants contended, inter alia, that plaintiff lacked standing to bring those claims inasmuch as plaintiff had been made whole for all of its losses by its nonparty insurer and thus plaintiff was not the real party in interest. Plaintiff ultimately withdrew its motion for leave to amend the complaint to join Mosaic. Defendants appeal from an order denying their cross motions, and we reverse.

We agree with defendants that Supreme Court erred in sua sponte addressing the admissibility of the evidence proffered by defendants in support of the cross motions inasmuch as plaintiff failed to raise

any objection on that ground before the court (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019]; *see generally Matter of Kellogg v Kellogg*, 300 AD2d 996, 996-997 [4th Dept 2002]).

Thus, regarding the merits, we conclude that defendants met their initial burden on their cross motions of establishing as a matter of law that plaintiff lacked standing to pursue claims for damages arising out of the damage to the property of Mosaic. As a general rule, a party does not have standing to assert claims on behalf of another (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation" (*Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975]). In order to have standing in a particular dispute, a party must demonstrate an injury in fact that falls within the relevant zone of interest sought to be protected by law (*see Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 346 [1976]). Here, it is undisputed that plaintiff did not suffer any loss related to the damage to Mosaic's property. Indeed, plaintiff had no ownership interest in that property. While plaintiff paid Mosaic for the amount of the loss, plaintiff was fully reimbursed by its insurer. Thus, plaintiff did not suffer any injury in fact related to the damage of Mosaic's property (*see generally Agway Ins. Co. v Williamson*, 162 AD2d 968, 968 [4th Dept 1990]).

In opposition, plaintiff failed to raise an issue of fact. CPLR 1004 provides an exception to the real party-in-interest rule whereby an insured who has executed a subrogation receipt or other similar agreement may sue without joining the insurer for whose interest the action is brought (*see CNA Ins. Co. v Cacioppo Elec. Contrs.*, 206 AD2d 399, 400 [2d Dept 1994]). That section "was enacted to prevent the prejudicial effect upon a plaintiff's ability to recover for losses which often results when it is disclosed to the jury that the loss was covered by insurance" (*id.*). In a similar vein, equitable subrogation "entitles an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*ELRAC, Inc. v Ward*, 96 NY2d 58, 75 [2001] [internal quotation marks omitted]), which is not the case here. Here, while plaintiff maintained that it was pursuing the relevant claims on behalf of the insurer, plaintiff failed to proffer any subrogation receipt or other similar agreement between the insurer and Mosaic. Furthermore, plaintiff is the insured, not Mosaic, and thus nothing entitled plaintiff to bring the relevant claims on behalf of the insurer for the damage to Mosaic's property (*cf. Henderson v Aetna Cas. & Sur. Co.*, 81 AD2d 702, 703 [3d Dept 1981], *affd* 55 NY2d 947 [1982]). Thus, we conclude that the court erred in denying defendants' cross motions.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

589

KA 18-02443

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COURTNEY A. WILLIAMS, DEFENDANT-APPELLANT.

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

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., A.J.), rendered April 27, 2017. The appeal was held by this Court by order entered July 17, 2020, decision was reserved and the matter was remitted to Niagara County Court for further proceedings (185 AD3d 1456 [4th Dept 2020]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). When the appeal was previously before us, we held the case, reserved decision, and remitted the matter to County Court "to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (3) and, if so, whether defendant should be afforded youthful offender status" (*People v Williams*, 185 AD3d 1456, 1457 [4th Dept 2020]). Upon remittal, the court determined that defendant is not an "eligible youth" because neither of the CPL 720.10 (3) factors was present and stated the reasons for that determination on the record (*People v Gonzalez*, 171 AD3d 1502, 1503 [4th Dept 2019]). We now affirm.

Defendant contends that his waiver of the right to appeal is invalid and does not encompass his challenge to the court's determination that he is not an eligible youth within the meaning of CPL 720.10 (3) or his challenge to the severity of the sentence. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of those challenges (*see People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Middlebrooks*, 167 AD3d 1483, 1484

[4th Dept 2018], *lv denied* 32 NY3d 1207 [2019], *reconsideration denied* 33 NY3d 1033 [2019]), we conclude that the court did not abuse its discretion in concluding that defendant was not an eligible youth and denying his request for youthful offender treatment (*see People v Jones*, 166 AD3d 1479, 1480 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]). We decline to exercise our discretion in the interest of justice to determine that the CPL 720.10 (3) factors exist and to adjudicate defendant a youthful offender (*see generally People v Williams*, 159 AD3d 1397, 1397 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

592

CA 20-00707

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

IN THE MATTER OF COR VAN RENSSELAER STREET COMPANY, III, INC., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, DOING BUSINESS AS EMPIRE STATE DEVELOPMENT, RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (KRISTIN KLEIN WHEATON OF COUNSEL), FOR RESPONDENT-APPELLANT.

CULLEN AND DYKMAN LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 13, 2020 in a proceeding pursuant to CPLR article 78. The order, inter alia, granted one of petitioner's requests for relief and denied other requested relief without prejudice as unripe for determination.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking several items of relief, including an order compelling respondent to present petitioner's grant application to respondent's Board of Directors for approval and compelling the Board of Directors to approve the application. Respondent now appeals from an order that, inter alia, granted the first item of relief and denied the second item of relief without prejudice as unripe for determination.

No appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding (*see* CPLR 5701 [b] [1]; *Matter of Green v Monroe County Child Support Enforcement Unit*, 111 AD3d 1446, 1447 [4th Dept 2013]). Here, the order is nonfinal because Supreme Court did not dismiss those parts of the petition that it declined to grant, but rather denied them without prejudice (*see Matter of Grosso v Slade*, 179 AD2d 585, 585-586 [1st Dept 1992]; *cf. Matter of Roesch v State of New York*, 187 AD3d 1651, 1651-1652 [4th Dept 2020]). Contrary to respondent's contention, although a determination that remits a matter for purely ministerial action is appealable as of right (*see Valentin v New York City Police Pension Fund*, 16 AD3d 145, 146 [1st Dept 2005]), here the court directed respondent to submit petitioner's

grant application for a determination by respondent's Board of Directors, not for a " 'purely ministerial' " action (*Matter of Mid-Is. Hosp. v Wyman*, 15 NY2d 374, 379 [1965]; *cf. Valentin*, 16 AD3d at 146). Although we have the power to treat the notice of appeal as an application for permission to appeal, we decline to do so here, and we therefore dismiss the appeal (*see Green*, 111 AD3d at 1447).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

594

KA 19-01039

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAEKWON BARNES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 20, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that the conviction is not supported by legally sufficient evidence. "To meet their burden of proving defendant's constructive possession of the [gun], the People had to establish that defendant exercised dominion or control over [the gun] by a sufficient level of control over the area in which [it was] found" (*People v Diallo*, 137 AD3d 1681, 1682 [4th Dept 2016] [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573-574 [1992]). Here, the People presented evidence that an officer discovered the gun on a heating duct in the basement of the home where defendant resided, and that defendant used and had access to the basement area in which the gun was located (*see generally People v Lawrence*, 141 AD3d 1079, 1082 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Moreover, forensic evidence established that defendant was a major contributor of the DNA profile from the gun. Viewing the evidence in the light most favorable to the People, we conclude that defendant exercised dominion and control over the gun by a sufficient level of control over the area in which it was discovered, and thus the evidence is legally sufficient to establish beyond a reasonable doubt that defendant constructively possessed the gun (*see id.*). In addition, "there was sufficient evidence that defendant's possession of the [gun] was knowing, [inasmuch] as[,] '[g]enerally, possession suffices to permit

the inference that the possessor knows what he possesses, especially, but not exclusively, if it is . . . on his premises' " (*People v Diaz*, 24 NY3d 1187, 1190 [2015]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even if we assume, arguendo, that a different verdict would not have been unreasonable, " 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]).

Defendant's contention that he was denied a fair trial by comments during his parole officer's trial testimony is unpreserved for review (*see generally People v Harris*, 147 AD3d 1328, 1329 [4th Dept 2017]).

Defendant's sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they do not require modification or reversal of the judgment.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

603

CA 20-00719

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

STERLING MILLER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

REROB, LLC, PETR-ALL PETROLEUM CONSULTING CORP., ALSO KNOWN AS PETR-ALL PETROLEUM CORP., ALSO KNOWN AS PETR-ALL CORP., CORTLAND PUMP & EQUIPMENT, INC., DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANT.

REROB, LLC, PETR-ALL PETROLEUM CONSULTING CORP., ALSO KNOWN AS PETR-ALL PETROLEUM CORP., ALSO KNOWN AS PETR-ALL CORP., THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

J&E PILE DRIVING, INC., THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

KENNEDYS CMK LLP, NEW YORK CITY (NITIN SAIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS REROB, LLC, AND PETR-ALL PETROLEUM CONSULTING CORP., ALSO KNOWN AS PETR-ALL PETROLEUM CORP., ALSO KNOWN AS PETR-ALL CORP.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT CORTLAND PUMP & EQUIPMENT, INC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 27, 2020. The order granted in part and denied in part the respective motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of defendants Rerob, LLC and Petr-All Petroleum Consulting Corp., also known as Petr-All Petroleum Corp., also known as Petr-All Corp.,

seeking summary judgment on their cross claim for contractual indemnification against defendant Cortland Pump & Equipment, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained in an accident on a construction site. The accident occurred when plaintiff, a laborer employed by third-party defendant J&E Pile Driving, Inc. (J&E), rigged a metal "Z sheet" to a crane and signaled the crane operator to hoist the Z sheet from its position on top of a stack of such sheets, even though a 600-pound, metal "corner piece" was lying unsecured on top of the Z sheet. As the crane was hoisting the Z sheet, the corner piece fell and struck plaintiff in the head. In appeal No. 1, defendants-third-party plaintiffs Rerob, LLC and Petr-All Petroleum Consulting Corp., also known as Petr-All Petroleum Corp., also known as Petr-All Corp. (Rerob defendants) and defendant Cortland Pump & Equipment, Inc. (Cortland Pump) appeal, and plaintiff cross-appeals, from an order that, inter alia, (1) granted that part of plaintiff's motion seeking partial summary judgment on his Labor Law § 240 (1) cause of action; (2) granted those parts of the motions of the Rerob defendants and Cortland Pump seeking summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action against them; (3) denied those parts of the Rerob defendants' motion seeking summary judgment on their cross claim for contractual indemnification against Cortland Pump and on their third-party cause of action for contractual indemnification against J&E; and (4) denied that part of Cortland Pump's motion seeking summary judgment on its cross claim for contractual indemnification against J&E. In appeal No. 2, the Rerob defendants and Cortland Pump appeal from an order that, among other things, granted plaintiff's motion to bifurcate and proceed to a trial on damages with respect to his Labor Law § 240 (1) cause of action.

The Rerob defendants and Cortland Pump contend in appeal No. 1 that plaintiff's own conduct was the sole proximate cause of the accident and therefore Supreme Court erred in granting that part of his motion seeking partial summary judgment on his Labor Law § 240 (1) cause of action. We reject that contention. It is well settled that the statute imposes absolute liability upon contractors or owners where a violation of the statute is a proximate cause of the accident, and that contributory negligence is not a defense to absolute liability under the statute (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Weitzel v State of New York*, 160 AD3d 1394, 1394 [4th Dept 2018]). Nevertheless, a defendant may defeat a plaintiff's motion for summary judgment by raising an issue of fact whether the plaintiff's own conduct was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Weitzel*, 160 AD3d at 1394). Here, we conclude that plaintiff met his initial burden on his motion with respect to the section 240 (1) cause of action by submitting, among other things, affidavits from experts who opined that the corner piece should have been removed with a crane immediately after the stack of Z sheets was offloaded from the flatbed truck that was used to transport the materials to the site, and before moving any individual Z sheet,

and the Rerob defendants and Cortland Pump failed to raise an issue of fact (*see Hamilton v Kushnir Realty Co.*, 51 AD3d 864, 865 [2d Dept 2008], *lv denied* 15 NY3d 705 [2010]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008]). In our view, the evidence submitted in opposition to plaintiff's motion established, at most, contributory negligence on the part of plaintiff (*see Gallegos v Bridge Land Vestry, LLC*, 188 AD3d 566, 567 [1st Dept 2020]; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]).

Furthermore, because plaintiff is entitled to partial summary judgment on the Labor Law § 240 (1) cause of action, the contentions of the Rerob defendants, Cortland Pump, and plaintiff on appeal and cross appeal concerning the common-law negligence and Labor Law §§ 200 and 241 (6) causes of action are academic (*see DaSilva v Everest Scaffolding, Inc.*, 136 AD3d 423, 424 [1st Dept 2016]; *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617-618 [1st Dept 2014]).

The Rerob defendants further contend that the court erred in denying that part of their motion seeking summary judgment on their cross claim for contractual indemnification against Cortland Pump. We agree, and we therefore modify the order in appeal No. 1 accordingly. The Rerob defendants met their initial burden by submitting the master hold harmless agreement executed by the Rerob defendants and Cortland Pump, along with the deposition testimony of numerous witnesses establishing that the Rerob defendants' liability was vicarious and they did not supervise or control the work (*see McKeighan v Vassar Coll.*, 53 AD3d 831, 833 [3d Dept 2008]; *cf. Divens v Finger Lakes Gaming & Racing Assn., Inc., LP*, 151 AD3d 1640, 1642-1643 [4th Dept 2017]). Cortland Pump failed to raise a triable issue of fact (*cf. McKeighan*, 53 AD3d at 833-834).

Nevertheless, we reject the contentions of the Rerob defendants and Cortland Pump that the court erred in denying those parts of their motions seeking summary judgment on their third-party cause of action and cross claim for contractual indemnification against J&E. "[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [4th Dept 1995]). Here, in the master subcontract agreement, J&E agreed to indemnify the Rerob defendants and Cortland Pump for claims "only to the extent attributable to the negligence of [J&E] or any entity for which it is legally responsible or vicariously liable." We conclude that neither the Rerob defendants nor Cortland Pump met their respective burdens because they failed to establish that the accident is attributable to the negligence of J&E or any entity for which it is vicariously liable (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Contrary to the contention of Cortland Pump, we conclude that it failed to establish as a matter of law that plaintiff is a person for whom J&E is vicariously liable (*see generally Rivera v State of New York*, 34 NY3d 383, 389 [2019]; *Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678, 679 [2d Dept 2013]).

With respect to appeal No. 2, we reject the contentions of the

Rerob defendants and Cortland Pump that the court abused its discretion in granting plaintiff's bifurcation motion (*cf. Blajszczak v McGhee-Reynolds*, 191 AD3d 1339, 1340-1341 [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

604

CA 20-00898

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

STERLING MILLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

REROB, LLC, PETR-ALL PETROLEUM CONSULTING CORP., ALSO KNOWN AS PETR-ALL PETROLEUM CORP., ALSO KNOWN AS PETR-ALL CORP., CORTLAND PUMP & EQUIPMENT, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

KENNEDYS CMK LLP, NEW YORK CITY (NITIN SAIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS REROB, LLC AND PETR-ALL PETROLEUM CONSULTING CORP., ALSO KNOWN AS PETR-ALL PETROLEUM CORP., ALSO KNOWN AS PETR-ALL CORP.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT CORTLAND PUMP & EQUIPMENT, INC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 10, 2020. The order, among other things, granted the motion of plaintiff for bifurcation.

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

Same memorandum as in *Miller v Rerob, LLC* ([appeal No. 1] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

605

CA 20-01589

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

GARY FRANKLIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIC A. LEARN AND VILLAGE OF FRANKLINVILLE,
DEFENDANTS-RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (RICHARD J. PORTER OF COUNSEL), FOR DEFENDANT-RESPONDENT ERIC A. LEARN.

BOUVIER LAW LLP, BUFFALO (PAUL F. HAMMOND OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE OF FRANKLINVILLE.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered July 27, 2020. The order granted the motion of defendant Eric A. Learn and the cross motion of defendant Village of Franklinville seeking summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he tripped and fell on an uneven sidewalk abutting the property of Eric A. Learn (defendant), located in defendant Village of Franklinville (Village). Plaintiff now appeals from an order that granted the motion of defendant and the cross motion of the Village for summary judgment dismissing the complaint. We affirm.

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not on the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *see Clauss v Bank of Am., N.A.*, 151 AD3d 1629, 1630 [4th Dept 2017]; *Capretto v City of Buffalo*, 124 AD3d 1304, 1306 [4th Dept 2015]). " 'That rule does not apply, however, if there is an ordinance or municipal charter that specifically imposes a duty on the abutting landowner to maintain and repair the public sidewalk and provides that a breach of that duty will result in liability for injuries to the users of the sidewalk; the sidewalk was constructed in

a special manner for the use of the abutting landowner; the abutting landowner affirmatively created the defect; or the abutting landowner negligently constructed or repaired the sidewalk' " (*Clauss*, 151 AD3d at 1630; *see Hausser*, 88 NY2d at 453; *Schroeck v Gies*, 110 AD3d 1497, 1497 [4th Dept 2013]).

Contrary to plaintiff's contention, defendant met his initial burden on the motion of establishing his entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although section 93.035 of the Village of Franklinville Code of Ordinances (Village Code) imposes a duty on the owners of premises to "keep sidewalks, on or running along the street row adjoining [their] property, in reasonably good and safe repair," it is undisputed that, at that time of the incident, the Village Code did not "clearly subject landowners to . . . liability" for failing to comply with that duty (*Smalley v Bemben*, 12 NY3d 751, 752 [2009]; *see Clauss*, 151 AD3d at 1630). Furthermore, the sidewalk was not constructed in a special manner for defendant's use (*see Schroeck*, 110 AD3d at 1498), and the deposition testimony submitted by defendant in support of his motion established that he did not affirmatively create the defect or negligently construct or repair the sidewalk (*see Clauss*, 151 AD3d at 1630; *Schroeck*, 110 AD3d at 1498). In opposition, plaintiff failed to raise an issue of fact (*see Zuckerman*, 49 NY2d at 562).

We also reject plaintiff's contention that Supreme Court erred in granting the Village's cross motion. The Village met its initial burden on its cross motion by establishing as a matter of law that it did not have prior written notice of the allegedly defective condition of the sidewalk, as required by Village Law § 6-628 (*see generally Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Lastowski v V.S. Virkler & Son, Inc.*, 64 AD3d 1159, 1160-1161 [4th Dept 2009]). Where, as here, "a municipality moves for summary judgment on its defense asserting the lack of written notice as a condition precedent to suit, the municipality sufficiently establishes that statutorily created defense by demonstrating, in the absence of any further requirement under the applicable prior notification law, that it did not receive prior written notice in the manner prescribed by the law" (*Horst v City of Syracuse*, 191 AD3d 1297, 1298 [4th Dept 2021]).

The burden thus shifted to plaintiff to raise a triable issue of fact whether either of the two exceptions to the written notice requirement applied, i.e., that the Village "affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough*, 10 NY3d at 728; *see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]), and plaintiff failed to meet that burden (*see generally Zuckerman*, 49 NY2d at 562).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

607

KA 19-00168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL J. WILSON, DEFENDANT-APPELLANT.

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

EARL J. WILSON, DEFENDANT-APPELLANT PRO SE.

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Richard M. Healy, A.J.), rendered November 19, 2018. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, aggravated driving while intoxicated, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, aggravated vehicular homicide (seven counts), vehicular manslaughter in the first degree (seven counts), manslaughter in the second degree (two counts), aggravated unlicensed operation of a motor vehicle in the first degree, operating a motor vehicle without an ignition interlock device, reckless driving, unlicensed operation of a motor vehicle, failure to keep right, and failure to use designated lane.

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

Memorandum: Defendant was previously convicted following a plea of guilty of one count of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]), and two counts each of aggravated vehicular homicide (Penal Law § 125.14 [1]) and manslaughter in the second degree (§ 125.15 [1]). On appeal from that judgment, we agreed with defendant that County Court (Bender, J.) erred in summarily denying his motion to withdraw his plea (*see People v Wilson*, 159 AD3d 1600, 1600 [4th Dept 2018]). We remitted the matter for a hearing on whether and to what extent defendant's decision to plead guilty was affected by the People's failure to disclose the autopsy and toxicology reports of one of the victims in violation of their *Brady* obligation (*id*. at 1602). On remittal, the court granted defendant's motion to vacate the plea, and the parties stipulated to dismissal of defendant's remaining contentions on the prior appeal (*People v Wilson*, 162 AD3d 1762 [4th Dept 2018]).

Defendant thereafter again pleaded guilty to the same counts, as well as the remaining 20 counts in the indictment. The court (Healy, A.J.) sentenced defendant as a persistent felony offender to 20 years to life imprisonment. Defendant appeals.

Defendant failed to preserve for our review the contention in his main and pro se supplemental briefs that the factual allocution was legally insufficient inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Gibbs*, 31 AD3d 1186, 1186 [4th Dept 2006], *lv denied* 7 NY3d 867 [2006]; *People v Loomis*, 17 AD3d 1019, 1019 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]). In any event, that contention is belied by the transcript of the plea colloquy (*see Loomis*, 17 AD3d at 1020). Although defendant did preserve for our review the contention in his main and pro se supplemental briefs that the court deviated from its sentencing promise, that contention is without merit inasmuch as the transcript of the plea colloquy reflects that defendant understood he was entering an unconditional plea of guilty to the entire indictment (*see generally People v Carr*, 147 AD3d 1506, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]).

By pleading guilty, defendant forfeited his further contention in his main and pro se supplemental briefs that the indictment should be dismissed because the prosecutor failed to introduce exculpatory evidence, including the above referenced autopsy and toxicology reports, before the grand jury (*see People v Rigby*, 105 AD3d 1383, 1384 [4th Dept 2013], *lv denied* 21 NY3d 1019 [2013]; *see generally People v Keizer*, 100 NY2d 114, 122 [2003]). Contrary to defendant's assertion in his main and pro se supplemental briefs, our decision on defendant's prior appeal (*Wilson*, 159 AD3d at 1601) and the record of the current proceedings both reflect that defendant was aware of the contents of those reports prior to his decision to plead guilty.

We cannot review defendant's contention in his main and pro se supplemental briefs regarding alleged investigative misconduct because it is based on matters outside the record on appeal (*see People v Griner*, 178 AD3d 1436, 1437 [4th Dept 2019], *lv denied* 35 NY3d 941 [2020]). Defendant further failed to preserve his contention in his main and pro se supplemental briefs that the sentence imposed upon defendant's guilty plea was "presumptively vindictive and imposed without State Due Process protections" (*People v Olds*, 36 NY3d 1091, 1092 [2021]), and we decline to exercise our power to review that argument as a matter of discretion in the interest of justice. Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

608

KA 18-01836

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. CASE, 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 February 26, 2018. The judgment convicted defendant upon a jury verdict of rape in the first degree and unlawful imprisonment in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]) and unlawful imprisonment in the first degree (§ 135.10), defendant contends that the allegedly improper admission of evidence of prior bad acts denied him a fair trial. We reject that contention. "Evidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Contrary to defendant's assertion, we are not limited in our review of County Court's multi-pronged *Molineux/Ventimiglia* ruling to the grounds overtly stated by the court in its decision (*see People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]). Here, the victim's testimony concerning uncharged acts that preceded the events charged in the indictment was admissible "to complete the narrative of the events charged in the indictment . . . , [to] provide[ ] necessary background information" (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009] [internal quotation marks omitted]; *see People v Griffin*, 111 AD3d 1413, 1414-1415 [4th Dept 2013], *lv denied* 23 NY3d 1037 [2014]; *People v Justice*, 99 AD3d 1213, 1215 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]), and to place "the charged conduct in context" (*People v Leeson*, 12 NY3d 823, 827 [2009] [internal quotation marks omitted]; *see People v Maxey*, 129 AD3d 1664, 1665 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). We further conclude that the court did not abuse its discretion in admitting the evidence at issue (*see Dorm*, 12 NY3d at 19; *see generally People v Henson*, 33 NY2d 63, 72 [1973]; *People v Molineux*,

168 NY 264, 293-294 [1901]). Furthermore, even assuming, arguendo, that the court erred in admitting any part of the evidence, we conclude that such error is harmless (*see generally People v Frankline*, 27 NY3d 1113, 1115 [2015]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant further contends that the court failed to conduct a sufficiently particularized analysis of the admission of evidence of certain of the prior bad acts and failed to weigh the probative value of the evidence against its prejudice. Inasmuch as defendant did not raise those contentions in the trial court, he failed to preserve them for our review (*see* CPL 470.05 [2]; *People v Woods*, 72 AD3d 1563, 1564 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]). In any event, the record "reflects that [the court] was aware of its obligation to balance the probative value of such evidence against its prejudicial effect" (*People v Brown*, 128 AD3d 1183, 1186 [3d Dept 2015], *lv denied* 27 NY3d 993 [2016]; *see People v Pigford*, 148 AD3d 1299, 1302 [3d Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Meseck*, 52 AD3d 948, 950 [3d Dept 2008], *lv denied* 11 NY3d 739 [2008]) and that the court engaged in such a balancing here. In addition, defendant "failed to preserve for our review his contention[] that . . . the court's *Molineux* instruction was inadequate" (*People v Dei*, 2 AD3d 1459, 1460 [4th Dept 2003], *lv denied* 1 NY3d 626 [2004]; *see generally People v Winston*, 169 AD3d 1361, 1362-1363 [4th Dept 2019], *lv denied* 33 NY3d 983 [2019]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice.

We agree with defendant that the court erred in admitting annotated cell phone records in evidence. The People failed to present a foundation for the admission of the cell phone records or the annotations thereon (*see People v Jones*, 158 AD3d 1103, 1105 [4th Dept 2018]), therefore they should have been excluded (*see People v Ramos*, 13 NY3d 914, 914-915 [2010]). Especially in light of the extensive use that defense counsel made of the records to support the defense, however, we conclude that any error in the admission of those records is harmless because the evidence of guilt is overwhelming and there is no significant probability that the error infected the verdict (*see Crimmins*, 36 NY2d at 241-242).

Defendant contends that the court erred in denying his challenges for cause to several prospective jurors. Even assuming, arguendo, that the court erred in denying those challenges, we conclude that reversal is not required because defendant failed to exhaust his peremptory challenges (*see People v LaValle*, 3 NY3d 88, 102 [2004]; *People v Lynch*, 95 NY2d 243, 248 [2000]; *People v Stewart*, 192 AD3d 1498, 1499 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]).

Defendant further contends that he was denied effective assistance of counsel by a litany of alleged errors, including defense counsel's failure to request additional limiting instructions concerning the *Molineux/Ventimiglia* evidence, his failure to exhaust the defense's peremptory challenges, and his failure to object to testimony concerning sexual assault and abuse in domestic violence

cases and testimony regarding the DNA analysis. We disagree. " 'Although the failure to request limiting instructions may constitute ineffective assistance of counsel if the error were so serious that defendant did not receive a fair trial' " (*People v Orcutt*, 51 AD3d 1404, 1405 [4th Dept 2008]), here, defense counsel may have had a strategic reason for failing to request a further limiting instruction inasmuch as he may not have wished to draw further attention to the *Molineux/Ventimiglia* evidence (*see People v Williams*, 107 AD3d 1516, 1516-1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]; *see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Contrary to defendant's contention that defense counsel was ineffective in failing to exhaust the defense's peremptory challenges in order to protect defendant's ability to contest the court's denial of his challenges for cause, defendant "failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge" any additional prospective jurors (*People v Mahoney*, 175 AD3d 1034, 1035 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]; *see Stewart*, 192 AD3d at 1499; *People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]). Similarly, defendant's contentions concerning the domestic violence testimony, the prosecutor's remarks on that testimony during summation, and the testimony of a forensic scientist regarding the DNA analysis are "based largely on [defendant's] hindsight disagreements with . . . trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Rogers*, 70 AD3d 1340, 1341 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010] [internal quotation marks omitted]). Upon our review of all of defendant's allegations of error concerning the representation provided by defense counsel, we conclude that defendant "failed to satisfy the well-settled, high burden of showing that he was deprived of a fair trial and meaningful representation sufficient to warrant a reversal" (*People v Flores*, 84 NY2d 184, 189 [1994]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

609

KA 14-00664

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON IRVINE, DEFENDANT-APPELLANT.

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

JASON IRVINE, DEFENDANT-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 7, 2014. The judgment convicted defendant upon a jury verdict of burglary in the second degree, grand larceny in the fourth degree, criminal possession of a controlled substance in the fifth degree, criminal possession of stolen property in the fourth degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), grand larceny in the fourth degree (§ 155.30 [8]), criminal possession of stolen property in the fourth degree (§ 165.45 [5]), and criminal possession of stolen property in the fifth degree (§ 165.40), arising from a series of incidents in which defendant, among other things, stole a motor vehicle. We affirm.

Defendant contends in his main brief that the evidence is legally insufficient to support the conviction of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree because the evidence fails to establish that the value of the vehicle exceeded $100. Defendant's contention is not preserved for our review because his motion for a trial order of dismissal was not " 'specifically directed' at the error being urged" on appeal (*People v Hawkins*, 11 NY3d 484, 492 [2008]; *see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Askia*, 38 AD3d 1212, 1212 [4th Dept 2007], *lv denied* 9 NY3d 839 [2007]).

Nonetheless, " 'we necessarily review the evidence adduced as to

each of the elements of th[ose] crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of those crimes as charged to the jury (*see Danielson*, 9 NY3d at 348-349), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention in his main brief, the People proved beyond a reasonable doubt that the value of the vehicle exceeded $100 inasmuch as the owner testified, without objection, that the vehicle was purchased new for $34,000 less than 10 years prior to the incident, was returned to use after the incident and was still in good working condition at the time of trial, and carried a "blue book" value of at least $4,900, and the People also introduced in evidence photographs of the interior and exterior of the vehicle (*see People v Williams*, 74 NY2d 675, 676 [1989]; *People v Chacon*, 11 AD3d 906, 907 [4th Dept 2004], *lv denied* 3 NY3d 755 [2004]). To the extent that defendant contends that the owner's testimony was not credible, "the jury was in the best position to assess the credibility of the witnesses" (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015] [internal quotation marks omitted]), and we perceive no reason to reject the jury's credibility determinations (*see People v Singh*, 35 AD3d 317, 317 [1st Dept 2006], *lv denied* 8 NY3d 927 [2007]).

Contrary to defendant's contention in his pro se supplemental brief, we conclude that the verdict on the charge of burglary in the second degree is not against the weight of the evidence with respect to the intent element inasmuch as the jury was entitled to infer defendant's intent to commit a crime at the time of entry " 'from the circumstances of the entry, from [his] unexplained or unauthorized presence on the premises and from [his] actions . . . when confronted' " (*People v Jamieson*, 88 AD3d 1298, 1299 [4th Dept 2011]; *see People v Mitchell*, 254 AD2d 830, 831 [4th Dept 1998], *lv denied* 92 NY2d 984 [1998]). Defendant failed to preserve for our review his related contention in his pro se supplemental brief that Supreme Court erred in failing to adequately instruct the jury on the intent element of the burglary in the second degree charge (*see People v Mason*, 177 AD2d 988, 988 [4th Dept 1991], *lv denied* 79 NY2d 950 [1992]; *People v Ortiz*, 173 AD2d 330, 331 [1st Dept 1991], *lv denied* 78 NY3d 1079 [1991]) and, in any event, that contention lacks merit (*see* CJI2d[NY] Penal Law § 140.25 [2]).

We reject defendant's further contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel. Although defense counsel erred in asking defendant whether he had *three* prior felony convictions after the court in its *Sandoval* ruling limited the prosecutor to asking whether defendant had *two* prior felony convictions, we conclude that defense counsel's error was " 'not so egregious and prejudicial that [it] deprived defendant of

his right to a fair trial' " (*People v Reitz*, 125 AD3d 1425, 1425 [4th Dept 2015], *lv denied* 26 NY3d 934 [2015], *reconsideration denied* 26 NY3d 1091 [2015]; *see People v Stumbo*, 155 AD3d 1604, 1605 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]). Additionally, even assuming, arguendo, that an objection by defense counsel to the admission of defendant's arrest photographs would have had a chance of success (*see People v Diaz*, 277 AD2d 325, 325 [2d Dept 2000], *lv denied* 96 NY2d 758 [2001]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]), we conclude that the discrete error by defense counsel in failing to object to the admission of that evidence was also "not so egregious as to deprive defendant of a fair trial" (*People v Galens*, 111 AD3d 1322, 1323 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *see generally People v Howard*, 22 NY3d 388, 400 [2013]; *Diaz*, 277 AD2d at 325). Defendant's claim that he was denied effective assistance based on defense counsel's performance during the cross-examination of certain prosecution witnesses involves "a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial" (*People v Flores*, 84 NY2d 184, 187 [1994]), and defendant's speculation that a more vigorous cross-examination might have undermined the credibility of witnesses does not establish ineffectiveness of counsel (*see People v Williams*, 110 AD3d 1458, 1459-1460 [4th Dept 2013], *lv denied* 22 NY3d 1160 [2014]). To the extent that defendant's claim that he was denied effective assistance of counsel is based on matters outside the record on appeal, including his assertions that defense counsel failed to investigate, call certain witnesses, and object to evidence that the People purportedly failed to disclose during pretrial discovery, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Resto*, 147 AD3d 1331, 1334-1335 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]; *People v Reyes*, 60 AD3d 873, 875 [2d Dept 2009], *lv denied* 12 NY3d 920 [2009]). Defendant's remaining claims of ineffective assistance of counsel are without merit and, to the extent that defendant's contention is reviewable on this appeal, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Goodson*, 144 AD3d 1515, 1517 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]).

We reject defendant's contention in his main brief that the sentence is unduly harsh and severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Finally, we have reviewed the remaining contentions raised in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

610

KA 16-01829

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IAN S. MCKAY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, JEFFREY WICKS, PLLC (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered August 16, 2016. The judgment convicted defendant upon a jury verdict of rape in the third degree, criminal contempt in the second degree and harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of rape in the third degree (Penal Law § 130.25 [3]), criminal contempt in the second degree (§ 215.50 [3]), and harassment in the second degree (§ 240.26 [1]). We affirm.

Defendant contends that Supreme Court erred in denying his motion for a mistrial after one of the victims testified, in violation of the court's pretrial ruling precluding any evidence that defendant had guns in the home, that she feared that defendant had "weapons" in his home. We conclude that the court did not abuse its discretion in denying the motion (*see People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]; *see generally People v Ortiz*, 54 NY2d 288, 292 [1981]). Although it denied the motion for a mistrial, the court sustained defendant's objection to the testimony, struck the offending portion from the record, and provided "the jury with a curative instruction directing them to disregard the improper testimony, which 'the jury is presumed to have followed' " (*People v Urrutia*, 181 AD3d 1338, 1338-1339 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *see People v DeJesus*, 110 AD3d 1480, 1482 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *People v Hawkes*, 39 AD3d 1209, 1210 [4th Dept 2007], *lv denied* 9 NY3d 845 [2007]).

We also reject defendant's contention that the court erred in

refusing to sever count one of the indictment, charging rape in the third degree, from counts two and three, charging criminal contempt in the second degree and harassment in the second degree with respect to a separate victim. The counts were properly joined pursuant to CPL 200.20 (2) (b), and the court therefore "lacked statutory authority to grant defendant's [severance] motion" (*People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict with respect to rape in the third degree is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]). The jury was "entitled to credit the testimony of the People's witnesses . . . over the testimony of defendant's witnesses, including that of defendant [himself]," and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). In particular, we note that there was nothing about the victim's testimony that was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]; *see People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]).

Finally, we note that the amended certificate of conviction must be corrected to reflect that Joanne M. Winslow, J., presided at trial and sentencing (*see People v Sweney*, 55 AD3d 1350, 1352 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

613

KA 20-00053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM GREEN, DEFENDANT-APPELLANT.

RYAN J. MULDOON, AUBURN, 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 August 20, 2019. The judgment convicted defendant upon a jury verdict of aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, leaving the scene of a property damage incident without reporting and criminal mischief in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a]), defendant contends that County Court erred in refusing to suppress a series of statements that he made to a sergeant with the Yates County Sheriff's Office. We reject that contention.

This prosecution arises from a motor vehicle accident in which a van struck another vehicle and then was immediately driven from the scene. As the van was driven away, the front bumper fell off with the license place attached. Witnesses notified the Yates County Sheriff's Office, which broadcast the name of the vehicle's registered owner. The sergeant heard the broadcast, knew the owner, and went to a farm he knew to be associated with her to investigate the incident. Upon arriving, he found defendant, who stated that the van had been stolen and gave the sergeant permission to look around the grounds for the van. The sergeant found the van in a rear area of the farm, and defendant was arrested after he made several admissions.

The evidence at the *Huntley* hearing establishes that defendant made three sets of statements to the sergeant. Contrary to defendant's contention, he was not subjected to custodial

interrogation by the sergeant during the first set of statements. "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]). Here, upon review of the relevant factors (*see People v Lunderman*, 19 AD3d 1067, 1068-1069 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]) and according due deference to the hearing court's credibility determinations (*see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]), we conclude that "the evidence at the *Huntley* hearing establishes that defendant was not in custody when he made the statements, and thus *Miranda* warnings were not required" (*People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *see People v Rounds*, 124 AD3d 1351, 1352 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]). Specifically, the evidence establishes, inter alia, that when defendant made the first set of statements, his freedom of action was not significantly restricted and the questioning was investigatory rather than accusatory (*see generally Kelley*, 91 AD3d at 1318).

With respect to the second set of statements, the evidence at the hearing establishes that the sergeant had placed defendant in handcuffs because defendant provided evasive answers while standing close to several sharp farm implements. At that time, the sergeant informed defendant that he was trying to sort out what had happened during the accident and that defendant was not under arrest. Based on the evidence, we reject defendant's contention that he was in custody at that time. " 'It is well established that not every forcible detention constitutes an arrest' " (*People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]) and, under these circumstances, we agree with the court that the sergeant's use of handcuffs did not transform the detention into a de facto arrest. To the contrary, the sergeant's use of the handcuffs was warranted in light of the threat to his safety (*see People v McDonald*, 173 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]; *People v LaBreck*, 286 AD2d 978, 978 [4th Dept 2001], *lv denied* 97 NY2d 730 [2002]).

Moreover, "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]; *see People v Hailey*, 153 AD3d 1639, 1640 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017]). Here, we conclude that defendant's second set of statements was made in response to a threshold inquiry by the sergeant that was "intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression" (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016] [internal quotation marks

omitted]; *see People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]).

We reject defendant's contention that the court erred in determining that defendant voluntarily made the third set of statements after validly waiving his *Miranda* rights. The court's determination to credit the testimony of the sergeant at the suppression hearing is entitled to great deference, and we perceive no reason to disturb that credibility determination (*see People v Lee*, 165 AD3d 1616, 1617 [4th Dept 2018], *lv denied* 32 NY3d 1113 [2018]; *People v Woods*, 303 AD2d 1031, 1031 [4th Dept 2003]).

We also reject defendant's contention that the court's *Sandoval* ruling constituted an abuse of discretion (*see People v Sandoval*, 34 NY2d 371, 374 [1974]). The court permitted the People to cross-examine defendant on certain convictions to the extent of asking whether defendant had been convicted of those crimes but barred the People from delving into the facts underlying those convictions or inquiring about the remainder of defendant's convictions. We conclude that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of those convictions upon which the court permitted inquiry] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*id.* at 378; *see People v Thomas*, 165 AD3d 1636, 1638 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert denied* — US —, 140 S Ct 257 [2019]).

Contrary to defendant's further contention, we conclude that he was not deprived of a fair trial based on prosecutorial misconduct during summation. The comments in question "were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Ali*, 89 AD3d 1412, 1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012] [internal quotation marks omitted]). Even assuming, arguendo, that the comments exceeded those bounds, we conclude that they "were not so egregious as to deprive defendant of a fair trial" (*id*. [internal quotation marks omitted]).

With respect to defendant's challenges to the assistance provided by defense counsel, "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," and thus we conclude that defendant's constitutional right to the effective assistance of counsel has been met (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Henry*, 95 NY2d 563, 565 [2000]).

By making only a general motion to dismiss the charges after the People rested their case, defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932

[2015]). In any event, contrary to defendant's contention, there is a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that defendant committed the crimes of which he was convicted. Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

The sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

614

KA 18-02439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTE D. TURNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered June 9, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and criminal trespass in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [2]) and criminal trespass in the second degree (§ 140.15 [1]). By making only a general motion to dismiss the charge of rape in the first degree after the People rested their case (*see People v Gray*, 86 NY2d 10, 19 [1995]) and by failing to renew his motion with respect to both charges at the close of his case (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]), defendant failed to preserve for our review his contention that his conviction is not supported by legally sufficient evidence (*see People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932 [2015]). Nonetheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Here, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jurors "failed to give the evidence the weight it should be accorded" (*People v Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]; *see generally Bleakley*, 69 NY2d

at 495).

Contrary to defendant's further contention, County Court properly refused to submit to the jury the charge of rape in the third degree (Penal Law § 130.25 [3]) as a lesser included offense of rape in the first degree (§ 130.35 [2]) because there was no "reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater offense" (CPL 300.50 [6]; *see People v Stephanski*, 286 AD2d 859, 860 [4th Dept 2001]).

We reject defendant's contention that the court abused its discretion in allowing the People to introduce a video recording of defendant's interview by the police. Contrary to defendant's contention, although some of defendant's statements at the end of the recording "were not entirely clear, they were not 'so inaudible and indistinct that the jury would have to speculate concerning [their] contents and would not learn anything relevant from them' " (*People v Warmley*, 179 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *see People v Cooke*, 119 AD3d 1399, 1400 [4th Dept 2014], *affd* 24 NY3d 1196 [2015], *cert denied* 577 US 1011 [2015]; *People v Jackson*, 94 AD3d 1559, 1561 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]).

Defendant also contends that the court erred in admitting in evidence testimony about his flight from the police on the day of his arrest. Contrary to defendant's contention, the evidence of his flight was relevant inasmuch as it was indicative of his consciousness of guilt (*see People v Yazum*, 13 NY2d 302, 304 [1963], *rearg denied* 15 NY2d 679 [1964]; *People v Fitzgerald*, 84 AD3d 1397, 1397 [2d Dept 2011], *lv denied* 17 NY3d 816 [2011]; *People v McDuffie*, 26 AD3d 667, 669 [3d Dept 2006], *lv denied* 7 NY3d 759 [2006]). Defendant failed to preserve for our review his contention that the prejudicial effect of that evidence outweighed its probative value inasmuch as he did not object to the testimony on that ground (*see People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014]; *People v Curtis*, 222 AD2d 237, 237-238 [1st Dept 1995], *affd* 89 NY2d 1003 [1997]). In any event, that contention lacks merit (*see Yazum*, 13 NY2d at 304; *People v Martinez*, 298 AD2d 897, 899 [4th Dept 2002], *lv denied* 98 NY2d 769 [2002], *cert denied* 538 US 963 [2003], *reh denied* 539 US 911 [2003]).

We reject defendant's further contention that the court's *Sandoval* ruling constituted an abuse of discretion (*see People v Sandoval*, 34 NY2d 371, 374 [1974]). Here, the court ruled that the People would be permitted to cross-examine defendant for impeachment purposes on his 2007 conviction of criminal possession of a controlled substance in the third degree. Contrary to defendant's assertion, that conviction was probative of his credibility inasmuch as such acts showed the "willingness . . . [of defendant] to place the advancement of his individual self-interest ahead of principle or of the interests of society" (*id.* at 377; *see People v Taylor*, 140 AD3d 1738, 1739 [4th Dept 2016]; *People v Carter*, 34 AD3d 1342, 1342 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]). Defendant's related assertion that the

2007 conviction was too remote in time to be probative is without merit (*see People v Scott*, 189 AD3d 2062, 2063 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Contrary to defendant's further assertion, "the court's *Sandoval* compromise[on the remaining offenses], in which it limited questioning on defendant's prior convictions for [those] offenses to whether [he] had been convicted of a felony or misdemeanor . . . , 'reflects a proper exercise of the court's discretion' " (*People v Stevens*, 109 AD3d 1204, 1205 [4th Dept 2013], *lv denied* 23 NY3d 1043 [2014]; *see People v Standsblack*, 162 AD3d 1523, 1525 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]; *People v Butler*, 140 AD3d 1610, 1613 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]).

We also reject defendant's contention that the court failed to make a sufficient inquiry into the complaints about defense counsel underlying his request for substitution of counsel. Defendant failed to make "specific factual allegations of 'serious complaints about counsel' " that would have required the court to conduct a minimal inquiry (*People v Porto*, 16 NY3d 93, 100 [2010]). Rather, defendant " 'made only vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense' " (*People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *see People v MacLean*, 48 AD3d 1215, 1217 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]). In any event, inasmuch as defendant did not subsequently express dissatisfaction with defense counsel and, instead, expressly stated in response to questioning by the court that he had decided to remain represented by defense counsel, we conclude that defendant abandoned his request for substitution of counsel (*see People v Avent*, 178 AD3d 1403, 1404-1405 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *People v Bennett*, 94 AD3d 1570, 1571 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012], *reconsideration denied* 19 NY3d 1101 [2012]; *People v Ocasio*, 81 AD3d 1469, 1470 [4th Dept 2011], *lv denied* 16 NY3d 898 [2011], *cert denied* 565 US 910 [2011]).

Contrary to defendant's contention, we conclude that any error by the court in allowing, after the jury had commenced deliberations, the redaction from the victim's medical records of a statement she made is harmless. The evidence of defendant's guilt is overwhelming and, particularly considering that the medical records were never published to the jury or provided to the jury during deliberations, there is no "significant probability" that the jury would have acquitted defendant but for the error (*People v Crimmins*, 36 NY2d 230, 242 [1975]; *see People v Washington*, 89 AD3d 1140, 1141-1142 [3d Dept 2011], *lv denied* 18 NY3d 963 [2012]; *see generally Harris v Campbell*, 155 AD3d 1622, 1623 [4th Dept 2017]).

Finally, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of

justice (*see* CPL 470.15 [6] [b]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

615

KA 18-01532

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISRAEL RAMOS-CARRASQUILLO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CAITLIN M. CONNELLY OF COUNSEL), 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 (Gordon J. Cuffy, A.J.), rendered February 23, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We affirm.

We reject defendant's contention that Supreme Court erred in refusing to suppress physical evidence seized following a search of his residence by his parole officers and members of the Syracuse Police Department (SPD). The search conducted by the parole officers was lawful because it was " 'rationally and reasonably related' " to the parole officers' duties and was not "merely a 'conduit' for doing what [SPD] could not do otherwise" (*People v Escalera*, 121 AD3d 1519, 1520 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]; *see People v Sapp*, 147 AD3d 1532, 1533-1534 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *People v Mackie*, 77 AD2d 778, 779 [4th Dept 1980]). Here, there was no evidence that defendant's parole officers were acting as agents of SPD. The testimony at the suppression hearing established that the parole officers were aware that SPD was investigating defendant but did not know about the warrant for his arrest, that they conducted a compliance check of defendant's residence only to ensure that he did not have a weapon at home, and that they were not seeking evidence to aid SPD in its investigation. We further conclude, based

on the totality of the circumstances, that defendant voluntarily consented to the search of his bedroom by SPD. Although defendant was being detained at the time, there was no evidence that SPD employed threats or other forms of coercion to obtain his verbal consent, defendant had prior dealings with the police, and he did not resist the police but instead actively cooperated with them (*see People v Fioretti*, 155 AD3d 1662, 1663-1664 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). SPD also obtained written consent to search the residence from an individual who "possesse[d] the requisite degree of authority and control over the premises" (*People v Kerr*, 166 AD3d 806, 807 [2d Dept 2018], *lv denied* 32 NY3d 1206 [2019]).

We also reject defendant's contention that the court should have suppressed his written statement to SPD, in which he admitted to ownership of the drugs obtained during the search. Defendant made the statement after he waived his *Miranda* rights and, under the totality of the circumstances, there is no indication on the record that the statement was not voluntary (*see People v Holland*, 126 AD3d 1514, 1514-1515 [4th Dept 2015], *lv denied* 25 NY3d 1165 [2015]; *People v Topolski*, 28 AD3d 1159, 1160 [4th Dept 2006], *lv dismissed* 6 NY3d 898 [2006], *lv denied* 7 NY3d 764 [2006], *reconsideration denied* 7 NY3d 795 [2006]; *People v May*, 263 AD2d 215, 219 [3d Dept 2000], *lv denied* 94 NY2d 950 [2000]). Indeed, it appears that defendant understood the *Miranda* warnings read to him and that he was eager to cooperate.

We further conclude that defendant failed to preserve for our review his contention that the court erred in admitting the testimony of the forensic chemist (*see* CPL 470.05 [2]; *see also People v De La Rosa*, 162 AD2d 698, 698 [2d Dept 1990]), 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]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). An acquittal would have been unreasonable on this record given the uncontested evidence that defendant directed SPD to the garbage bag containing cocaine found in his bedroom, that he admitted in a statement to SPD that he took full responsibility for and ownership of all the drugs recovered by the police, and that his fingerprints were found on a scale and bags containing cocaine found at the residence. Furthermore, the uncontested evidence of the forensic chemist established that the substances recovered at defendant's residence were cocaine. Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*).

We also reject defendant's contention that the court penalized him for asserting his right to a trial. "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [his] right to trial," and here there is "no

indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to trial" (*People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017] [internal quotation marks omitted]; *see People v Warmley*, 179 AD3d 1537, 1539 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]).

Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

619

CA 20-01471

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

CAROL L. JONES, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF DONALD J. JONES, DECEASED, JONES-CARROLL, INC., AND SEALAND WASTE LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CARROLL AND TOWN BOARD OF TOWN OF CARROLL, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS CAROL L. JONES, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF DONALD J. JONES, DECEASED, AND JONES-CARROLL, INC.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-RESPONDENT SEALAND WASTE LLC.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered June 23, 2020. The order, among other things, denied the cross motion of defendants for summary judgment.

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

Memorandum: The facts and procedural history of this case are set forth in our decisions on the prior appeals (*Jones v Town of Carroll*, 32 AD3d 1216 [4th Dept 2006], *lv dismissed* 12 NY3d 880 [2009]; *Jones v Town of Carroll* [appeal No. 1], 57 AD3d 1376 [4th Dept 2008], *revd* 15 NY3d 139 [2010], *rearg denied* 15 NY3d 820 [2010] [*Jones I*]; *Jones v Town of Carroll* [appeal No. 2], 57 AD3d 1379 [4th Dept 2008] [*Jones II*]; *Jones v Town of Carroll*, 122 AD3d 1234 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015] [*Jones III*]; *Jones v Town of Carroll*, 158 AD3d 1325 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018] [*Jones IV*]; *Jones v Town of Carroll*, 177 AD3d 1297 [4th Dept 2019] [*Jones V*]). Here, defendants appeal from an order that, among other things, denied their cross motion for summary judgment seeking dismissal of certain causes of action.

Supreme Court denied defendants' cross motion upon determining, inter alia, that the cross motion was untimely and an improper

successive motion for summary judgment. Defendants do not challenge those determinations by the court and thus, having failed to present any argument with respect to those dispositive determinations, defendants are deemed to have abandoned any contentions with respect to the propriety thereof (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1143-1144 [4th Dept 2014]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Even assuming, arguendo, that defendants have not abandoned on appeal any challenge to those determinations, we conclude that the court properly denied defendants' cross motion for summary judgment as untimely under CPLR 3212 (a) (*see Lozzi v Fuller Rd. Mgt. Corp.*, 175 AD3d 1815, 1816 [4th Dept 2019]; *Mitchell v City of Geneva*, 158 AD3d 1169, 1169 [4th Dept 2018]; *see generally Brill v City of New York*, 2 NY3d 648, 650-654 [2004]) and as an improper successive motion for summary judgment (*see Magic Circle Films Intl., LLC v Breon*, 192 AD3d 1610, 1611-1612 [4th Dept 2021]; *Vinar v Litman*, 110 AD3d 867, 868-869 [2d Dept 2013]). Inasmuch as defendants presented no argument with respect to the court's dispositive determinations, we affirm with costs (*see Becker-Manning, Inc.*, 114 AD3d at 1144).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

622

KA 19-02349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAVYIA A. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered October 7, 2019. The judgment convicted defendant upon his plea of guilty of rape in the third degree.

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

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [1]). In appeal No. 2, he appeals from an order that determined him to be a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We affirm in each appeal.

In appeal No. 1, defendant contends that his waiver of the right to appeal is invalid and that his sentence is excessive. Initially, we note that, contrary to the People's assertion, "[i]t is well settled that this Court's sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court . . . , and that we may substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Colon*, 192 AD3d 1567, 1570 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021] [internal quotation marks omitted]; *see People v Reid*, 173 AD3d 1663, 1666 [4th Dept 2019]; *People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). Nevertheless, "[e]ven assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of [his] challenge to the severity of [his] sentence" (*People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]; *see People v Bishop*, 192 AD3d 1504, 1504 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]),

we conclude that the sentence is not unduly harsh or severe. Furthermore, again assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his contentions concerning the denial of his request for youthful offender status, after applying the nine *Cruickshank* factors (*People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *see People v Z.H.*, 192 AD3d 55, 58-61 [4th Dept 2020]; *People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we conclude that County Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see generally People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]), and we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see People v Kocher*, 116 AD3d 1301, 1301-1303 [3d Dept 2014]; *see generally People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019], *lv denied* 34 NY3d 1132 [2020]).

In appeal No. 2, defendant contends that the court erred in assessing points under risk factors 11 and 13. We reject that contention. With respect to risk factor 11, a SORA court may assess 15 points if the defendant "has a substance abuse history or was abusing drugs . . . or alcohol at the time of the offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006] [Guidelines]). Here, the People established, by the requisite clear and convincing evidence (*see People v Mingo*, 12 NY3d 563, 571 [2009]; *see generally* Correction Law § 168-n [3]), that defendant was intoxicated at the time of the crime and that he admittedly was using alcohol to excess during the college semester during which the crime occurred. Thus, the court properly assessed 15 points under risk factor 11 (*see People v McClendon*, 175 AD3d 1329, 1330 [2d Dept 2019], *lv denied* 34 NY3d 910 [2020]; *see generally People v Williamson*, 181 AD3d 1100, 1101 [3d Dept 2020]).

Furthermore, contrary to defendant's contention, risk factor 13, which concerns conduct while confined or under supervision (*see* Guidelines at 16), permits the assessment of points for, insofar as relevant here, "defendant's behavior while being supervised on probation" (*People v Miller*, 186 AD3d 1095, 1097 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020]; *see People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013]). Here, the People established by clear and convincing evidence that defendant's conduct while on interim probation was unsatisfactory.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

623

KA 20-00574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAVYIA SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara Sheldon, J.), entered February 20, 2020. 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.

Same memorandum as in *People v Spencer* ([appeal No. 1] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

629

KA 18-02442

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL D. WILSON, ALSO KNOWN AS NATHANIEL D. WILSON, JR., ALSO KNOWN AS NATHANIEL WILSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered September 25, 2018. The judgment convicted defendant, upon a plea of guilty, 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 his *Alford* plea, of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid and does not encompass his challenges to his plea and to the severity of the sentence. With respect to defendant's contention that County Court erred in accepting his *Alford* plea because the record does not contain the requisite strong evidence of guilt or establish that the plea was the product of a voluntary and rational choice, we note that defendant's contention would survive even a valid waiver of the right to appeal to the extent that it implicates the voluntariness of the plea (*see People v Dash*, 74 AD3d 1859, 1860 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]; *People v Dille*, 21 AD3d 1298, 1298 [4th Dept 2005], *lv denied* 5 NY3d 882 [2005]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, however, and thus he failed to preserve that contention for our review (*see People v Dixon*, 147 AD3d 1518, 1518-1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]; *People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). Defendant further contends that preservation is not required because the plea was not knowingly, voluntarily and intelligently entered inasmuch as he made statements during sentencing that were inconsistent with guilt and the court failed to conduct the requisite "further inquiry" (*People v Lopez*, 71 NY2d 662, 666 [1988]). We conclude that preservation is required

because the "record indicated strong evidence of guilt and the court was not required to do more than it did to ensure that defendant voluntarily entered the plea" (*People v Couser*, 28 NY3d 368, 379 [2016]). Furthermore, defendant raised the issue of intoxication for the first time in the presentence interview, and therefore the court had no duty to make further inquiry at the time of the plea based on such information (*see generally People v Espinal*, 99 AD3d 435, 435 [1st Dept 2012], *lv denied* 20 NY3d 986 [2012]). In any event, " '[i]n New York, [an *Alford*] plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt' " (*People v Richardson*, 72 AD3d 1578, 1579 [4th Dept 2010]; *see People v Hill*, 16 NY3d 811, 814 [2011]). Here, we conclude that both of those conditions were met (*see People v Cruz*, 89 AD3d 1464, 1465 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]). Furthermore, we note that, "unlike an ordinary guilty plea, an *Alford* plea does not involve a recitation of guilt . . . Inasmuch as defendant tendered his plea without admitting guilt, his claims of innocence are not incompatible with his *Alford* plea . . . As such, they form no basis to attack the plea" (*People v Alexander*, 97 NY2d 482, 487 [2002]).

Finally, even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see also People v Bisono*, 36 NY3d 1013, 1017-1018 [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: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

633

CA 20-00005

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

CHRISTOPHER M., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF HEATHER M., DECEASED, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF T.M., DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF M.M., AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. MINEO, DEFENDANT, NICHOLAS MOROSCO, INDIVIDUALLY, AND AS ASSISTANT FIRE CHIEF OF YORKVILLE FIRE DEPARTMENT, THE YORKVILLE FIRE AND HOSE COMPANY, INC., AND VILLAGE OF YORKVILLE, DEFENDANTS-RESPONDENTS.

DAVID A. LONGERETTA, UTICA, FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (PAUL V. MULLIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NICHOLAS MOROSCO, INDIVIDUALLY, AND AS ASSISTANT FIRE CHIEF OF YORKVILLE FIRE DEPARTMENT, AND THE YORKVILLE FIRE AND HOSE COMPANY, INC.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE OF YORKVILLE.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered November 27, 2019. The order granted the motions of defendants Nicholas Morosco, individually and as Assistant Fire Chief of the Yorkville Fire Department, the Yorkville Fire and Hose Company, Inc. and the Village of Yorkville to dismiss plaintiff's amended complaint against them.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that, inasmuch as plaintiff correctly concedes in his appellate brief that the amended complaint fails to allege the existence of a special duty, the court properly granted those parts of the motions of defendants Nicholas Morosco, individually, and as Assistant Fire Chief of the Yorkville Fire Department, the Yorkville Fire and Hose Company, Inc., and the Village of Yorkville, seeking to dismiss the sixth cause of action, which is

against Morosco for gross negligence. "In a negligence-based claim against a municipality [and its agents], a plaintiff must allege that a special duty existed between the municipality and the [injured person]" (*Kirchner v County of Niagara*, 107 AD3d 1620, 1623 [4th Dept 2013]; *see Valdez v City of New York*, 18 NY3d 69, 75 [2011]; *Laratro v City of New York*, 8 NY3d 79, 82-83 [2006]). "Without a [special] duty running directly to the injured person[,] there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]). Thus, contrary to plaintiff's contention, even if we accept as true the allegation that Morosco was grossly negligent and we accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), "in the absence of a special duty there can be no liability" (*Rennix v Jackson*, 152 AD3d 551, 554 [2d Dept 2017]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

634

CA 19-01938

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

2006905 ONTARIO INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOODRICH AEROSPACE CANADA, LTD., AND DINO SOAVE, DEFENDANTS-RESPONDENTS.

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

NASH CONNORS, P.C., BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 1, 2019. The order, among other things, denied that part of plaintiff's motion seeking partial summary judgment.

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

Memorandum: In this action seeking damages for, inter alia, fraud allegedly arising from contract negotiations, plaintiff appeals from an order that, among other things, denied that part of its motion seeking partial summary judgment on certain elements of its fraud cause of action, i.e., the elements requiring a material misrepresentation of fact, knowledge of its falsity, and an intent to induce reliance (*see generally Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). We affirm.

It is well settled that "fraud must be proven by clear and convincing evidence; 'loose, equivocal or contradictory' evidence will not suffice" (*Callisto Pharm., Inc. v Picker*, 74 AD3d 545, 546 [1st Dept 2010]; *see George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219-220 [1978]; *see also Matter of Monto v Zeigler*, 183 AD3d 1294, 1295 [4th Dept 2020], *lv denied* 35 NY3d 904 [2020]). It is also well settled that "[t]he proponent on a summary judgment motion bears the initial burden of establishing entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact" (*Rice v City of Buffalo*, 145 AD3d 1503, 1504-1505 [4th Dept 2016]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, contrary to plaintiff's contention, the evidence that it submitted in support of the motion failed to eliminate all questions of fact with respect to the elements of fraud in question.

Consequently, Supreme Court properly denied the motion "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff's remaining contentions are academic in light of our determination.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

638

CA 20-01094

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

IN THE MATTER OF CHARLES GUTTMAN AND
SHIRLEY LADD,
PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

COVERT TOWN BOARD, RESPONDENT-RESPONDENT,
PAUL MIKESKA AND HEIDI MIKESKA,
RESPONDENTS-RESPONDENTS-APPELLANTS.

THE CROSSMORE LAW OFFICE, ITHACA (ANDREW P. MELENDEZ OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

SHARON M. SULIMOWICZ, ITHACA, FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered May 15, 2020 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition in part.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to respondent Covert Town Board for further proceedings in accordance with the following memorandum: Petitioners appeal and Paul Mikeska and Heidi Mikeska (respondents) cross-appeal from a judgment that, inter alia, granted in part petitioners' CPLR article 78 petition seeking, among other things, to annul the determination of respondent Covert Town Board (Town Board) granting respondents' application for a variance from the requirement that they must obtain a building permit before making improvements to their property. We are unable on the record before us to review the propriety of Supreme Court's conclusions regarding the Town Board's determination (*see Matter of Fike v Zoning Bd. of Appeals of Town of Webster*, 2 AD3d 1343, 1343 [4th Dept 2003]). Generally, "[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination" (*Matter of South Blossom Ventures, LLC v Town of Elma*, 46 AD3d 1337, 1338 [4th Dept 2007], *lv dismissed* 10 NY3d 852 [2008] [internal quotation marks omitted]; *see Matter of Livingston Parkway Assn., Inc. v Town of Amherst Zoning Bd. of Appeals*, 114 AD3d 1219, 1219-1220 [4th Dept 2014]; *see also Matter of Paloma Homes, Inc. v Petrone*, 10 AD3d 612, 613 [2d Dept 2004]). Here, although the Town Board held a public hearing and a meeting to discuss respondents' application and engaged in a lengthy discussion regarding that application, the Town Board failed to articulate its reasons for

granting the variance and failed to set forth any findings of fact to support its determination. We therefore hold the case, reserve decision and remit the matter to the Town Board to set forth the factual basis for its determination.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

639.1

CA 21-00292

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

IN THE MATTER OF PHARAOHS GC, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY,
RESPONDENT-DEFENDANT-APPELLANT.

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

HOGAN WILLIG, PLLC, AMHERST (BRETT D. TOKARCZYK OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 28, 2021 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, inter alia, permanently enjoined respondent-defendant from enforcing certain COVID-19 pandemic-related guidance.

It is hereby ORDERED that said appeal is unanimously dismissed without costs and the judgment is vacated.

Memorandum: Petitioner-plaintiff commenced this hybrid CPLR article 78 proceeding and declaratory judgment action challenging COVID-19 pandemic-related guidance issued by respondent-defendant New York State Liquor Authority (SLA) that, among other things, prohibited exotic dancing during the pandemic at licensed bars and restaurants. SLA appeals from a judgment that, inter alia, permanently enjoined SLA from enforcing the guidance. We dismiss the appeal as moot.

The guidance at issue is no longer in effect, and the parties correctly concede that this appeal is moot (*see Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]). Contrary to SLA's contention, the issue here is not likely to recur (*see generally id.* at 811-812; *People v Rikers Is. Corr. Facility Warden*, 112 AD3d 1350, 1351 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]), and it "is not of the type that typically evades review" (*Wisholek v Douglas*, 97 NY2d 740, 742 [2002]). Therefore, the exception to the mootness doctrine does not apply (*cf. generally Coleman v Daines*, 19 NY3d 1087, 1090 [2012]).

As a final matter, " 'in order to prevent [the] judgment which is unreviewable for mootness from spawning any legal consequences or

precedent,' " we vacate the judgment (*Matter of Thrall v CNY Centro, Inc.*, 89 AD3d 1449, 1451 [4th Dept 2011], *lv dismissed* 19 NY3d 898 [2012], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 718 [1980]; *see Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1559 [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

640

TP 20-01618

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

IN THE MATTER OF LEROY JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

STEWART T. ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

LEROY JOHNSON, 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, Erie County [M. William Boller, A.J.], entered December 8, 2020) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 106.10 (7 NYCRR 270.2 [B] [7] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul that part of a determination, following a tier II disciplinary hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [direct order]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). As respondent correctly concedes, the determination that petitioner violated inmate rule 106.10 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see id.* at 1701). We have reviewed petitioner's remaining contentions and conclude that none warrants reversal or

further modification of the determination.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

643

KA 18-02052

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 (Thomas J. Miller, J.), rendered May 17, 2018. The judgment convicted defendant upon a plea of guilty of attempted assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant, a predicate felon with a prior manslaughter conviction, contends that his bargained-for sentence, which includes a determinate term of incarceration of six years, is unduly harsh and severe. We conclude, however, that County Court erred in sentencing defendant as a second felony offender without first determining whether defendant had a predicate violent felony offense. Thus, if defendant is indeed a second violent felony offender, the sentence is illegal (*see People v Paige*, 137 AD3d 1659, 1660 [4th Dept 2016]).

Where it is apparent at the time of sentencing that a defendant may be a second violent felony offender, the People are required to file a second violent felony offender statement in accordance with CPL 400.15 and, if appropriate, the court is then required to sentence the defendant as a second violent felony offender (*see Paige*, 137 AD3d at 1660; *cf. People v Scarbrough*, 66 NY2d 673, 674 [1985]; *see generally* Penal Law §§ 70.02 [1]; 70.04 [1]). Here, no such statement was filed, although the People were aware that, approximately 10 years earlier, defendant had been incarcerated in North Carolina for a period of approximately 38 months on a prior conviction of voluntary manslaughter (*see generally* § 70.04 [1] [b]). Had the court concluded based on that predicate offense that defendant is a second violent

felony offender for this class C violent felony, the court would have been constrained by statute to impose a sentence that includes a determinate term of incarceration of not less than seven years and not more than 15 years (*see* §§ 70.02 [1] [a], [b]; 70.04 [3] [b]; 120.10 [1]), and thus the six-year term of incarceration that defendant actually received pursuant to his plea agreement would have been illegal.

We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for further proceedings (*see generally Paige*, 137 AD3d at 1660). On remittal, the People must file the second violent felony offender statement (*see id.*) and will have the burden at a second violent felony offender hearing of establishing that the offense of which defendant was convicted in North Carolina is equivalent to a violent felony as defined in Penal Law § 70.02 (*see generally People v Yancy*, 86 NY2d 239, 247 [1995]). If the court concludes, pursuant to CPL 400.15, that defendant is a second violent felony offender, then the agreed-upon sentence is illegal, and the court must give defendant the opportunity to withdraw the plea (*see generally People v Griffin*, 72 AD3d 1496, 1497 [4th Dept 2010]). In light of our determination, we do not address defendant's remaining contention.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

651

KA 16-00654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE ALEXANDER, DEFENDANT-APPELLANT.

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

WILLIE ALEXANDER, DEFENDANT-APPELLANT PRO SE.

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 August 28, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [1]), and petit larceny (§ 155.25). We affirm.

At trial, a WalMart security guard testified that he saw defendant take a handgun out of his pants and toss it into a snowbank outside the store. At the time of his observation, the guard was pursuing defendant for shoplifting at a distance of approximately eight feet. Defendant's tossing gesture was also observed by another WalMart employee who witnessed the pursuit from a greater distance. The guard immediately secured defendant after the gun was discarded; minutes later, the police recovered the gun in the exact location where defendant had just thrown it and where a passerby had been continuously safeguarding it in the interim. Moreover, a federal agent testified that the subject gun had been purchased by a straw buyer in Columbia, South Carolina, and defendant's state identification card was issued by South Carolina and bore a Columbia address.

Viewing the trial evidence independently and in light of the elements as charged to the jury (*see People v Dexter*, 191 AD3d 1246, 1246-1247 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we reject the contention in defendant's main brief that the verdict convicting him of criminal possession of a weapon in the second and third degrees is against the weight of the evidence with respect to the element of possession (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, given the security guard's detailed eyewitness testimony, the provenance of the gun, and the virtually instantaneous recovery of the gun in the exact location where defendant had just discarded it, the evidence of actual possession is so overwhelming that an acquittal on that ground would have been unreasonable (*see People v Simmons*, 133 AD3d 1275, 1277 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]; *People v Wimberly*, 86 AD3d 806, 808 [3d Dept 2011], *lv denied* 18 NY3d 863 [2011]). Under these circumstances, the absence of fingerprint or DNA evidence does not raise a reasonable doubt concerning defendant's actual possession of the gun (*see People v Randolph*, 180 AD3d 716, 717 [2d Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *People v Butler*, 126 AD3d 1122, 1123 [3d Dept 2015], *lv denied* 25 NY3d 1199 [2015]). Nor is the security guard's credibility undermined by his purported failure to include, in his written report, an inconsequential collateral detail about the incident (*see People v Jefferson*, 207 AD2d 753, 754 [1st Dept 1994], *lv denied* 84 NY2d 1012 [1994]).

We note, however, the following three statements in the People's responding brief: "deference should be afforded the factual findings of the jury" in conducting our weight of the evidence review; a conviction should not be overturned on weight of the evidence review " 'unless clearly unsupported by the record' "; and a conviction should be overturned on weight of the evidence review only when it "rests upon testimony that is 'physically impossible, contrary to experience, or self-contradictory.' " All three propositions are incorrect characterizations of the Appellate Division's power to review the weight of the evidence in criminal cases (*see People v Isaac*, 195 AD3d 1410, 1410-1411 [4th Dept 2021]; *Dexter*, 191 AD3d at 1247; *People v Gant*, 189 AD3d 2160, 2161 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021], citing *People v Sanchez*, 32 NY3d 1021, 1022-1023 [2018]; *see also Sanchez*, 32 NY3d at 1024-1026 [Wilson, J., dissenting in part]). We reiterate that "[t]he proper standard for conducting weight of the evidence review is set forth in *People v Delamota* (18 NY3d 107, 116-117 [2011]) and *Danielson* (9 NY3d at 349)" (*Gant*, 189 AD3d at 2161).

Contrary to defendant's further contention in his main brief, the sentence is not unduly harsh or severe. Contrary to the People's assertion, however, we reiterate that "we need not determine 'that there is some demonstrated need to impose a different view of discretion than that of the sentencing Judge' " when "exercising our power to review the severity of a sentence as a matter of discretion in the interest of justice" (*People v Parker*, 137 AD3d 1625, 1626 [4th Dept 2016]).

In his pro se supplemental brief, defendant posits that the gun was subject to suppression because he discarded it as a direct result of the security guard's purportedly unlawful pursuit. Defendant therefore contends that defense counsel was ineffective for not moving to suppress the gun. We reject that contention. " 'It is settled that [even] an unauthorized search or seizure by private individuals, including store detectives, does not render the evidence inadmissible at subsequent civil or criminal proceedings' " (*People v Mendoza*, 82 NY2d 415, 433 [1993], quoting *People v Jones*, 47 NY2d 528, 533 [1979]), and the pursuing security guard in this case was a private individual acting on behalf of his private employer. Indeed, defendant does not identify any recognized indicia of state action (*see People v Ray*, 65 NY2d 282, 286 [1985]) upon which suppression could have been sought under these circumstances (*cf. Mendoza*, 82 NY2d at 425, 433-434). Thus, defense counsel was not ineffective for failing to make such a meritless suppression motion (*see People v Taylor*, 157 AD2d 617, 617-618 [1st Dept 1990], *lv denied* 76 NY2d 796 [1990]).

The remaining branches of defendant's ineffective assistance claim—i.e., that defense counsel failed to adequately cross-examine the security guard about certain topics and unreasonably failed to call certain witnesses at trial—implicate matters outside the record and thus cannot be reviewed on direct appeal (*see People v Narine*, 153 AD3d 1280, 1280 [2d Dept 2017], *lv denied* 30 NY3d 1062 [2017]). Finally, defendant's pro se challenge to the legal sufficiency of his petit larceny conviction is unpreserved for appellate review (*see People v Hawkins*, 11 NY3d 484, 492 [2008]), 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]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

660

KA 20-00702

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. DZIEDZIC, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated March 12, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that he is entitled to a downward departure from his presumptive risk level based upon his advanced age, degenerative disc condition, and low risk of reoffending. We reject that contention. Defendant, who committed murder in the second degree while on parole for an attempted rape in the first degree conviction, "failed to demonstrate by a preponderance of the evidence that his alleged medical impairments at the time of the SORA determination would reduce the risk of his own recidivism or the danger he poses to the community" (*People v Williams*, 172 AD3d 1923, 1924 [4th Dept 2019], *lv denied* 33 NY3d 913 [2019]; *see People v Wallason*, 169 AD3d 728, 729 [2d Dept 2019], *lv denied* 33 NY3d 905 [2019]; *People v Mota*, 165 AD3d 988, 989 [2d Dept 2018], *lv denied* 32 NY3d 917 [2019]). The fact that an evaluator found that he was a low risk to reoffend "does not, standing alone, qualify as an appropriate mitigating factor, and . . . defendant did not identify any specific, unique risk factor on the [evaluator's assessment] that would serve as a mitigating factor in this case" (*People v Vega*, 189 AD3d 1288, 1289 [2d Dept 2020], *lv denied* 36 NY3d 913 [2021]).

Defendant's further contentions that County Court rendered an improper medical conclusion and that the court erred in considering a statement purported to be from the victim without adequate foundation

are not preserved for our review (*see People v Augsbury*, 156 AD3d 1487, 1487 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]; *People v Jewell*, 119 AD3d 1446, 1447 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]; *People v Walter*, 100 AD3d 1442, 1443 [4th Dept 2012]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

664

KA 18-00921

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FURQUAN MURRAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered October 6, 2017. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [2]). As an initial matter, defendant correctly contends and the People correctly concede that defendant did not validly waive his right to appeal. County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea . . . and thus the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Walker*, 171 AD3d 1501, 1502 [4th Dept 2019], *lv denied* 33 NY3d 1074 [2019] [internal quotation marks omitted]). The court also "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends that the court abused its discretion in denying his request to substitute counsel (*see generally People v Porto*, 16 NY3d 93, 99-100 [2010]). Although that contention is not encompassed by his guilty plea inasmuch as, under the circumstances presented here, it "implicates the voluntariness of the plea" (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019] [internal quotation marks omitted]; *cf. People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012],

lv denied 21 NY3d 1004 [2013]), we nonetheless conclude that it is without merit. Contrary to defendant's contention, this is not a case where, "[a]fter refusing to allow defendant to articulate his complaints about defense counsel, the court essentially gave defendant an ultimatum: plead guilty with present counsel or proceed to trial with present counsel" (*Jones*, 173 AD3d at 1630). Instead, the court "afforded defendant [multiple] opportunit[ies] to express his objections concerning defense counsel, and . . . thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]; *see People v Spencer*, 185 AD3d 1440, 1441 [4th Dept 2020]). Further, although it denied defendant's request to discharge assigned counsel, the court did assign a second counsel to assist in defendant's defense and relieve any purported tension between defendant and his original counsel.

Next, even assuming, arguendo, that defendant's pro se oral motion at sentencing to withdraw his guilty plea preserved for our review his contention that his plea was not knowing, intelligent, and voluntary based on the grounds now raised on appeal (*see People v Kosmetatos*, 178 AD3d 1433, 1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]), we conclude that his contention is without merit. The court was not obligated to engage in any specific litany or " 'uniform mandatory catechism of pleading defendant[]' " (*People v Alexander*, 19 NY3d 203, 219 [2012]), and the record establishes that defendant's plea was knowingly, voluntarily, and intelligently entered "even though some of defendant's responses to the court's inquiries were monosyllabic" (*People v Lewis*, 114 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *see People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]). Thus, we reject defendant's contention that the court abused its discretion in denying defendant's oral motion to withdraw his plea (*see People v Long*, 183 AD3d 1275, 1276 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020], *reconsideration denied* 35 NY3d 1095 [2020]). We similarly reject defendant's further contention that he was denied the effective assistance of counsel due to defense counsel's failure to file a formal motion to withdraw the plea on those grounds (*see People v Weinstock*, 129 AD3d 1663, 1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; *People v Viscomi*, 286 AD2d 886, 886 [4th Dept 2001], *lv denied* 97 NY2d 763 [2002]).

Defendant forfeited the right to raise his contention that the court erred in its consideration of defendant's request to proceed pro se at trial " 'inasmuch as he pleaded guilty before the court issued a ruling thereon' " (*People v Ortega*, 175 AD3d 1810, 1811 [4th Dept 2019]). Finally, the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

665

KA 19-02350

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HUGH SMITH, ALSO KNOWN AS HUGH D. SMITH, JR.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 1, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the fourth degree (two counts) and criminal possession of a controlled substance in the seventh degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him, also upon his plea of guilty, of attempted promoting prison contraband in the first degree (§§ 110.00, 205.25 [2]). We agree with defendant that his waiver of the right to appeal in each 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]; *see People v Brooks*, 187 AD3d 1587, 1588 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021]).

Defendant failed to preserve for our review his contention in appeal No. 1 that the court erred in assigning new counsel to replace his initial assigned attorney (*see People v Triplett*, 149 AD3d 1592, 1593 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017]; *see generally People v Tineo*, 64 NY2d 531, 535-536 [1985]). In any event, the court

did not abuse its discretion in replacing that attorney. Although a defendant has the right to continue to be represented by an assigned attorney with whom the defendant has developed a professional relationship, and courts may not interfere with that right arbitrarily (*see People v Knowles*, 88 NY2d 763, 766 [1996]; *see also People v Arroyave*, 49 NY2d 264, 270 [1980]), "[t]he right to counsel of choice . . . is not absolute. A criminal defendant does not have a categorical right to insist that a retained or assigned attorney continue to represent him" or her (*People v Childs*, 247 AD2d 319, 325 [1st Dept 1998], *lv denied* 92 NY2d 849 [1998]). Furthermore, it is well settled that trial courts generally have broad discretion to substitute counsel (*see People v Robinson*, 121 AD3d 1179, 1180 [3d Dept 2014]), and " '[t]hat discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review' " (*People v Watson*, 26 NY3d 620, 624 [2016], quoting *Tineo*, 64 NY2d at 536). It is also well settled that a defendant's right to be represented by counsel of his or her choosing "may be overcome by demonstration of an actual conflict or a serious potential for conflict" (*id.* at 625). Here, the court properly determined that counsel had an actual conflict of interest based on his representation of a witness who was planning to testify against defendant, and thus the court did not abuse its discretion in replacing that attorney with new counsel (*see generally id.* at 624-625; *People v Carncross*, 14 NY3d 319, 326-330 [2010]).

Defendant's sentence in each appeal is not unduly harsh or severe. Defendant's remaining contention in appeal No. 2 is academic in light of our determination.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

668

KA 19-01368

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC DEMPSEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (TYLER BUGDEN 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 (Matthew J. Doran, J.), rendered May 24, 2019. The judgment convicted defendant upon his plea of guilty of aggravated vehicular homicide (three counts), vehicular manslaughter in the first degree (three counts), vehicular manslaughter in the second degree (two counts), manslaughter in the second degree (two counts), unlawful fleeing a police officer in a motor vehicle in the first degree (two counts), unlawful fleeing a police officer in a motor vehicle in the third degree, aggravated driving while intoxicated, driving while intoxicated (two counts), reckless driving and aggravated unlicensed operation of a motor vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of, inter alia, three counts of aggravated vehicular homicide (Penal Law § 125.14 [1], [4]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of any of defendant's contentions, we nevertheless affirm the judgment.

By pleading guilty, defendant forfeited his contention that County Court erred in refusing to preclude evidence that he willfully refused to submit to a chemical test to determine the alcohol and drug content of his blood (*see People v Sirico*, 135 AD3d 19, 25-26 [2d Dept 2015], *lv denied* 27 NY3d 1075 [2016]).

Defendant further contends that the police violated his limited right to counsel, and that the court therefore erred in refusing to suppress the results of the chemical tests of two samples of defendant's blood. Although it survives the guilty plea (*see* CPL

710.70 [2]), we reject that contention because "both samples were properly obtained by law enforcement; the first sample was obtained by warrant after it had been collected by medical personnel for medical purposes, and the second sample was drawn from defendant pursuant to a court order" (*People v Dell*, 175 AD3d 1037, 1038 [4th Dept 2019], *lv denied* 34 NY3d 980 [2019]).

By failing to move to withdraw the plea or vacate the judgment of conviction, defendant failed to preserve his contention that his guilty plea was not knowing, voluntary, and intelligent based on an alleged *Brady/Giglio* violation (*see People v Brown*, 162 AD3d 1568, 1568 [4th Dept 2018], *lv denied* 32 NY3d 935 [2018]), 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 [3] [c]). To the extent that defendant contends that the court erred in denying his motions to reopen the suppression hearing after the delayed disclosure of impeachment material, that contention is forfeited by the guilty plea (*see People v Weinstock*, 129 AD3d 1663, 1663-1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; *People v Fulton*, 30 AD3d 961, 962 [4th Dept 2006], *lv denied* 7 NY3d 789 [2006]).

The sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

669

KA 21-00227

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY HICKS, DEFENDANT-APPELLANT.

PAUL G. DELL, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 9, 2020. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). As defendant contends, and the People correctly concede, the waiver of the right to appeal is invalid inasmuch as Supreme Court "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Further, although the record reflects that defendant signed a written waiver at some point, we may not "consider whether that document corrected 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 DeMarco*, 191 AD3d 1428, 1428 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]; *see generally People v Bradshaw*, 18 NY3d 257, 262 [2011]). We nonetheless conclude that the sentence is not unduly harsh or severe.

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

670

KA 20-00747

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HUGH SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 1, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Same memorandum as in *People v Smith* ([appeal No. 1] — AD3d — [Aug. 26, 2021] [4th Dept 2021]).

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

682

CA 20-01257

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

ANNMARIE ENGLE AND CHRISTOPHER ENGLE,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

SERGI CONSTRUCTION, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 12, 2020. The order granted in part and denied in part the motion of defendant for summary judgment and granted in part and denied in part the cross motion of plaintiffs for summary judgment.

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

702

CA 20-01078

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

WYOMING-GIFFORD, LLC, PLAINTIFF-APPELLANT,

V ORDER

ANUP BHATT, DOING BUSINESS AS PAT'S DRY CLEANING,
DEFENDANT-RESPONDENT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN M. DELANEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered July 28, 2020. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment and granted in part the cross motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 25 and June 3, 2021,

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

705

CA 20-01551

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

JEREMY KAPPELL, PLAINTIFF-APPELLANT,

V ORDER

WHEC-TV, LLC, HUBBARD BROADCASTING, INC.,
AND RICHARD REINGOLD, DEFENDANTS-RESPONDENTS.

RICOTTA & MARKS, P.C., LONG ISLAND CITY (THOMAS RICOTTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered March 16, 2020. The order, insofar as appealed from, granted the motion of defendants to dismiss the amended complaint, dismissed the amended complaint and denied the cross motion of plaintiff for leave to amend the amended complaint.

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court

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

713

CA 20-01552

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

JEREMY KAPPELL, PLAINTIFF-APPELLANT,

V ORDER

CITY OF ROCHESTER AND MAYOR LOVELY WARREN
(INDIVIDUALLY AND IN HER OFFICIAL CAPACITIES),
DEFENDANTS-RESPONDENTS.

RICOTTA & MARKS, P.C., LONG ISLAND CITY (THOMAS RICOTTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (PATRICK BEATH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered March 16, 2020. The order, among other things, granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Entered: August 26, 2021

Mark W. Bennett
Clerk of the Court