SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 8, 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

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED OCTOBER 8, 2021

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	No.	Docket	Case
________	313	CA 20 00843	JAMES W. RAND V FINGER LAKES PREMIER PROPERTIES
________	314	CA 20 00845	JAMES W. RAND V FINGER LAKES PREMIER PROPERTIES
________	554	CA 20 00940	VIKKI-LYNN A. V JEFFREY M. ZEWIN
________	616	CA 21 00013	BPGS LAND HOLDINGS, LLC V ELIZABETH S. FLOWER
________	628	KA 18 00172	PEOPLE V VINCENT K. SMITH, JR.
________	647	KA 18 01272	PEOPLE V JOSEPH R. WATKINS, II
________	666	KA 17 00689	PEOPLE V JASON D. HOLLEY
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________	685	CA 20 01553	ALLSTATE INSURANCE COMPANY In the Matter of Arbit JAMES M. TWOMEY
________	693	KA 13 01131	PEOPLE V TOMMY DAVIS
________	700	CAF 19 02127	Mtr of ANNASTASIA P.
________	745	KA 17 01377	PEOPLE V THOMAS B. NEWSOME
________	749	KA 15 01933	PEOPLE V MICHAEL L. BELL
________	770	KAH 20 01142	GERMAINE BROWN V STATE OF NEW YORK DEPARTMENT OF
________	771	CAF 19 00180	SHERI L. MAUNG V STEPHANIE L. FARRELL
________	788	KA 20 01371	PEOPLE V AUSTIN PELLETIER
________	792	KA 15 00236	PEOPLE V JOHN OSBORN
________	793	KA 17 00005	PEOPLE V JOHN OSBORN
________	794	KA 17 00006	PEOPLE V JOHN OSBORN
________	795	KA 19 00166	PEOPLE V CHARLES THIGPEN-WILLIAMS
________	800	CAF 19 02353	Mtr of CHRISTINA S.
________	801	CAF 20 00228	Mtr of CHRISTINA S.
________	812	KA 20 01459	PEOPLE V RANDY TAYLOR
________	835	KA 19 00076	PEOPLE V AKEEM BROWN
________	838	KA 19 00887	PEOPLE V LAWRENCE CANNON

_________	839	KA 20 00055	PEOPLE V MICHAEL MYERS
_________	841	CAF 19 00745	ELIZABETH J. FOWLER V DAVID L. ROTHMAN
_________	854	KA 20 01460	PEOPLE V MICHAEL RAY
_________	855	KA 19 01575	PEOPLE V LIAM EALAHAN
_________	857	KA 20 00318	PEOPLE V ROBERT SANTY, JR.
_________	859	KA 19 00982	PEOPLE V ANDRES ROBLES-PIZARRO
_________	866	KA 17 01074	PEOPLE V BARBARA A. FREELAND
_________	867	KA 20 01414	PEOPLE V ZACHERY BISHOP
_________	868	KA 21 00179	PEOPLE V ZACHERY BISHOP
_________	869	CA 20 01412	JANICE COOKE V CORNING HOSPITAL

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

313
CA 20-00843
PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

JAMES W. RAND, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

FINGER LAKES PREMIER PROPERTIES, INC., ET AL.,
DEFENDANTS,
AND VALERIE MARTINI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, LLP, ROCHESTER (MARTIN S. HANDELMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered March 16, 2020. The order denied the motion of defendant Valerie Martini for summary judgment dismissing the amended complaint against her.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the amended complaint against defendant Valerie Martini is dismissed.

Memorandum: Plaintiff commenced this negligence action seeking damages arising from the destruction by accidental fire of his cottage on Keuka Lake in Yates County. He sued his neighbors, defendants David Binkowski and Karen Binkowski, on whose property the fire allegedly started before it spread across the yard to plaintiff’s cottage, and also sued their adult son, defendant Steven Binkowski. Plaintiff further sued defendant Valerie Martini, who rented the Binkowski property in the days before the fire occurred, and defendant Finger Lakes Premier Properties, Inc. (Finger Lakes), the management company used by the Binkowskis to rent their property. Following discovery, Martini and the remaining defendants separately moved for summary judgment dismissing the amended complaint against them. In appeal No. 1, Martini appeals from an order denying her motion. In appeal No. 2, the Binkowskis and Finger Lakes (collectively, defendants) appeal from an order denying their motion.

According to plaintiff, the fire started on the Binkowskis’ lawn

after Steven dumped the remains of a portable fire pit on the ground. Plaintiff's cottage caught fire late in the afternoon the following day. Martini and her friends used the fire pit during her stay at the Binkowski property, which ended the day before the fire and on the day Steven arrived at the property. Martini, however, testified at her deposition that she and her friends extinguished the fire in the pit after each use and then poured water from a hose into the pit before leaving the Binkowski property.

Plaintiff's theory is that, unbeknownst to Steven, the contents of the fire pit were still hot when he dumped them on the ground, and a burning ember reached a bale of hay on the Binkowski property, causing the hay to smolder. The smoldering hay bale later ignited into flames, which then spread over the ground to plaintiff's property.

Addressing first appeal No. 2, we reject defendants' contention that Supreme Court erred in denying their motion. Even assuming, arguendo, that defendants met their initial burden of establishing entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), we conclude that plaintiff's submission of the affidavit of his expert raised a triable issue of fact sufficient to defeat summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff's expert conducted an investigation of the fire and concluded that it was highly likely that the ashes or embers admittedly dumped on the ground by Steven "contained smoldering residue a portion of which came in contact with an adjacent hay bale causing the hay to smolder," that the smoldering hay bale was later ignited by oxygen from strong winds, and that the fire then spread to plaintiff's property. In our view, whether the fire started in the manner suggested by plaintiff's expert is an issue of fact to be resolved at trial.

In appeal No. 1, we reach a different conclusion with respect to Martini. Negligence is defined as the "lack of ordinary care," or a "failure to use that degree of care that a reasonably prudent person would have used under the same circumstances" (PJI 2:10; *see Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). Here, Martini met her initial burden of establishing that she was not negligent as a matter of law even if, as plaintiff alleges, she failed to completely extinguish the contents of the fire pit before departing the premises, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). We note that the fire pit was made of metal and was self-contained, and Martini had no reason to believe that someone would later dump its contents on the ground. We thus conclude that the court erred in denying Martini's motion for summary judgment dismissing the amended complaint against her.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

314

CA 20-00845

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

JAMES W. RAND, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

FINGER LAKES PREMIER PROPERTIES, INC., DAVID
BINKOWSKI, KAREN BINKOWSKI, STEVEN BINKOWSKI,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

MARK D. GORIS, CAZENOVIA, FOR DEFENDANTS-APPELLANTS.

HANDELMAN, WITKOWICZ & LEVITSKY, LLP, ROCHESTER (MARTIN S. HANDELMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered March 16, 2020. The order denied the motion of defendants Finger Lakes Premier Properties, Inc., David Binkowski, Karen Binkowski and Steven Binkowski for summary judgment dismissing the amended complaint against them.

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

Same memorandum as in *Rand v Finger Lakes Premier Props., Inc.* ([appeal No. 1] — AD3d — [Oct. 8, 2021] [4th Dept 2021]).

Entered: October 8, 2021   Ann Dillon Flynn
Clerk of the Court

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

554
CA 20-00940
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

VIKKI-LYNN A., AS PARENT AND NATURAL GUARDIAN
OF KAEDEN J.M., PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

JEFFREY M. ZEWIN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered July 14, 2020. The order granted the motion of defendant Jeffrey M. Zewin for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant Jeffrey M. Zewin insofar as it asserts a cause of action for strict liability, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her infant child when he was attacked by two Rottweilers harbored by tenants living in a house owned by Jeffrey M. Zewin (defendant). Defendant moved for summary judgment dismissing the complaint against him on the ground that he was not aware that dogs were kept on the property or that those dogs had vicious propensities. In opposition to the motion, plaintiff submitted, inter alia, the affidavits of two nonparty witnesses: Erica Davis and Terrance Cheetham. Supreme Court, however, precluded those affidavits as a remedy for plaintiff’s failure to disclose them during discovery, and thus it did not consider them on the motion. The court determined that, absent those affidavits, plaintiff failed to raise a triable issue of fact, and it granted defendant’s motion. Plaintiff appeals.

Preliminarily, we note that plaintiff does not address the dismissal of the complaint insofar as it asserts a cause of action for negligence, and we therefore deem any challenge to that part of the order abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In any event, cases involving injuries inflicted by

domestic animals may proceed only under a theory of strict liability, not on theories of common-law negligence (*see Russell v Hunt*, 158 AD3d 1184, 1185-1186 [4th Dept 2018]).

With respect to the merits, we agree with the court that the affidavit of Davis, insofar as it contained a party statement of defendant, should have been disclosed. CPLR 3101 (e) "enables a party to unconditionally obtain a copy of his or her own statement[,] creating an exception to the rule that material prepared for litigation is ordinarily not discoverable" (*Sands v News Am. Publ.*, 161 AD2d 30, 40 [1st Dept 1990]). We nevertheless agree with plaintiff that the court abused its discretion in precluding Davis's affidavit from consideration in opposition to the motion (*see generally Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2d Dept 2012]; *Ronan v Northrup*, 245 AD2d 1119, 1119 [4th Dept 1997]). Defendant knew of Davis as a person of interest, which is why counsel sought to depose her approximately four months prior to making the motion, and defendant did not seek the assistance of the court to compel Davis's production (*see Dume v CK-HP 1985 Marcus Ave., LLC*, 136 AD3d 860, 861 [2d Dept 2016]; *Pearson v City of New York*, 74 AD3d 1160, 1161-1162 [2d Dept 2010]). Inasmuch as plaintiff is not precluded from relying on Davis's affidavit to oppose summary judgment, Davis is not precluded from testifying at trial (*cf. Fleming v Vassallo*, 295 AD2d 172, 172 [1st Dept 2002]).

We also conclude that the court abused its discretion in precluding the Cheetham affidavit from consideration. Cheetham was listed as a witness in discovery and was deposed. Cheetham is not a party to this action, and his affidavit did not include any statements of a party. Even assuming that Cheetham's statement was discoverable, we note that defendant's discovery demands did not include a demand for nonparty witness statements. Assuming further that defendant's discovery demands could be read to include a request for the statement of a nonparty witness, i.e., Cheetham, we conclude that Cheetham's statement was conditionally privileged as material prepared in anticipation of litigation (*see* CPLR 3101 [d] [2]; *Guzek v B & L Wholesale Supply, Inc.*, 126 AD3d 1506, 1508 [4th Dept 2015]; *Salzer v Farm Family Life Ins. Co.*, 280 AD2d 844, 846-847 [3d Dept 2001]). Defendant would be unable to show any substantial need for Cheetham's statement inasmuch as Cheetham was deposed and therefore provided the substantial equivalent of the material contained in the statement (*see Salzer*, 280 AD2d at 847).

Even assuming, arguendo, that defendant met his initial burden on the motion by establishing that he had no notice that dogs were on the premises and no notice of vicious propensities (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Toher v Duchnycz*, 172 AD3d 1894, 1895 [4th Dept 2019], *lv denied* 34 NY3d 908 [4th Dept 2020]), we further conclude that plaintiff's submissions, including the Davis and Cheetham affidavits, are sufficient to raise triable issues of fact whether defendant had notice that dogs were harbored at the premises, whether the dogs had vicious propensities, and whether defendant knew or should have known of those propensities (*see Modafferi v DiMatteo*, 177 AD3d 1413, 1414 [4th Dept 2019];

Pauszek v Waylett, 173 AD3d 1631, 1632 [4th Dept 2019]; *Meka v Pufpaff*, 167 AD3d 1547, 1547-1548 [4th Dept 2018]). We therefore modify the order accordingly.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00013

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

BPGS LAND HOLDINGS, LLC, AND BPGS
FACILITIES, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ELIZABETH S. FLOWER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

SELLSTROM LAW FIRM, LLP, JAMESTOWN (STEPHEN E. SELLSTROM OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

WRIGHT WRIGHT AND HAMPTON, JAMESTOWN (JOSEPH M. CALIMERI OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered July 23, 2020. The order, among other things, granted the motion of defendant Elizabeth S. Flower to dismiss the first cause of action, declared that defendant Elizabeth S. Flower has a limited ownership interest in a gas lease and denied in part the cross motion of plaintiffs for, inter alia, partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion, reinstating the first cause of action against defendant Elizabeth S. Flower, and vacating the declaration that she has an ownership interest in the gas lease limited to the Residential Gas rights, and the cross motion insofar as it seeks a declaration is granted to the extent that:

> It is ADJUDGED and DECLARED that plaintiff BPGS Land Holdings, LLC is the sole owner of any and all rights and interests in and to the subject oil and gas lease as lessor, including the right to free gas as specified in the lease

and as modified, the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, in their first cause of action, a declaration that plaintiff BPGS Land Holdings, LLC (Holdings), the owner of real property known as the Bemus Point Golf Course Property (Golf Course Property), is the sole owner of all oil, gas, and mineral rights arising from an oil and gas lease (Lease) entered into by Marshall Gordon, the original owner of the property. Elizabeth S. Flower (defendant) moved to dismiss the first cause of action against her on the basis of documentary evidence purportedly showing that she acquired certain "free gas" rights under

the Lease through her father, Frank A. Flower, who purchased the Golf Course Property from Gordon. Plaintiffs cross-moved for, among other things, partial summary judgment on the issue of the ownership of the gas, oil, and mineral rights under the Lease. Plaintiffs now appeal from an order that granted the motion, declared that defendant had an ownership interest in the free gas rights, and granted in part and denied in part the cross motion, determining, inter alia that, aside from the free gas rights, ownership of the oil, gas, and mineral rights under the Lease resided in Holdings. We agree with plaintiffs that Supreme Court erred in concluding that defendant has an ownership interest in the free gas rights as specified in the Lease.

Pursuant to the terms of the Lease, Gordon, as lessor, was entitled to receive royalties on the sale of oil, gas, or other petroleum products taken from the premises and he was also entitled to an allowance of free gas from any well drilled on the premises. In the deed conveying the Golf Course Property to Frank Flower in 1984, Gordon assigned to Flower a share of the royalties and also "quit claim[ed]" to Flower his right to obtain the " 'free gas.' "

Flower conveyed the Golf Course Property to Bemus Point Golf Club, Inc. in 1995 and in 2006 filed a corrected deed for that conveyance "[r]eserving unto [himself] mineral, oil and/or gas rights contained in the contract for sale of real property . . . Said reservation to [Flower] to expire on December 26, 2015." The referenced contract of sale, dated October 23, 1995, reserved to Flower "the right to *all* oil, gas and other mineral rights on said premises" (emphasis added) for a period of 20 years.

In 2017, Bemus Point Golf Club, Inc. conveyed the Golf Course Property to Holdings, together "with the appurtenances and all the estate and rights of [Bemus Point Golf Club, Inc.] in and to the said premises."

Plaintiffs contend that Holdings, as the fee owner of the Golf Course Property, acquired all rights to the oil, gas, and minerals under the Lease as lessor, including the free gas rights. Defendant, however, claims that, through the quitclaim to Flower, Gordon severed the free gas rights from the other rights set forth in the Lease and that Flower did not convey his free gas rights with the Golf Course Property in 1995. Defendant thus claims an ownership interest in the free gas rights pursuant to a 2019 assignment by Flower's estate of "all interests in and to [the Lease] . . . being specifically those leasehold rights conveyed to . . . Flower in [the 1984] deed from . . . Gordon . . . including, but not limited to, free gas."

The construction of deeds generally "presents a question of law for the court to decide" (*Allen v Cross*, 64 AD2d 288, 291 [4th Dept 1978]; *see Elwell v Shumaker*, 158 AD3d 1133, 1134 [4th Dept 2018]), and deeds must be "construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law" (Real Property Law § 240 [3]). "The 'intent' to which [section 240 (3)] refers is the objective intent of the parties as manifested by the language of the deed"

(*Margetin v Jewett*, 78 AD3d 1486, 1488 [4th Dept 2010]). "[A] court will only look outside the four corners of the deed to establish the intent of the parties when . . . that instrument is found to be ambiguous" (*Pepe v Antlers of Raquette Lake, Inc.*, 87 AD3d 785, 787 [3d Dept 2011]; *see Margetin*, 78 AD3d at 1488).

In this case, pursuant to the unambiguous language of the corrected deed and the contract of sale referenced therein, Flower transferred "all" of his oil, gas, and mineral rights in the premises when he conveyed the Golf Course Property to Bemus Point Golf Club, Inc. Flower's transfer was subject only to the 20-year reservation, which expired in 2015. It is a fundamental principle of deed construction that "[w]hen words have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning" (*Uihlein v Matthews*, 172 NY 154, 159 [1902]; *see Margetin*, 78 AD3d at 1488). We conclude that, in determining that Flower intended to transfer to Bemus Point Golf Club, Inc. only his right to receive royalties while retaining his right to receive free gas, the court improperly restricted the meaning of the plain language of the corrected deed, particularly the word "all."

Based on the foregoing, when Flower's reservation period ended in 2015, Bemus Point Golf Club, Inc. obtained all of his rights to the oil, gas, and minerals on the Golf Course Property, including the free gas rights. When the Golf Course Property was subsequently conveyed to Holdings in 2017, Holdings obtained those rights (*see* Real Property Law § 255; *Patouillet v State of New York*, 39 AD2d 1012, 1012-1013 [4th Dept 1972]; *see also 54-48 Catalpa Realty Corp. v S & S Med. Assoc., P.C.*, 185 AD3d 877, 878 [2d Dept 2020]). Conversely, because Flower no longer possessed the right to free gas once the reservation expired in 2015, his estate's purported transfer of that right to defendant in 2019 was ineffective (*see generally Durham Commercial Capital Corp. v Wadsworth Golf Constr. Co. of the Midwest, Inc.*, 160 AD3d 1442, 1444 [4th Dept 2018], *lv denied* 32 NY3d 907 [2018]). The court thus erred in granting the motion and declaring that defendant had an ownership interest in the free gas rights under the Lease, and it erred in determining on the cross motion that Holdings' ownership of the oil, gas, and mineral rights under the Lease did not include the free gas rights. We therefore modify the order accordingly.

In light of our determination, we need not address plaintiffs' remaining contentions.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

628

KA 18-00172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT K. SMITH, JR., DEFENDANT-APPELLANT.

CONNIE M. LOZINSKY, NIAGARA FALLS, 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 (Matthew J. Murphy, III, J.), rendered September 15, 2017. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that, based on his alleged mental illness, his guilty plea was not voluntarily, knowingly and intelligently entered (*see People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]; *People v Carpenter*, 13 AD3d 1193, 1194 [4th Dept 2004], *lv denied* 4 NY3d 797 [2005]). This case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *Carpenter*, 13 AD3d at 1194). The plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[ ] into question the voluntariness of the plea," and County Court therefore had no duty to conduct further inquiry with respect to the plea (*Lopez*, 71 NY2d at 666).

Insofar as defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to investigate his history of mental illness and potential defenses, that contention involves matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440 (*see People v Dizak*, 93 AD3d 1182, 1185 [4th Dept 2012], *lv denied* 19 NY3d 972 [2012], *reconsideration denied* 20 NY3d 932 [2012]). To the extent that defendant contends defense counsel was ineffective for failing to

request a competency hearing and to present evidence of defendant's mental health condition, that contention survives the guilty plea " 'only to the extent that defendant contends that his plea was infected by the alleged ineffective assistance' " (*People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]; *see People v Wilcox*, 45 AD3d 1320, 1320 [4th Dept 2007], *lv denied* 10 NY3d 772 [2008]), and we conclude that defendant was afforded meaningful representation. Defendant received an advantageous plea offer, and nothing in the record from defendant's plea proceeding casts doubt on the apparent effectiveness of defense counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant further contends that the court erred in failing to sua sponte order a competency hearing. Although that contention survives the guilty plea to the extent that it implicates the voluntariness of defendant's plea (*see People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]), we reject that contention. A defendant is "presumed competent and is not entitled, as a matter of law, to a competency hearing unless the court has reasonable grounds to believe that, because of mental disease or defect, the defendant is incapable of understanding the proceedings against him or her" (*People v Gunn*, 35 AD3d 1243, 1244 [4th Dept 2006], *lv denied* 8 NY3d 923 [2007], *reconsideration denied* 8 NY3d 985 [2007] [internal quotation marks omitted]; *see People v Jackson*, 163 AD3d 1360, 1361 [3d Dept 2018]). Here, the record reflects that defendant understood the proceedings and responded appropriately and coherently to all inquiries of the court. Prior to entering the plea, defendant assured the court that he had a clear mind and was able to make an important decision, and defendant made no statements that called into question the voluntariness of the plea or alerted the court "of the need to inquire as to his competency or to hold a competency hearing" (*People v Hilts*, 157 AD3d 1123, 1124 [3d Dept 2018] [internal quotation marks omitted]).

Finally, we note that the "certificate of disposition" lacks clarity and requires amendment (*see generally People v Cutaia*, 167 AD3d 1534, 1536 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]). First, the certificate contains four "charge[s]" rather than explicitly listing each of the five counts contained within the indictment. Thus, it is not clear from the face of the certificate that defendant was charged with two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Second, it is not clear from the face of the certificate that counts two and four of the indictment-the two counts of criminal possession of a weapon in the second degree-were amended to the reduced charges of attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). Finally, it is not clear from the face of the certificate that defendant pleaded guilty to both counts of attempted criminal possession of a weapon in the second degree, nor is it clear from the face of the certificate that defendant was sentenced to two determinate concurrent terms of imprisonment. Thus, the certificate must be amended to clearly indicate that: (1) defendant was charged with two counts of criminal possession of a weapon in the second degree under counts two and four of the indictment; (2) counts two and

four were reduced to attempted criminal possession of a weapon in the second degree; and (3) defendant pleaded guilty to both counts of attempted criminal possession of a weapon in the second degree and was sentenced to two determinate terms of seven years' imprisonment on those counts, to run concurrently.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

647
KA 18-01272
PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R. WATKINS, II, DEFENDANT-APPELLANT.

STEVEN A. FELDMAN, UNIONDALE, FOR DEFENDANT-APPELLANT.

JOSEPH R. WATKINS, II, DEFENDANT-APPELLANT PRO SE.

Appeal from a judgment of the Steuben County Court (William F. Kocher, A.J.), rendered December 15, 2017. The appeal was held by this Court by order entered January 31, 2020, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (179 AD3d 1467 [4th Dept 2020]). The proceedings were held and completed (Chauncey J. Watches, J.).

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 [1]), criminal sexual act in the first degree (§ 130.50 [1]), and incest in the third degree (§ 255.25). We previously held the case, reserved decision, and remitted the matter to County Court for a ruling on that part of defendant's omnibus motion seeking to suppress an intercepted telephone call pursuant to CPL 700.70 (*People v Watkins*, 179 AD3d 1467, 1467-1468 [4th Dept 2020]). Upon remittal, the court (Watches, J.) denied that part of defendant's motion. We affirm.

In this case, the victim made a controlled telephone call that was recorded by the police. Defendant contends in his pro se supplemental brief that the recording of the controlled call must be suppressed because the People allegedly failed to comply with CPL 700.70. We reject that contention. The statute, in pertinent part, requires the People, within 15 days after arraignment, to "furnish the defendant with a copy of the eavesdropping warrant, and accompanying application" in order to introduce the "contents of any intercepted communication" into evidence at a criminal trial (*id.*). Because the victim was a party to the recorded conversation and consented to the recording, the recording was not an "intercepted communication" within the meaning of CPL 700.70 (CPL 700.05 [3]; *see People v Goldfeld*, 60 AD2d 1, 9 [4th Dept 1977], *lv denied* 43 NY2d 928 [1978]). Thus, no

eavesdropping warrant was required, and the disclosure requirement set forth in CPL 700.70 does not apply here (*see People v Ross*, 118 AD3d 1321, 1323 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014], *reconsideration denied* 24 NY3d 1122 [2015]; *Goldfeld*, 60 AD2d at 9).

In his main brief, defendant contends that he was deprived of his constitutional right to present a defense. By failing to raise that contention in the trial court, defendant failed to preserve it for our review (*see People v Brown*, 4 AD3d 886, 889 [4th Dept 2004], *lv denied* 3 NY3d 637 [2004]; *People v Triplett*, 305 AD2d 230, 231 [1st Dept 2003]). Also unpreserved are defendant's contentions in his main brief that certain text messages admitted in evidence at trial improperly bolstered the testimony of the victim (*see People v Pendarvis*, 143 AD3d 1275, 1276 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *People v Brown*, 140 AD3d 1740, 1741 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]) and that, in sentencing him, the court (Kocher, A.J.) penalized him for exercising his right to a jury trial (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Trinidad*, 107 AD3d 1432, 1432 [4th Dept 2013], *lv denied* 21 NY3d 1046 [2013]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's contention in his main brief, we conclude that the sentence is neither unduly harsh nor severe. Finally, we have reviewed the remaining contentions in defendant's main and pro se supplemental briefs, and we conclude that none warrants reversal or modification of the judgment.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

666
KA 17-00689
PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON D. HOLLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (J. Scott Odorisi, J.), rendered November 14, 2016. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of three counts of falsifying business records in the first degree (Penal Law § 175.10) but acquitting him of three concomitant counts of insurance fraud in the fifth degree (§ 176.10). Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*).

Defendant further contends that the split verdict is repugnant. Even assuming, arguendo, that defendant preserved that contention for our review by objecting to the verdict "before the jury was excused" (*People v Hunter*, 46 AD3d 1417, 1418 [4th Dept 2007], *lv denied* 10 NY3d 812 [2008]), we find no repugnancy in the verdict. A conviction will be reversed as repugnant "only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict

was rendered" (*People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]). "The determination as to the repugnancy of the verdict is made solely on the basis of the trial court's charge and not on the correctness of those instructions" (*People v Hampton*, 61 NY2d 963, 964 [1984]). Moreover, we cannot consider "the particular facts of the case" (*People v Johnson*, 70 NY2d 819, 820 [1987]; *see People v Muhammad*, 17 NY3d 532, 539 [2011]).

Here, the jury's not guilty verdict on the counts of insurance fraud did not necessarily negate an essential element of the falsifying business records in the first degree counts. "A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof" (Penal Law § 175.10). Although the jury acquitted defendant of insurance fraud, which is the crime the People alleged that defendant intended to commit or conceal by falsifying business records, the jury could "convict defendant of falsifying business records if the jury concluded that defendant had intended to commit or conceal another crime, even if he was not convicted of the other crime" (*People v McCumskey*, 12 AD3d 1145, 1146 [4th Dept 2004]; *see People v Crane*, 87 AD3d 1386, 1386 [4th Dept 2011], *lv denied* 17 NY3d 952 [2011]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

671
KA 18-00919
PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE LABELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered August 22, 2017. The judgment convicted defendant upon a nonjury verdict of sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that the sexual abuse count of the indictment was rendered duplicitous by the victim's trial testimony. Defendant failed to preserve that contention for our review (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Martin*, 175 AD3d 1798, 1799 [4th Dept 2019], *lv denied* 34 NY3d 1017 [2019]). In any event, County Court identified the potentially duplicitous nature of the victim's testimony, and when rendering its verdict the court stated that it disregarded the testimony about the uncharged sexual abuse. There is thus no danger that defendant was convicted of an unindicted crime.

Defendant further contends that the evidence is legally insufficient to establish that he subjected the victim to sexual contact because the People presented no eyewitness testimony of the sexual contact other than that of the victim. That contention is unpreserved for our review inasmuch as "it was not specifically raised in support of defendant's motion for a trial order of dismissal" (*People v Beard*, 100 AD3d 1508, 1509 [4th Dept 2012]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). Regardless, there is no requirement that the testimony of a sexual assault victim be corroborated by eyewitness testimony. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620,

621 [1983]), as we must, we conclude that there is a valid line of reasoning and permissible inferences from which the court could have found the elements of the crimes proved beyond a reasonable doubt (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

With respect to defendant's challenge to the weight of the evidence, this case turned largely on the credibility of the victim and defendant, who also testified at trial. The court stated that it found the victim "credible and worthy of belief," and that defendant had "apparent selective memory" and offered "inconsistent testimony." "[T]hose who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" and we perceive no basis in the record for us to substitute our credibility determinations for those of the court (*People v Imes*, 107 AD3d 1577, 1578 [4th Dept 2013]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

685

CA 20-01553

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

IN THE MATTER OF ARBITRATION BETWEEN
ALLSTATE INSURANCE COMPANY,
PETITIONER-APPELLANT,

AND   MEMORANDUM AND ORDER

JAMES M. TWOMEY, RESPONDENT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR PETITIONER-APPELLANT.

FINN LAW OFFICES, ALBANY (RYAN M. FINN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered September 22, 2020. The order denied the petition seeking, inter alia, to stay arbitration.

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

Memorandum: In this proceeding seeking to stay arbitration related to supplementary uninsured/underinsured motorist (SUM) coverage and to compel discovery in aid of arbitration pursuant to CPLR 3102 (c), Supreme Court did not err in denying the petition. The record here establishes that "petitioner . . . had ample time . . . within which to seek discovery of the respondent insured as provided for in the insurance policy, and unjustifiably failed to utilize that opportunity" to obtain the discovery now sought (*Matter of Connecticut Indem. Ins. Co. [Laperla]*, 21 AD3d 1262, 1262-1263 [4th Dept 2005]; *see Matter of Allstate Ins. Co. v Urena*, 208 AD2d 623, 623 [2d Dept 1994]; *cf. Matter of Liberty Mut. Ins. Co. v Almeida*, 266 AD2d 547, 547-548 [2d Dept 1999]). Petitioner further failed to establish the extraordinary circumstances necessary to warrant court-ordered disclosure in aid of arbitration under CPLR 3102 (c) (*see AXA Equit. Life Ins. Co. v Kalina*, 101 AD3d 1655, 1656 [4th Dept 2012]; *Matter of Progressive Specialty Ins. Co. v Alexis*, 90 AD3d 933, 933-934 [2d Dept 2011]; *see generally De Sapio v Kohlmeyer*, 35 NY2d 402, 406 [1974]) and made no showing that the discovery that it is allowed in arbitration would be inadequate for it to establish its case (*see AXA Equit. Life Ins. Co.*, 101 AD3d at 1656; *Matter of Travelers Indem. Co. v United Diagnostic Imaging, P.C.*, 73 AD3d 791, 792 [2d Dept 2010]; *International Components Corp. v Klaiber*, 54 AD2d 550, 551 [1st Dept 1976]).

To the extent that petitioner argues that respondent's demand for arbitration was premature inasmuch as respondent had not complied with the terms of the endorsement for SUM coverage, that argument is not properly before us because petitioner failed to raise it before the court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, that contention lacks merit inasmuch as petitioner failed to demonstrate that respondent had failed to comply with the terms of the endorsement (*cf. Matter of USAA Ins. Co. [Armstrong]*, 124 AD3d 1383, 1384 [4th Dept 2015], *lv dismissed* 27 NY3d 1048 [2016]). The court therefore properly denied the petition.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

693
KA 13-01131
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY DAVIS, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, MANLIUS, 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 (Anthony F. Aloi, J.), rendered July 18, 2012. The judgment convicted defendant upon a jury verdict of murder in the second degree, endangering the welfare of a child, criminal possession of a weapon in the second degree and attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]). Contrary to defendant’s contention, his conviction on the murder and attempted murder counts is supported by legally sufficient evidence (*see People v Rouse*, 34 NY3d 269, 274-275 [2019]; *People v Alligood*, 192 AD3d 1508, 1508-1509 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *cf.* CPL 300.40). 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 generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant’s contentions, County Court properly refused to suppress identification testimony by the teenage eyewitnesses (*see People v Marte*, 12 NY3d 583, 586-589 [2009], *cert denied* 559 US 941 [2010]; *see also People v Jackson*, 90 AD3d 519, 519 [1st Dept 2011], *lv denied* 19 NY3d 997 [2012]; *People v Elliot*, 283 AD2d 183, 183-184 [1st Dept 2001], *lv denied* 96 NY2d 901 [2001]). Moreover, given the absence of any “substantial issues as to the constitutionality of the [subject identification procedures],” the court properly denied defendant’s request to call those teenagers to testify at the suppression hearing (*People v Chipp*, 75 NY2d 327, 338 [1990], *cert denied* 498 US 833 [1990]). Indeed, defendant sought to

call those teenagers at the suppression hearing only to demonstrate suggestiveness arising from the actions of private citizens, which is not a cognizable basis for suppressing identification testimony on due process grounds (*see Marte*, 12 NY3d at 586-589).

Contrary to defendant's further contentions, the court's *Sandoval* ruling was not an abuse of discretion (*see People v Cotton*, 184 AD3d 1145, 1146-1147 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]), and the imposition of consecutive terms of imprisonment on the murder and attempted murder counts was not illegal (*see People v McKnight*, 16 NY3d 43, 47-50 [2010]; *People v Smith*, 171 AD3d 1102, 1105-1106 [2d Dept 2019], *lv denied* 33 NY3d 1073 [2019]). Defendant's remaining contentions do not warrant reversal or modification of the judgment.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

700
CAF 19-02127
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF ANNASTASIA P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KIRSTIN P., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JONATHAN CHOI OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 1, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding and disposition that, inter alia, adjudged that she neglected the subject child. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that she neglected the child (*see* § 1046 [b] [i]). Here, petitioner established that the mother admitted to using cocaine during her pregnancy with the child, that the mother's hospital records indicated that she tested positive for cocaine during her pregnancy and had a history of polysubstance abuse, that the mother tested positive for cocaine less than three months after the child's birth, and that she refused to provide a urine sample on four other occasions (*see* § 1046 [a] [iii]; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1677-1678 [4th Dept 2021]; *Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 29 NY3d 905 [2017]; *Matter of Benicio H. [Charlene H.]*, 115 AD3d 857, 858 [2d Dept 2014]).

Insofar as the mother further contends that her participation in a drug treatment program is sufficient to bring this matter within the statutory exception for parents who are "voluntarily and regularly participating in a recognized rehabilitative program" (Family Ct Act § 1046 [a] [iii]), we reject that contention. There is no evidence

that the mother's participation in the treatment program is voluntary (*see Matter of Hailey W.*, 42 AD3d 943, 944 [4th Dept 2007], *lv denied* 9 NY3d 812 [2007]; *Matter of Amber DD.*, 26 AD3d 689, 690 [3d Dept 2006]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

745

KA 17-01377

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS B. NEWSOME, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 1, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant contends that his guilty plea was not knowing, voluntary, and intelligent. Defendant, however, failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]). This case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review the issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that County Court erred in failing to order a competency hearing sua sponte. Although that contention need not be preserved for our review (*see People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Henderson*, 162 AD3d 1507, 1508 [4th Dept 2018], *lv denied* 32 NY3d 1004 [2018]), we nevertheless reject it. We conclude that there is "no indication in the record that defendant was unable to understand the proceedings. . . . Rather, the record establishes that the court conducted a thorough plea colloquy and that [d]efendant's answers were

in all respects appropriate, showing no indication of mental impairment requiring a competency hearing” (*People v Roosevelt*, 43 AD3d 1300, 1301 [4th Dept 2007], *lv denied* 9 NY3d 1038 [2008] [internal quotation marks omitted]; *see People v Shannon*, 189 AD3d 2165, 2166 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Wilcox*, 45 AD3d 1320, 1320 [4th Dept 2007], *lv denied* 10 NY3d 772 [2008]). Although defendant advised the court of his mental health issues, it is well established that “a history of psychiatric illness does not in itself call into question defendant’s competence to proceed” (*Henderson*, 162 AD3d at 1508 [internal quotation marks omitted]; *see People v Carpenter*, 13 AD3d 1193, 1194 [4th Dept 2004], *lv denied* 4 NY3d 797 [2005]).

To the extent that defendant’s further contention that he was denied effective assistance of counsel survives his guilty plea (*see People v Barnes*, 32 AD3d 1250, 1251 [4th Dept 2006]), we reject that contention. On the record before us, we conclude that defendant “received an advantageous plea, and ‘nothing in the record casts doubt on the apparent effectiveness of’ ” the attorneys who represented him (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]).

Finally, we note that defendant was sentenced to the minimum term of incarceration authorized by law. Thus, contrary to defendant’s contention, “that part of his . . . sentence cannot be considered unduly harsh or severe” (*People v Griffith*, 181 AD3d 1170, 1172 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020] [internal quotation marks omitted]; *see People v Leggett*, 101 AD3d 1694, 1695 [4th Dept 2012], *lv denied* 20 NY3d 1101 [2013]). Also, the period of postrelease supervision imposed by the court is not unduly harsh or severe.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

749
KA 15-01933
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. BELL, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered September 15, 2015. 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 refusing to preclude identification testimony from an eyewitness to the crime. At a hearing, the People established that the witness had known defendant for at least nine months prior to the incident, and thus they established that the identification procedure was " 'merely confirmatory' " (*People v Rodriguez*, 79 NY2d 445, 452 [1992]; *see People v Carter*, 107 AD3d 1570, 1572 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]). We decline to disturb the court's credibility determinations with respect to the testimony at the hearing (*see generally People v Donaldson*, 35 AD3d 1242, 1243 [4th Dept 2006], *lv denied* 8 NY3d 984 [2007]; *People v Jordan*, 242 AD2d 254, 255 [1st Dept 1997], *lv denied* 91 NY2d 875 [1997]).

The court did not abuse its discretion in denying defendant's request for a missing witness charge. Defendant failed to establish that the witness at issue could "be expected to testify favorably to the [People]" (*People v Gonzalez*, 68 NY2d 424, 427 [1986]), inasmuch as the witness initially gave a statement to the police that was favorable to the People, i.e., identifying defendant as the perpetrator, but the witness later gave a statement to a defense investigator that he could not identify defendant as the perpetrator (*see generally People v Vigliotti*, 270 AD2d 904, 905 [4th Dept 2000], *lv denied* 95 NY2d 839 [2000], *reconsideration denied* 95 NY2d 970

[2000]; *People v Congilaro*, 159 AD2d 964, 965 [4th Dept 1990]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see generally 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]).

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

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

770

KAH 20-01142

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GERMAINE BROWN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK DEPARTMENT OF CORRECTIONS,
RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Orleans County (Sanford A. Church, A.J.), entered August 19, 2020 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner is currently serving a sentence of imprisonment at Orleans Correctional Facility (OCF). In June 2020, he filed a petition for a writ of habeas corpus seeking his immediate release on the ground that his underlying health conditions placed him at increased risk if infected with the novel coronavirus responsible for causing COVID-19. Petitioner alleged that, as a result of the COVID-19 pandemic, the conditions at OCF and the risks presented by his confinement constitute cruel and unusual punishment in violation of the United States and New York Constitutions (*see* US Const, 8th Amend; NY Const, art I, § 5). Petitioner appeals from a judgment dismissing his petition. We affirm.

Even assuming, arguendo, that petitioner, having received the benefit of assigned counsel, was therefore entitled to the protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings, we reject petitioner’s contention that he was denied effective assistance of counsel. Viewing the record as a whole, we conclude that counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Petitioner further contends that Supreme Court erred in dismissing the petition and that the matter should be remitted for

further development of the record. We reject that contention. Petitioner failed to satisfy his burden to demonstrate that his detention at OCF was illegal (*see* CPLR 7010 [a]; *People ex rel. Figueroa v Keyser*, 193 AD3d 1148, 1149-1150 [3d Dept 2021]; *People ex rel. Carroll v Keyser*, 184 AD3d 189, 194-196 [3d Dept 2020]). Thus, the court properly dismissed the petition.

Entered: October 8, 2021 Ann Dillon Flynn
Clerk of the Court

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

771
CAF 19-00180
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF SHERI L. MAUNG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE L. FARRELL, RESPONDENT-APPELLANT,
AND GARY A. LABRECK, JR., RESPONDENT-RESPONDENT.

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

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

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Diana D. Trahan, R.), entered October 10, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the subject child’s primary residence shall be with petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, modified a prior stipulated order of custody by awarding primary physical residence of the subject child to the child’s maternal grandmother (petitioner). Contrary to the mother’s contention, the finding of extraordinary circumstances is supported by evidence in the record that, inter alia, the mother continued to reside and maintain a relationship with her boyfriend, who perpetrated instances of domestic violence against her in the presence of the child (*see Matter of Sofia S.S. [Goldie M.—Elizabeth C.]*, 145 AD3d 787, 789 [2d Dept 2016]; *Matter of Lori MM. v Amanda NN.*, 75 AD3d 774, 775-776 [3d Dept 2010]; *see generally Matter of McNeil v Deering*, 120 AD3d 1581, 1582 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014]).

The mother does not contest Family Court’s determination with respect to a change in circumstances (*see generally Matter of Driscoll v Mack*, 183 AD3d 1229, 1230 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]). Contrary to the mother’s further contention, we conclude that a sound and substantial basis in the record supports the determination that an award of primary physical residence to petitioner is in the child’s best interests (*see Matter of Greeley v Tucker*, 150 AD3d 1646, 1647 [4th Dept 2017]).

We have considered the mother's remaining contention and conclude that it lacks merit.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

788

KA 20-01371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUSTIN PELLETIER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Michael L. Dollinger, J.), entered September 25, 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.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court engaged in impermissible double counting by assessing points against him under risk factors 12, 13 and 14 based on the same underlying conduct. We reject that contention. Defendant was properly assessed points under risk factor 12 because he refused to participate in sex offender treatment due to his unwillingness to abide by Internet restrictions, and he was properly assessed points under risk factor 13 because he violated the terms and conditions of his probation. The violations in question concerned not only defendant's refusal to continue with treatment, but also his impermissible use of the Internet for sexually related purposes.

With respect to risk factor 14, there is no dispute that defendant was released from jail in Oklahoma without any supervision, and that he had no supervision when he moved to New York. Although defendant's release from jail without supervision was the result of his being terminated from probation, the assessment of points under both risk factor 13 and risk factor 14, based on his unsatisfactory conduct while supervised and his release without supervision, respectively, does not constitute improper double counting (*see People v Cruz*, 139 AD3d 601, 602 [1st Dept 2016]; *see also People v Corn*, 128 AD3d 436, 436-437 [1st Dept 2015]).

In the alternative, defendant contends that the court should have granted his request for a downward departure to risk level one. Although we agree with defendant that he met his burden of establishing the existence of appropriate mitigating factors by a preponderance of the evidence (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we conclude that the court did not abuse its discretion in denying his request for a downward departure (*see People v Wooten*, 136 AD3d 1305, 1306 [4th Dept 2016]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

792

KA 15-00236

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN OSBORN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN OSBORN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 8, 2014. The judgment convicted defendant upon his plea of guilty of grand larceny in the second degree (two counts) and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for a hearing to determine the amount of restitution.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of, inter alia, two counts of grand larceny in the second degree (Penal Law § 155.40 [1]), defendant contends in his main brief, and the People correctly concede, that his waiver of the right to appeal is invalid. "[T]here is no basis [in the record] upon which to conclude that [County C]ourt ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]). In addition, the court mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]).

Defendant contends in his main and pro se supplemental briefs that his plea was not knowingly, voluntarily, and intelligently entered, and that the court erred in summarily denying his motion to

withdraw the plea. We reject those contentions. Defendant's contention that he was coerced into pleading guilty is "unsupported by the record and belied by his statements during the plea colloquy" (*People v Gerena*, 174 AD3d 1428, 1430 [4th Dept 2019], *lv denied* 34 NY3d 981 [2019]; *see People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]). Moreover, in considering a motion to withdraw a guilty plea, a hearing is required only in rare instances (*see People v Brown*, 14 NY3d 113, 116 [2010]; *People v Tinsley*, 35 NY2d 926, 927 [1974]). Defendant was afforded a reasonable opportunity to present his contentions such that the court was able to make an informed determination (*see Tinsley*, 35 NY2d at 927; *People v Zimmerman*, 100 AD3d 1360, 1362 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]).

Defendant further contends in his main and pro se supplemental briefs that the court erred in denying his request for a hearing on the amount of restitution. We agree. Penal Law § 60.27 (2) provides in relevant part that, when a court requires restitution to be made, "[i]f the record does not contain sufficient evidence to support such finding *or upon request by the defendant*, the court must conduct a hearing" (emphasis added). Here, contrary to the assertion of the People, defendant made a timely request for a restitution hearing inasmuch as he requested a hearing before the court made its determination on restitution. The court never ordered a specific amount of restitution at sentencing, and the People did not prepare the order of restitution setting forth the amount requested until the following week. Defendant raised issues with the amount and requested a hearing. Upon defendant's request, the court was required to conduct a hearing "irrespective of the level of evidence in the record" to support the amount of restitution (*People v Consalvo*, 89 NY2d 140, 146 [1996]; *see People v Ippolito*, 89 AD3d 1369, 1370 [4th Dept 2011], *affd* 20 NY3d 615 [2013]; *People v Case*, 160 AD3d 1448, 1451 [4th Dept 2018], *lv denied* 31 NY3d 1146 [2018]; *People v Gazivoda*, 68 AD3d 1346, 1347 [3d Dept 2009], *lv denied* 14 NY3d 840 [2010]). We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution. In light of our determination, defendant's remaining contention in his main brief with respect to restitution is moot.

We reject defendant's contention in his main and pro se supplemental briefs that the sentence is unduly harsh and severe. We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

Entered: October 8, 2021 Ann Dillon Flynn
Clerk of the Court

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

793

KA 17-00005

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

JOHN OSBORN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN OSBORN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 22, 2015. The judgment convicted defendant upon his plea of guilty of grand larceny in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for a hearing to determine the amount of restitution.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]), we agree with defendant's contention in his main and pro se supplemental briefs that County Court erred in denying his request for a hearing on the amount of restitution. Penal Law § 60.27 (2) provides in relevant part that, when a court requires restitution to be made, "[i]f the record does not contain sufficient evidence to support such finding *or upon request by the defendant*, the court must conduct a hearing" (emphasis added). Upon defendant's request, the court was required to conduct a hearing "irrespective of the level of evidence in the record" to support the amount of restitution (*People v Consalvo*, 89 NY2d 140, 146 [1996]; *see People v Ippolito*, 89 AD3d 1369, 1370 [4th Dept 2011], *affd* 20 NY3d 615 [2013]; *People v Case*, 160 AD3d 1448, 1451 [4th Dept 2018], *lv denied* 31 NY3d 1146 [2018]; *People v Gazivoda*, 68 AD3d 1346, 1347 [3d Dept 2009], *lv denied* 14 NY3d 840 [2009]). We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution.

We reject defendant's further contention in his main and pro se supplemental briefs that the sentence is unduly harsh and severe. We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

794

KA 17-00006

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN OSBORN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

JOHN OSBORN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 22, 2015. The judgment convicted defendant upon his plea of guilty of criminal tax fraud in the third degree and criminal tax fraud in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal tax fraud in the third degree (Tax Law § 1804) and two counts of criminal tax fraud in the fourth degree (§ 1803). Contrary to defendant’s contention in his main and pro se supplemental briefs, the sentence is not unduly harsh or severe. We have considered the remaining contentions in defendant’s pro se supplemental brief and conclude that none warrants reversal or modification of the judgment. We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of criminal tax fraud in the fourth degree under Tax Law § 1804, and it therefore must be amended to reflect that he was convicted of those counts under Tax Law § 1803 (*see People v Martinez*, 37 AD3d 1099, 1100 [4th Dept 2007], *lv denied* 8 NY3d 947 [2007]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

795

KA 19-00166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES THIGPEN-WILLIAMS, ALSO KNOWN AS CHARLES GUS THIGPEN WILLIAMS, ALSO KNOWN AS “GUS,” ALSO KNOWN AS “GUSTO,” DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON KEHL-WIERZBOWSKI 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 November 19, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Genesee County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]), defendant contends that his plea was rendered involuntary due to statements made by County Court during the plea colloquy indicating that the court would impose the maximum sentence and direct that it run consecutively to a previously imposed sentence if he were convicted at trial. Although defendant’s contention that his plea was coerced and thus was not voluntary survives even a valid waiver of the right to appeal (*see People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]), he failed to preserve it for our review by way of a motion to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]; *People v Hall*, 82 AD3d 1619, 1619 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]). We nevertheless exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Flinn*, 60 AD3d 1304, 1305 [4th Dept 2009]).

With respect to the merits, it is well settled that a defendant

"may not be induced to plead guilty by the threat of a heavier sentence" if he or she decides to proceed to trial (*People v Juarbe*, 162 AD3d 1625, 1626 [4th Dept 2018] [internal quotation marks omitted]; *see People v Williams*, 144 AD3d 1529, 1529 [4th Dept 2016]). Here, as the People correctly concede, the court's comments about sentencing were not merely a description of the range of the potential sentences; instead, they conveyed to defendant the court's intent to impose the maximum punishment at sentencing if he proceeded to trial and lost. That constitutes coercion, rendering the plea involuntary (*see Williams*, 144 AD3d at 1529). We therefore reverse the judgment, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

800

CAF 19-02353

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

IN THE MATTER OF CHRISTINA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEFFERY S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

PETER VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 18, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, granted petitioner's motion to revoke a suspended judgment and freed the subject child for adoption.

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

Memorandum: Respondent father appeals from an order that, inter alia, granted petitioner's motion to revoke a suspended judgment that had been entered upon the father's admission to permanently neglecting the subject child and freed the child for adoption. We affirm.

The father contends that petitioner failed to establish that he violated any of the terms and conditions of the suspended judgment. We reject that contention. Even assuming, arguendo, that petitioner failed to establish a violation of the condition requiring the father to obtain and maintain adequate housing, we conclude that petitioner established, by the requisite preponderance of the evidence (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1618 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]), that the father failed to comply with the visitation requirements of the suspended judgment. In particular, petitioner established that the father failed to meet the condition in the suspended judgment requiring that he "graduate to unsupervised overnight access." Although the father places the blame for his failure on lapses by petitioner in its supervisory obligations and its failure to consult with an expert, "[e]ven lapses by an agency during a suspended judgment do not relieve a parent of his or her duty to comply with the terms of the suspended judgment" (*Matter of Christian*

Anthony Y.T. [Donna Marie T.], 78 AD3d 410, 411 [1st Dept 2010]; *see Matter of Jessica J.*, 44 AD3d 1132, 1133 [3d Dept 2007]).

The father's further contention regarding petitioner's purported failure to establish that it exercised diligent efforts to encourage and strengthen his parental relationship with the child lacks merit. Here, in moving to revoke the suspended judgment, petitioner alleged that the father violated various terms and conditions of the suspended judgment "despite diligent efforts of the caseworker to encourage and assist [the father] in fulfilling the terms and conditions" of the suspended judgment. Although petitioner correctly notes that an agency generally does not need to establish diligent efforts when a court is determining whether to revoke a suspended judgment (*see Matter of Chanteau M.R.W. [Pamela R.B.]*, 101 AD3d 1129, 1129 [2d Dept 2012]; *Matter of Ronald O.*, 43 AD3d 1351, 1351 [4th Dept 2007]; *see also Matter of Seandell L.*, 57 AD3d 1511, 1511 [4th Dept 2008], *lv denied* 12 NY3d 708 [2009]), and nothing in the suspended judgment imposed such an obligation on petitioner, the father nevertheless contends that the aforementioned allegation created an obligation on the part of petitioner to establish the alleged diligent efforts. We reject that contention inasmuch as any lapses on the part of petitioner do not excuse the father's failure to comply with the terms and conditions of the suspended judgment (*see Christian Anthony Y.T.*, 78 AD3d at 411; *Jessica J.*, 44 AD3d at 1133).

Contrary to the father's final contention, there is "a sound and substantial basis in the record to support the determination that revocation of the suspended judgment and termination of [the father's] parental rights was in the [subject child's] best interests" (*Matter of Max HH. [Kara FF.]*, 170 AD3d 1456, 1459 [3d Dept 2019]; *see generally Jenna D.*, 165 AD3d at 1619).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

801
CAF 20-00228
PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF CHRISTINA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JEFFERY S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

PETER VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 27, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent’s parental rights with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

812

KA 20-01459

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered September 4, 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.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court erred in assessing 20 points against him under risk factor 3 for having two victims. " '[I]t is well settled that, in determining the number of victims for SORA purposes, the hearing court is not limited to the crime of which defendant was convicted' " (*People v Robertson*, 101 AD3d 1671, 1671 [4th Dept 2012]; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 [2006]; *People v Gardiner*, 92 AD3d 1228, 1229 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]). Here, defendant pleaded guilty to one count of criminal sexual act in the second degree (Penal Law § 130.45 [1]), a disposition that, among other things, "satisf[ied] uncharged crimes" related to defendant's possession of child pornography discovered during the investigation into the incident underlying the count to which he pleaded guilty. Defendant does not dispute that the children depicted in that pornography are "victims" as contemplated by factor 3 (*see People v Gillotti*, 23 NY3d 841, 855 [2014]), and defendant's own submissions included a letter from defendant's former psychologist who stated that defendant acknowledged that he possessed child pornography on his computer, which was consistent with the allegations in the case summary. Under these circumstances, we conclude that the court properly considered the children depicted in the pornography as victims when assessing

points under risk factor 3 and that its assessment of points was supported by clear and convincing evidence based on, inter alia, defendant's statement to his psychologist and the case summary (*see Robertson*, 101 AD3d at 1671-1672; *Gardiner*, 92 AD3d at 1229; *see also People v Christie*, 94 AD3d 1263, 1263 [3d Dept 2012], *lv denied* 19 NY3d 808 [2012]).

The court also properly denied defendant's request for a downward departure. Although it is not clear whether the court applied the correct standard when considering defendant's request, we need not remit the matter because the record is sufficient to review defendant's request for a downward departure under the correct standard (*see People v Kowal*, 175 AD3d 1057, 1059 [4th Dept 2019]). Applying the correct standard (*see Gillotti*, 23 NY3d at 860-861), even assuming, arguendo, that defendant satisfied his burden at the first and second steps of the downward departure analysis, at the third step of that analysis we have " 'weigh[ed] the aggravating and mitigating factors [and] determin[ed that] the totality of the circumstances' " do not warrant a downward departure to level one (*Kowal*, 175 AD3d at 1059).

Entered: October 8, 2021 Ann Dillon Flynn
Clerk of the Court

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

835
KA 19-00076
PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AKEEM BROWN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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 December 3, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]), defendant contends that County Court erred in refusing to suppress physical evidence obtained from the vehicle he was driving because officers performed what defendant contends was an invalid inventory search (*see generally People v Gomez*, 13 NY3d 6, 10 [2009]). We reject that contention.

The testimony at the suppression hearing established that, after the officers performed a traffic stop of the vehicle, the validity of which defendant does not contest, defendant informed the officers that he did not have a driver's license and that he did not own the vehicle. At that point, one of the officers asked defendant to exit the vehicle. As defendant exited, that officer, who was standing outside the vehicle, observed what he identified as a bag containing cocaine and crack cocaine in plain view in the area between the driver's seat and the door. The officer testified that, although he originally intended to perform an inventory search of the vehicle once defendant exited, he had not yet initiated an inventory search when he observed the cocaine. Based on that observation, the officer conducted a search of the vehicle and recovered additional physical evidence from inside.

Contrary to defendant's contention, the court properly determined that no inventory search took place and that the evidence was instead lawfully seized based on what the officer observed in plain view and pursuant to the automobile exception to the search warrant requirement. The officers were permitted to ask defendant to exit the vehicle both as part of the traffic stop (*see People v Garcia*, 20 NY3d 317, 321 [2012]; *People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]) and because they had probable cause to arrest defendant based on his failure to produce a valid driver's license (*see People v Holt*, 192 AD3d 1680, 1681 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *see also People v Clark*, 227 AD2d 983, 984 [4th Dept 1996]). When defendant exited the vehicle, the officer observed the cocaine in plain view, providing him with both a lawful basis to seize the cocaine and probable cause to search the vehicle under the automobile exception (*see People v Simpson*, 176 AD3d 1113, 1113 [2d Dept 2019], *lv denied* 34 NY3d 1162 [2020]; *cf. People v Johnson*, 183 AD3d 1273, 1275 [4th Dept 2020]; *see generally People v King*, 193 AD2d 1075, 1075-1076 [4th Dept 1993], *lv denied* 82 NY2d 721 [1993]), which permits officers to " 'search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there' " (*People v Johnson*, 159 AD3d 1382, 1383 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]; *see People v Henderson*, 57 AD3d 562, 564 [2d Dept 2008], *lv denied* 12 NY3d 925 [2009]).

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

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

838

KA 19-00887

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE CANNON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 31, 2016. The judgment convicted defendant upon his plea of guilty of burglary in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [3]). We conclude that Supreme Court properly refused to suppress defendant’s statement to the police inasmuch as the record establishes that he knowingly and intelligently waived his *Miranda* rights and, contrary to his contention, there is no indication that the police unlawfully isolated him from supportive adults who attempted to see him (*see People v Salaam*, 83 NY2d 51, 55 [1993]; *People v Tompkins*, 66 AD3d 1373, 1373 [4th Dept 2009], *lv denied* 15 NY3d 758 [2010]).

However, we agree with defendant that the court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v Lester*, 155 AD3d 1579, 1579 [4th Dept 2017], *lv denied* 32 NY3d 1206 [2019]). Defendant is an eligible youth and, as the People correctly concede, the sentencing court must make “a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it” (*Rudolph*, 21 NY3d at 501; *see People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see People v Polanco*, 186 AD3d

1109, 1110 [4th Dept 2020]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

839
KA 20-00055
PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MYERS, 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 (Stephen J. Dougherty, J.), rendered December 23, 2019. The judgment convicted defendant, upon a jury verdict, of leaving the scene of an incident resulting in death without reporting.

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 leaving the scene of an incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]), defendant contends that County Court erred in refusing to suppress statements that he made during a three-way telephone call initiated by an inmate in the Onondaga County Justice Center. In particular, defendant contends that, because one of the recipients of that call was the subject of an eavesdropping warrant, the recording of the call constitutes evidence derived from an intercepted communication that should have been suppressed on the ground that the People failed to comply with the notice provision of CPL 700.70. We reject that contention. CPL 700.70 provides that "[t]he contents of any intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant." The definition of an intercepted communication does not include a communication that is recorded with the consent of one of the parties thereto (*see* CPL 700.05 [3] [a], [b]). "[D]etainees, informed of the monitoring and recording of their calls, have no objectively reasonable constitutional expectation of privacy in the content of those calls (US Const Amend IV). Thus, a correctional facility may record and monitor detainees' calls, as well as share the recordings with law enforcement officials and

prosecutors" (*People v Diaz*, 33 NY3d 92, 95 [2019], *cert denied* — US —, 140 S Ct 394 [2019]). Here, the inmate who placed the call was aware that the call was being monitored and recorded by the Onondaga County Justice Center, and the call was thus recorded with his implied consent (*see People v Jackson*, 125 AD3d 1002, 1004 [2d Dept 2015], *lv denied* 25 NY3d 1202 [2015]). Therefore, no warrant was required to record that conversation (*see People v Koonce*, 111 AD3d 1277, 1279 [4th Dept 2013]), and the People were not required to comply with CPL 700.70 before using the recording at defendant's trial.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

841
CAF 19-00745
PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF ELIZABETH J. FOWLER,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID L. ROTHMAN, RESPONDENT-PETITIONER-RESPONDENT.

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

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-PETITIONER-RESPONDENT.

RALPH A. COGNETTI, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an amended order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered November 28, 2018 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, awarded respondent-petitioner sole legal and physical custody of the subject children.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner-respondent mother appeals from an amended order that, inter alia, granted respondent-petitioner father's cross petition to modify the parties' judgment of divorce by awarding him sole legal and physical custody of the subject children. We affirm.

Initially, we take judicial notice of the fact that, subsequent to the issuance of the amended order on appeal, Family Court issued an order in October 2020 modifying the mother's visitation arrangement with the children. That order expressly provided, however, that the directive contained in the amended order on appeal granting the father sole legal and physical custody of the children "shall continue," and the October 2020 order did not state that the amended order on appeal was being superseded or vacated. Consequently, we conclude that the mother's appeal, which challenges only the court's custody determination, is not moot (*see Matter of Nicole B. v Franklin A.*, 185 AD3d 1166, 1166 [3d Dept 2020]; *Matter of William O. v Wanda A.*, 151 AD3d 1189, 1190 [3d Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Blagg v Downey*, 132 AD3d 1078, 1079 [3d Dept 2015]).

With respect to the merits, we conclude that the mother "waived

her contention that the father failed to establish a change of circumstances warranting an inquiry into the best interests of the children inasmuch as [she] alleged in her own . . . petition that there had been such a change in circumstances" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *see Matter of Verne v Hamilton*, 191 AD3d 1433, 1433-1434 [4th Dept 2021]). In any event, we agree with the father that he established the requisite change in circumstances based on the deterioration of the parties' relationship and ability to work together to co-parent the children (*see Matter of Noble v Gigon*, 165 AD3d 1640, 1640 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Werner v Kenney*, 142 AD3d 1351, 1351-1352 [4th Dept 2016]), as well as the mother's repeated unsubstantiated allegations that the father abused the children, none of which ultimately resulted in any indicated reports (*see Nicole B.*, 185 AD3d at 1166-1167; *Matter of Anthony JJ. v Joanna KK.*, 182 AD3d 743, 744 [3d Dept 2020]; *Matter of Howden v Keeler*, 85 AD3d 1561, 1561-1562 [4th Dept 2011]).

Contrary to the mother's further contention, we conclude that the court did not err in determining that awarding the father sole legal and physical custody of the children is in the children's best interests. Indeed, the record establishes that the court's determination resulted from a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record" (*Matter of Talbot v Edick*, 159 AD3d 1406, 1407 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Saletta v Vecere*, 137 AD3d 1685, 1686 [4th Dept 2016]; *see generally Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). "It is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child[ren] is so inimical to the best interests of the child[ren] . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011] [internal quotation marks omitted]). Here, the record supports the court's conclusion that the mother interfered with the father's relationship with the children by making repeated and unfounded allegations that the father had physically and sexually abused the children (*see Werner*, 142 AD3d at 1352; *Howden*, 85 AD3d at 1562). "Although the court must consider the effects of domestic violence in determining the best interests of the children," here, the mother "failed to prove her allegations of domestic violence by a preponderance of the evidence" (*Matter of Miller v Jantzi*, 118 AD3d 1363, 1363-1364 [4th Dept 2014]). We therefore see no reason to disturb the court's custody determination (*see Matter of Lewis R.E. v Deloris A.E.*, 37 AD3d 1092, 1093 [4th Dept 2007]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

854
KA 20-01460
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL RAY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), entered September 9, 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.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in granting the People's request for an upward departure to a level two risk. "[W]hen the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines,' a court 'must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure' from a sex offender's presumptive risk level" (*People v Havlen*, 167 AD3d 1579, 1579 [4th Dept 2018], quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]). Here, we conclude that the determination to grant an upward departure was based on clear and convincing evidence of certain aggravating factors, namely the quantity and nature of the child pornography possessed by defendant (*see People v McCabe*, 142 AD3d 1379, 1380-1381 [4th Dept 2016]; *People v Rotunno*, 117 AD3d 1019, 1019 [2d Dept 2014], *lv denied* 24 NY3d 902 [2014]), and his use of the internet to engage with an undercover police officer posing as a 13-year-old girl, which included sending child pornography to the officer (*see Havlen*, 167 AD3d at 1579; *People v Agarwal*, 96 AD3d 1450, 1451

[4th Dept 2012]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

855
KA 19-01575
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LIAM EALAHAN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Stephen J. Dougherty, J.), rendered July 3, 2019. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [4]), defendant contends that County Court erred in denying his request to charge assault in the third degree as a lesser included offense (§ 120.00 [3]). We reject that contention. Viewing the evidence in the light most favorable to defendant, as we must (*see People v Rivera*, 23 NY3d 112, 120-121 [2014]), we conclude that there is no reasonable view of the evidence that defendant "failed to perceive a substantial and unjustifiable risk [of physical injury] and therefore acted with criminal negligence when he chose to [brandish] a knife when a physical altercation with the [victim] was imminent" (*People v Arzu*, 240 AD2d 217, 217 [1st Dept 1997], *lv denied* 90 NY2d 938 [1997]). Indeed, the evidence established that, moments after he commenced a heated verbal exchange with the victim on the street at the end of defendant's shift as a chef, defendant reencountered the victim and, in response to the victim's stance suggesting that a physical altercation was imminent, brandished a particularly sharp, professional culinary knife that he meticulously maintained using a whetstone before leaving work, despite admittedly knowing that the victim was unarmed and that the culinary knife was readily capable of causing harm in these circumstances (*see id.*; *cf. People v McIntosh*, 162 AD3d 1612, 1613-1614 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]).

Contrary to defendant's further contention, the sentence is not unduly harsh and severe. Finally, we note that the certificate of

conviction and uniform sentence and commitment form incorrectly reflect that defendant was convicted of assault in the second degree under Penal Law § 120.05 (1), and they must therefore be amended to reflect that he was convicted under Penal Law § 120.05 (4) (*see People v Martinez*, 37 AD3d 1099, 1100 [4th Dept 2007], *lv denied* 8 NY3d 947 [2007]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

857

KA 20-00318

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT SANTY, JR., DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (TYLER B. BUGDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered January 15, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). On appeal, defendant contends that County Court should have suppressed the physical evidence, i.e., the crack cocaine, that the police found in his pants as a result of a pat frisk during a traffic stop. We agree.

Insofar as relevant here, a pat down search of a traffic offender is not authorized unless, when the vehicle is stopped, there is reasonable suspicion that the defendant is armed or poses a threat to the officer’s safety (*see People v Batista*, 88 NY2d 650, 654 [1996]; *People v Marsh*, 20 NY2d 98, 101 [1967]; *People v Everett*, 82 AD3d 1666, 1666 [4th Dept 2011]). The requisite reasonable suspicion is simply lacking here; defendant made no evasive moves, he was not aggressive with the officer, he did not reach into his clothing or into dark hiding spots in the car, there were no telltale bulges in his clothes, he made no statements about weapons or other dangerous items, and the officer had no prior knowledge of any defendant-specific concerns (*see e.g. People v Roberts*, 158 AD3d 1141, 1143 [4th Dept 2018]; *People v Burnett*, 126 AD3d 1491, 1493-1494 [4th Dept 2015]; *People v Mobley*, 120 AD3d 916, 918 [4th Dept 2014]; *cf. People*

v Muhammed, 196 AD3d 1151, 1153 [4th Dept 2021]; *People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* 571 US 907 [2013]). Contrary to the motion court's view, "non-compliant and erratic behavior" does not automatically give rise to reasonable suspicion of a threat to officer safety (*see e.g. People v Ford*, 145 AD3d 1454, 1455-1456 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]). Although defendant's flat affect and partial disrobement during the traffic stop was odd, nothing about his specific odd behavior during the episode gave rise to reasonable suspicion that he was armed or posed a threat to the officer's safety (*see People v Solivan*, 156 AD3d 1434, 1435 [4th Dept 2017]; *People v Major*, 115 AD3d 1, 6-7 [1st Dept 2014]). If anything, the officer's ability to peer unobstructed into defendant's open pants should have assuaged, rather than heightened, any concerns that defendant was concealing a weapon. The crack cocaine should therefore have been suppressed as the fruit of the unlawful frisk (*see People v Brown*, 166 AD3d 506, 507 [1st Dept 2018]; *Ford*, 145 AD3d at 1456).

Defendant's remaining contentions are academic in light of our determination.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

859

KA 19-00982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRES ROBLES-PIZARRO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered November 30, 2017. 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]). We reject defendant's contention that Supreme Court (Brunetti, A.J.) erred in refusing to suppress evidence obtained from a search of his apartment. "It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected" (*People v Adams*, 53 NY2d 1, 8 [1981], *rearg denied* 54 NY2d 832 [1981], *cert denied* 454 US 854 [1981]; *see People v Cosme*, 48 NY2d 286, 290 [1979]; *People v Swain*, 109 AD3d 1090, 1092 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014]). Here, the court credited a detective's testimony that defendant let the officers inside his apartment after the detective knocked on the door (*see People v McCrary*, 152 AD2d 710, 711 [2d Dept 1989]; *see generally People v Tucker*, 149 AD3d 1261, 1263 [3d Dept 2017], *lv denied* 29 NY3d 1087 [2017]). The court further credited the testimony of another detective that defendant's girlfriend consented to the police searching the apartment and determined that her consent was freely and voluntarily given (*see Swain*, 109 AD3d at 1092). "In reviewing a determination of the suppression court, great weight must be accorded its decision because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Stokes*, 212 AD2d 986,

987 [4th Dept 1995], *lv denied* 86 NY2d 741 [1995]; *see People v Mejia*, 64 AD3d 1144, 1145 [4th Dept 2009], *lv denied* 13 NY3d 861 [2009]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). The court's credibility determinations are supported by the record, and we see no basis to disturb them.

Defendant's remaining contentions are either unpreserved for our review or without merit.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

866
KA 17-01074
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA A. FREELAND, DEFENDANT-APPELLANT.

PEKAREK LAW GROUP, P.C., WELLSVILLE (DANIELLE G. CHAMBERLAIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered January 5, 2016. The judgment convicted defendant upon a plea of guilty of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]). Defendant failed to preserve for our review her challenge to the voluntariness of her plea because she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). There is a narrow exception to the preservation requirement for the "rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," thereby imposing on the trial court "a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" (*People v Lopez*, 71 NY2d 662, 666 [1988]). "Where the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal, notwithstanding that a formal postallocution motion was not made" (*id.*). Here, nothing defendant said during the plea colloquy itself required County Court to inquire further before accepting the plea (*see Shanley*, 189 AD3d at 2109). Moreover, even assuming, arguendo, that the court's duty to inquire as contemplated by *Lopez* may be triggered by a defendant's statements at sentencing (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *see generally People v Delorbe*, 35 NY3d 112, 121 [2020]), we conclude that defendant's conclusory and unsupported claim of innocence was belied by her statements during the plea colloquy (*see People v Wilson*, 179

AD3d 1527, 1528-1529 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]).

Defendant next contends that the court erred in denying defense counsel's application to withdraw from representing her. Defendant failed to preserve that contention for our review inasmuch as she did not join in that application (*see People v Harris*, 151 AD3d 1720, 1720 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *cf. People v Hunter*, 171 AD3d 1534, 1535 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]). In any event, the court did not improvidently exercise its discretion in denying counsel's application, which was made less than three weeks before the trial. Defendant's alleged inability to pay for counsel's services "did not entitle counsel to withdraw as defendant's attorney" (*Harris*, 151 AD3d at 1721; *see People v Woodring*, 48 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 10 NY3d 846 [2008]), and he provided no other basis for withdrawal. In denying the request, the court "properly balance[d] the need for the expeditious and orderly administration of justice against the legitimate concerns of counsel" (*Hunter*, 171 AD3d at 1535-1536 [internal quotation marks omitted]). Contrary to defendant's further contention, the court's denial of the request to withdraw did not result in counsel providing ineffective assistance. There is no indication in the record that counsel "either expedited the case to the detriment of defendant or failed to provide effective assistance of counsel following the denial of his motion to withdraw" (*Woodring*, 48 AD3d at 1274).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

867

KA 20-01414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHERY BISHOP, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered November 14, 2019. The judgment convicted defendant upon a plea of guilty of robbery in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty during a single plea proceeding of, respectively, robbery in the second degree (Penal Law § 160.10 [1]) and robbery in the first degree (§ 160.15 [3]). Defendant contends in both appeals that County Court erred in imposing enhanced sentences because the court's *Outley* warning was not part of the plea agreement, the court failed to sufficiently warn him of the consequences of violating the subject conditions and, in any event, he did not violate the conditions as articulated by the court. Defendant, however, failed to preserve those contentions for our review inasmuch as he did not object to the enhanced sentences or move to withdraw his guilty pleas or to vacate the judgments of conviction (*see People v Shelton*, 192 AD3d 1506, 1507 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; *People v Coker*, 133 AD3d 1218, 1218 [4th Dept 2015], *lv denied* 27 NY3d 995 [2016]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant failed to preserve for our review his contention that the court violated CPL 380.50 by not asking him if he wished to make a statement at sentencing (*see People v Green*, 54 NY2d 878, 880 [1981]). In any event, the court substantially complied with CPL 380.50 by asking defense counsel if he wished to be heard prior to the imposition of sentence (*see People v Desius*, 188 AD3d 1626, 1629 [4th

Dept 2020], *lv denied* 36 NY3d 1096 [2021]; *see generally People v McClain*, 35 NY2d 483, 491 [1974], *cert denied* 423 US 852 [1975]).

Finally, the enhanced sentences are not unduly harsh or severe.

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

868

KA 21-00179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHERY BISHOP, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered November 14, 2019. The judgment convicted defendant upon a plea of guilty of robbery in the first degree.

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

Same memorandum as in *People v Bishop* ([appeal No. 1] — AD3d — [Oct. 8, 2021] [4th Dept 2021]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court

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

869
CA 20-01412

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

JANICE COOKE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROBERT COOKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CORNING HOSPITAL, GUTHRIE MEDICAL GROUP, P.C., JAMES PERLE, M.D., AND GURPREET SINGH, M.D., DEFENDANTS-APPELLANTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS CORNING HOSPITAL, GUTHRIE MEDICAL GROUP, P.C. AND JAMES PERLE, M.D.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANT-APPELLANT GURPREET SINGH, M.D.

DEFRANCISCO & FALGIATANO, LLP, SYRACUSE (CHARLES L. FALGIATANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Steuben County (William K. Taylor, J.), entered October 22, 2020. The order denied defendants’ motions 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 medical malpractice and wrongful death arising from the death of her husband. Following discovery, defendant Gurpreet Singh, M.D. moved for summary judgment dismissing the complaint and all cross claims against him, and defendants Corning Hospital, Guthrie Medical Group, P.C., and James Perle, M.D. moved for summary judgment dismissing the complaint against them. Supreme Court denied the motions, concluding that the opposing affidavit from plaintiff’s medical expert raised triable issues of fact. Defendants appeal, and we now affirm.

“It is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby” (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]). Once such a defendant meets the initial burden, the burden shifts to the plaintiff

to raise a triable issue of fact, but "only as to the elements on which the defendant met the prima facie burden" (*Bubar*, 177 AD3d at 1359 [internal quotation marks omitted]; *see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]).

Although there is no dispute that defendants met their initial burden on their respective motions, we reject defendants' contention that the court erred in determining that the affidavit of plaintiff's expert raised triable issues of fact sufficient to defeat the motions. Where, as here, "a nonmovant's expert affidavit 'squarely opposes' the affirmation[s] of the moving parties' expert[s], the result is 'a classic battle of the experts that is properly left to a jury for resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). "In determining a summary judgment motion, '[i]ssue-finding, rather than issue-determination, is the key to the procedure' " (*Wilk v James*, 107 AD3d 1480, 1485-1486 [4th Dept 2013]; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]), and we decline to determine the issues identified by plaintiff's expert.

Contrary to defendants' contentions, this is not a case in which plaintiff's expert "misstate[d] the facts in the record," nor is the affidavit " 'vague, conclusory, speculative, [or] unsupported by the medical evidence in the record' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Moreover, " '[t]he probative force of an opinion is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis' " (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019], quoting *Matter of Miller v National Cabinet Co.*, 8 NY2d 277, 282 [1960], *mot to amend remittitur granted* 8 NY2d 1100 [1960]).

Entered: October 8, 2021

Ann Dillon Flynn
Clerk of the Court