SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 29, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED APRIL 29, 2022

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

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CA 20-01655

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

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

V ORDER

GREGORY ARMS, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GERBER CIANO KELLY BRADY LLP, BUFFALO (BRENDAN T. FITZPATRICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a decision of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 7, 2020. The decision awarded plaintiff money damages after a nonjury trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]).

Entered: April 29, 2022

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 21-00584

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

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

V ORDER

GREGORY ARMS, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GERBER CIANO KELLY BRADY LLP, BUFFALO (BRENDAN T. FITZPATRICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered March 29, 2021. The order amended an award for money damages to plaintiff.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1555 [4th Dept 2018]; *see generally* CPLR 5511).

Entered: April 29, 2022

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 20-01603

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

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

V ORDER

GREGORY ARMS, LLC, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 7, 2020. The order, among other things, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

56

KA 19-01816

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN T. PALOMBI, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JUSTIN T. PALOMBI, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (Christopher S. Ciaccio, A.J.), rendered September 27, 2019. The judgment convicted defendant upon a jury verdict of assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment is dismissed and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [3]). The charge arose from an incident where defendant was driving a motor vehicle and a passenger in the vehicle sustained physical injuries allegedly caused by defendant's criminal negligence. While navigating a curve in the road, defendant's vehicle crossed over the double yellow line into the other lane of travel and forced an oncoming motor vehicle to pull over to avoid a collision. Defendant then moved back into the proper lane but lost control of the vehicle, which went off the road and crashed into a mailbox, tree, and a utility pole. At the time of the incident, defendant had a learner's permit, but no driver's license.

On appeal, defendant contends in his main brief that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. We reject defendant's contention with respect to the sufficiency of the evidence. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to support the conviction (*see*

generally People v Bleakley, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). A review of the weight of the evidence requires us to first determine whether an acquittal would have been unreasonable (*see Danielson*, 9 NY3d at 348). If we determine that an acquittal would not have been unreasonable, then we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id*.). We thus " 'serve, in effect, as a second jury' with the power to 'independently assess all of the proof' " (*People v Gonzalez*, 174 AD3d 1542, 1544 [4th Dept 2019], quoting *People v Delamota*, 18 NY3d 107, 116-117 [2011]).

As relevant here, a person is guilty of assault in the third degree when "[w]ith criminal negligence, he [or she] causes physical injury to another person by means of . . . a dangerous instrument," i.e., a vehicle (Penal Law § 120.00 [3]; *see generally People v Cabrera*, 10 NY3d 370, 375 [2008]). " 'The carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and the carelessness must be such that its *seriousness would be apparent to anyone who shares the community's general sense of right and wrong*. Moreover, criminal negligence requires a defendant to have *engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk* of a proscribed result; *nonperception of a risk*, even if [the proscribed result occurs], *is not enough*' " (*Cabrera*, 10 NY3d at 376, quoting *People v Conway*, 6 NY3d 869, 872 [2006]; *see People v Pinnock*, 188 AD3d 1708, 1710 [4th Dept 2020]).

Here, we conclude that acquittal would not have been unreasonable and the jury was not justified in finding beyond a reasonable doubt that defendant was criminally negligent in his operation of the vehicle (*see generally People v Derival*, 181 AD3d 918, 925 [2d Dept 2020], *appeal dismissed* 36 NY3d 1107 [2021], *reconsideration denied* 37 NY3d 1023 [2021]). In cases involving criminal negligence arising out of automobile accidents involving excess rates of speed, such as here, "it takes some additional affirmative act by the defendant to transform 'speeding' into 'dangerous speeding' " (*Cabrera*, 10 NY3d at 377). With respect to the issue of defendant's rate of speed, the trial testimony from the prosecution's expert witness that defendant was driving at the excessive speed of approximately 92 miles per hour at the time of the incident was speculative (*see Derival*, 181 AD3d at 927; *see generally People v Richardson*, 55 AD3d 934, 936 [3d Dept 2008], *lv dismissed* 11 NY3d 857 [2008]). The expert's calculation of the vehicle's speed was based on the assumption of "100 percent braking," but there was no evidence that defendant braked at all before his vehicle collided with the mailbox, tree and utility pole and came to a stop. Moreover, the People's version of the events, that defendant deliberately attempted to "flatten out the curve" by crossing the double line of the curve, does not rise to the level of

moral blameworthiness to constitute criminal negligence (*see Cabrera*, 10 NY3d at 378).

Additionally, contrary to the People's assertion, the fact that defendant knowingly drove with a passenger in violation of the restrictions placed upon his learner's permit does not establish beyond a reasonable doubt that defendant engaged in some blameworthy conduct that either created or contributed to a substantial and unjustifiable risk (*see id.* at 379-380; *cf. People v Asaro*, 21 NY3d 677, 682-685 [2013]; *see generally Pinnock*, 188 AD3d at 1711).

In light of our determination, we do not address defendant's remaining contention in his main and pro se supplemental brief.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-00768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL BRADFORD, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Steuben County Court (Patrick F. McAllister, A.J.), dated June 2, 2020. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was previously convicted after a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), aggravated criminal contempt (§ 215.52 [1]), and tampering with physical evidence (§ 215.40 [2]). On a prior appeal, we modified the judgment of conviction by "reversing that part convicting defendant of tampering with physical evidence and dismissing count six of the indictment, and by vacating the sentences imposed on the remaining counts" (*People v Bradford*, 118 AD3d 1254, 1254 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]), and we remitted the matter to County Court for resentencing (*id.*). Later, we denied defendant's motion for a writ of error coram nobis (*People v Bradford*, 137 AD3d 1633, 1633 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016]), and we affirmed the resentence (*People v Bradford*, 138 AD3d 1436, 1437 [4th Dept 2016], *lv denied* 27 NY3d 1149 [2016]). Defendant thereafter moved pro se to vacate the judgment of conviction pursuant to CPL 440.10 (1), and he now appeals by permission of this Court from an order denying that motion. We affirm.

Defendant contends that he was improperly compelled to wear a stun belt during his trial inasmuch as the court did not place on the record its findings showing that he needed such a restraint (*see generally People v Buchanan*, 13 NY3d 1, 4 [2009]). Although defendant established that he was forced to wear a stun belt, he failed to object to the use of the belt, and the improper use of a stun belt is not a mode of proceedings error (*see People v Cooke*, 24 NY3d 1196,

1197 [2015], *cert denied* 577 US 1011 [2015]). Therefore, "the failure to object to the stun belt's use means that 'reversal would not have been *required*' on a direct appeal" and, as a result, even on the merits of the contention, "there is no basis upon which to vacate the judgment of conviction" pursuant to CPL 440.10 (1) (*People v Osman*, 174 AD3d 1477, 1480 [4th Dept 2019], *lv denied* 34 NY3d 1080 [2019]; *see People v Schrock*, 108 AD3d 1221, 1223-1224 [4th Dept 2013], *lv denied* 22 NY3d 998 [2013], *reconsideration denied* 23 NY3d 1025 [2014]).

Contrary to defendant's further contention, he failed to establish that he was deprived of effective assistance of counsel by defense counsel's failure to raise the issue of the stun belt before the trial court (*see Osman*, 174 AD3d at 1480; *People v Ashline*, 124 AD3d 1258, 1261 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]; *People v Schrock*, 99 AD3d 1196, 1196-1197 [4th Dept 2012]). It is well settled that, in order " '[t]o prevail on a claim of ineffective assistance, [a] defendant[] must demonstrate that [he or she was] deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies [or] tactics . . . , weighed long after the trial, does not suffice' . . . Thus, 'it is incumbent on [a] defendant to demonstrate the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct' " (*People v Borcyk*, 184 AD3d 1183, 1184 [4th Dept 2020]; *see e.g. People v Kates*, 162 AD3d 1627, 1630-1631 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019]; *People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]). Defendant failed to make such a showing here. Inasmuch as defendant raises an ineffective assistance of counsel challenge under both the Federal and New York State Constitutions, "the claim is properly evaluated using the state standard" (*People v Oliver* [appeal No. 2], 162 AD3d 1722, 1723 [4th Dept 2018]; *see People v Stultz*, 2 NY3d 277, 282-284 [2004], *rearg denied* 3 NY3d 702 [2004]; *Conway*, 148 AD3d at 1741). That standard provides that "[a] single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Settles*, 192 AD3d 1510, 1511 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; *People v Johnson*, 192 AD3d 1612, 1615 [4th Dept 2021]). Here, in light of the lack of any evidence that the stun belt was visible to the jurors or that they were aware of its presence, we conclude that defendant failed to make a sufficient showing of egregiousness or that his right to a fair trial was compromised, and thus the court properly determined that defendant's allegations "do not rise to the level of ineffective assistance of counsel."

All concur except LINDLEY and BANNISTER, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. There is no dispute that defendant was required to wear a stun belt during his jury trial and that County Court failed to make the requisite finding that there was a "specifically identified security reason" for restraining defendant in such a significant manner (*People v Buchanan*, 13 NY3d 1, 4 [2009]). In his

CPL 440.10 motion, defendant contended, among other things, that his trial attorney was ineffective in failing to object to the unauthorized use of the stun belt. Defendant noted that *Buchanan* was decided by the Court of Appeals more than a year before his trial, and that defense counsel should therefore have been aware of its holding (*cf. People v Osman*, 174 AD3d 1477, 1480 [4th Dept 2019], *lv denied* 34 NY3d 1080 [2019]; *People v Schrock*, 99 AD3d 1196, 1196 [4th Dept 2012]).

The court summarily denied the motion, concluding in relevant part that defendant is not entitled to relief on his ineffective assistance of counsel claim because we determined on direct appeal that he was not deprived of effective assistance of counsel (*see People v Bradford*, 118 AD3d 1254, 1255-1256 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). The majority affirms that ruling on another ground, one not argued by the People on appeal—namely, that defense counsel's failure to object to the stun belt, standing alone, was not such an egregious or prejudicial error as to compromise defendant's right to a fair trial. Because the court did not deny defendant's motion on the ground relied upon by the majority, we are precluded from affirming on that ground (*see People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]).

With respect to the ground relied upon by the court to deny the motion, although it is true that we determined on direct appeal that defendant was not deprived of effective assistance of counsel, defendant's contention was based on other alleged errors attributed to defense counsel. Defendant did not reference his trial attorney's failure to object to the stun belt, and we thus did not consider it in rejecting his contention. Indeed, any claim that defense counsel was ineffective in failing to object to the stun belt would not have been reviewable on direct appeal even if raised because the record did not indicate that defendant was required to wear a stun belt at trial; rather, the unauthorized use of the stun belt was established in defendant's motion papers. It is well settled that contentions that are "based primarily on matters outside the record" are more properly raised in a motion pursuant to CPL 440.10 (*People v Richards*, 177 AD3d 1280, 1282 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]; *see People v Jenkins*, 197 AD3d 927, 927-928 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021]).

In our view, the court erred in summarily denying defendant's CPL 440.10 motion, and we would therefore reverse the order and remit the matter for a hearing pursuant to CPL 440.30 (5) on defendant's ineffective assistance of counsel claim (*see People v Washington*, 128 AD3d 1397, 1399-1400 [4th Dept 2015]; *People v Campbell*, 81 AD3d 1251, 1251-1252 [4th Dept 2011]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

105

CA 21-00457

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

KISZEAK D. SCOTT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES P. HARTMAN, DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (GRACE E. TESMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered March 24, 2021. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for the injuries she allegedly sustained in a motor vehicle accident. Supreme Court thereafter denied defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury that was causally related to the accident (*see generally* Insurance Law § 5102 [d]). Defendant now appeals and we affirm.

We reject defendant's contention that the court erred in denying the motion because, even assuming, arguendo, that defendant satisfied his initial burden with respect to causation and every applicable category of serious injury, plaintiff submitted evidence raising triable questions of material fact in opposition thereto (*see Cuyler v Sepcic*, 196 AD3d 1122, 1123 [4th Dept 2021]; *Green v Repine*, 186 AD3d 1059, 1061 [4th Dept 2020]; *Grier v Mosey*, 148 AD3d 1818, 1819 [4th Dept 2017]). Indeed, "[i]t is well established that conflicting expert opinions may not be resolved on a motion for summary judgment" (*Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013] [internal quotation marks omitted]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

112

KA 19-02139

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAIAH GINTY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 October 18, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: In appeal No. 1, 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]) and criminal possession of a weapon in the third degree (§ 265.02 [8]). In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal possession of a controlled substance in the third degree (§ 220.16 [1]) and imposing a determinate term of imprisonment, followed by a period of postrelease supervision. We affirm in each appeal.

Defendant first contends, and the dissent agrees, that County Court erred in refusing to suppress evidence obtained by the police as a result of an interaction and pat frisk conducted during a traffic stop. We reject that contention.

The evidence at the suppression hearing established that the police lawfully stopped the vehicle in which defendant was a passenger (*see People v Robinson*, 97 NY2d 341, 348-349 [2001]). Although defendant, along with the other occupants, was initially cooperative and compliant with the officers' instructions to keep his hands visible, one of the officers observed that defendant thereafter began to exhibit furtive behavior in the vehicle inasmuch as his hands

became "fidgety and shaky," he started "looking all around" while the other occupants remained calm, and he then "gently leaned forward and b[lad]ed his body away from [the officer]" and "reached underneath toward his waistband" (*see People v Carter*, 109 AD3d 1188, 1189 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* 571 US 907 [2013]). The officer further explained that defendant appeared to be "reaching for something" in a slow manner designed to avoid "attract[ing the officer's] attention," which raised safety concerns that defendant may have had a weapon (*see People v Benjamin*, 51 NY2d 267, 271 [1980]). Although the dissent suggests otherwise, the fact that the officer's view of defendant was obscured to some extent when defendant was partially concealed inside the vehicle and was observed surreptitiously reaching toward his waistband constitutes a "circumstance that supports a reasonable suspicion that [defendant was] armed or pose[d] a threat to [officer] safety" (*People v Batista*, 88 NY2d 650, 654 [1996]; *see Fagan*, 98 AD3d at 1271; *see generally People v Garcia*, 20 NY3d 317, 323 [2012]). Indeed, based on his movements inside the vehicle, the officers "reasonably suspected that defendant was armed and posed a threat to their safety because his actions were directed to the area of his waistband, which was concealed from their view" (*Fagan*, 98 AD3d at 1271; *see People v Roberson*, 155 AD3d 1683, 1683-1684 [4th Dept 2017], *lv denied* 31 NY3d 1086 [2018]; *Carter*, 109 AD3d at 1189). Thus, contrary to the dissent's suggestion, we conclude that "[e]ven though some of the circumstances, when viewed in isolation, might be considered innocuous, the totality of the information available to the police justified the frisk of defendant" (*People v Feldman*, 114 AD3d 603, 603 [1st Dept 2014], *lv denied* 23 NY3d 962 [2014]; *see Benjamin*, 51 NY2d at 271).

In view of our determination to affirm the judgment in appeal No. 1, we reject defendant's contention that the judgment in appeal No. 2 must be reversed on the ground that he admitted his violation of probation in appeal No. 2 based on the promise that the sentence in appeal No. 2 would run concurrently with the sentence in appeal No. 1 (*see People v Collins*, 167 AD3d 1493, 1498-1499 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v Khammonivang*, 68 AD3d 1727, 1727-1728 [4th Dept 2009], *lv denied* 14 NY3d 889 [2010]; *cf. People v Fuggazzatto*, 62 NY2d 862, 863 [1984]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. Defendant does not dispute that the vehicle in which he was a passenger was lawfully stopped (*see People v Robinson*, 97 NY2d 341, 348-349 [2001]). Nor does he dispute that, "upon making a valid stop of a motor vehicle for a traffic violation, the police may order the driver and all passengers out of the vehicle until the stop is concluded" (*People v Forbes*, 283 AD2d 92, 94 [2d Dept 2001], *lv denied* 97 NY2d 681 [2001]). He contends that, based on the suppression hearing testimony, the People failed to meet their burden of showing that the officer had a reasonable suspicion "that defendant was armed and posed a threat to [his] safety" to justify a pat frisk of

defendant's person (*People v Carter*, 109 AD3d 1188, 1189 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]).

The evidence at the hearing showed that defendant was initially "fully cooperative" with the officers who stopped the vehicle, answering their questions and complying with their instructions "to keep [his] hands where [the officers could] see them." However, at some point during the stop, defendant became restless, "looking all around" with "fidgety and shaky" hands. Although one of the officers testified that he observed defendant make one reaching movement "underneath toward his waistband," the officer's view of the movement was severely impeded inasmuch as, according to his testimony, he was outside the car, on the opposite side from defendant, observing defendant through a window. The officer did not observe a telltale bulge in defendant's clothing (*cf. People v Jackson*, 52 AD3d 400, 400 [1st Dept 2008], *lv denied* 11 NY3d 833 [2008]; *People v Price*, 49 AD3d 330, 330 [1st Dept 2008], *lv denied* 10 NY3d 938 [2008]), nor did he actually see defendant's hand reach into his clothing (*cf. Carter*, 109 AD3d at 1189; *People v Daniels*, 103 AD3d 1204, 1205 [4th Dept 2013], *lv denied* 22 NY3d 1137 [2014]). Instead, he testified only that defendant's left hand remained in view while his right hand was out of view reaching "in the general waistline side of his body area."

"Reasonable suspicion 'may not rest on equivocal or "innocuous behavior" that is susceptible of an innocent as well as a culpable interpretation' " (*People v Hinshaw*, 35 NY3d 427, 438 [2020], quoting *People v Brannon*, 16 NY3d 596, 602 [2011]). Inasmuch as defendant's nervousness and movements were susceptible of an innocent interpretation, particularly in light of his status as the vehicle's only black occupant, and inasmuch as defendant was, according to the officer's testimony, "fully compliant" with the officers' instruction to exit the vehicle, I agree with defendant that his conduct while in the vehicle was insufficient to establish reasonable suspicion necessary for law enforcement to conduct a pat frisk of his person (*cf. People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* 571 US 907 [2013]; *see generally People v Garcia*, 20 NY3d 317, 322-323 [2012]; *People v De Bour*, 40 NY2d 210, 223 [1976]).

I therefore agree with defendant that County Court erred in refusing to suppress the weapon seized from his person (*see generally Brannon*, 16 NY3d at 602-603). Thus, in appeal No. 1, I would reverse the judgment, vacate the plea, and grant that part of the omnibus motion seeking suppression of the weapon. Further, because my determination would result in the suppression of all evidence in support of the crimes charged, I would also dismiss the indictment in appeal No. 1 (*see People v Williams*, 177 AD3d 1312, 1313 [4th Dept 2019]). Additionally, inasmuch as defendant admitted to a probation violation based on the promise that the sentence in appeal No. 2 would run concurrently with the sentence in appeal No. 1 (*see generally People v Fuggazzatto*, 62 NY2d 862, 863 [1984]), I would reverse the judgment in appeal No. 2, vacate the admission, and remit for further

proceedings on the violation.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-00022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAIAH GINTY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 October 18, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same memorandum as in *People v Ginty* ([appeal No. 1] — AD3d — [Apr. 29, 2022] [4th Dept 2022]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the same memorandum as in *People v Ginty* ([appeal No. 1] — AD3d — [Apr. 29, 2022] [4th Dept 2022]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KAH 21-00466

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CAROL STEINAGLE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF,
RESPONDENT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (BARRY N. COVERT OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 9, 2021 in a habeas corpus proceeding. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, the petition is granted in part, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus challenging her detention on the ground that Supreme Court (Haendiges, J.) (bail-setting court) had abused its discretion in remanding her to custody without bail. Supreme Court (Michalski, A.J.) dismissed the petition, and petitioner appeals.

At oral argument before this Court, petitioner conceded that the bail-setting court is permitted to consider factors other than those explicitly set forth in CPL 510.30 (1), but on appeal petitioner contends that the bail-setting court failed to adequately "explain its choice of release, release with conditions, bail or remand on the record or in writing," as required by CPL 510.10 (1). We agree.

"The action of a bail-fixing court is nonappealable, but may be reviewed in a habeas corpus proceeding 'if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated' " (*People ex rel. Rosenthal v Wolfson*, 48 NY2d 230, 232 [1979], quoting *People ex rel. Klein v Krueger*, 25 NY2d 497, 499 [1969]). "When reviewing a bail determination, the habeas corpus court is limited to the record that was before the nisi prius court" (*People ex rel. Taylor v Meloni*, 96

AD2d 1149, 1149 [4th Dept 1983]; *see Rosenthal*, 48 NY2d at 231-232), and the scope of review is limited to whether the court " 'abused its discretion by denying bail without reason or for reasons insufficient in law' " (*People ex rel. Gugino v Braun*, 58 AD2d 738, 738-739 [4th Dept 1977], quoting *People ex rel. Shapiro v Keeper of City Prison*, 290 NY 393, 399 [1943]). Where the bail-setting court's determination is supported by a rational basis in the record, it is "beyond correction in habeas corpus" (*People ex rel. Parone v Phimister*, 29 NY2d 580, 581 [1971]). Under the recently revised statutory scheme, "the court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required" (CPL 510.30 [1]).

Here, after considering all of the relevant factors under CPL 510.30 (1), the bail-setting court determined that remand was the least restrictive condition. We conclude that the bail-setting court failed to comply with the statutory mandate of CPL 510.10 (1) because it failed to "explain its choice of release, release with conditions, bail or remand on the record or in writing." We therefore reverse the judgment, reinstate the petition, and grant the petition in part, and we remit the matter to the bail-setting court for further proceedings to satisfy the requirements of CPL 510.10 (1) (*see generally People ex rel. Rankin v Brann*, 201 AD3d 675, 677 [2d Dept 2022]; *People ex rel. Bauer v McGreevy*, 147 Misc 2d 213, 216 [Sup Ct, Rensselaer County 1990]; *Becher v Dunston*, 142 Misc 2d 103, 104 [Sup Ct, Rensselaer County 1988]). In light of our determination, we do not address petitioner's contention regarding whether remand is warranted in this case.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

157

KA 19-01364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY A. BUBIS, JR., DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 19, 2019. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [4]), defendant contends that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment pursuant to CPL 210.35 (5), based on statements allegedly made by a grand juror approximately seven months after defendant was indicted. We reject that contention. "[D]ismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Fisher*, 101 AD3d 1786, 1786 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013] [internal quotation marks omitted]; *see People v Huston*, 88 NY2d 400, 409 [1996]). Defendant failed to establish that such conduct occurred here (*cf. People v Connolly*, 63 AD3d 1703, 1705 [4th Dept 2009]).

We reject defendant's further contention that the court abused its discretion in denying his requests for adjournments, inter alia, to permit his attorney time to prepare for trial and to accommodate an expert witness's schedule. "The court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127 [4th Dept 1990], *lv denied* 76 NY2d 852 [1990]; *see People v Micolo*, 171 AD3d 1484, 1485 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]; *People v Bones*, 50 AD3d 1527, 1528 [4th Dept 2008], *lv denied* 10 NY3d 956 [2008]), and defendant failed to show such prejudice here. Indeed, we

note that defense counsel was well-prepared for trial and that the expert witness testified on defendant's behalf.

Although defendant contends that his conviction is not supported by legally sufficient evidence, his general motion to dismiss at the close of the People's case did not preserve for our review any of his specific challenges on appeal to the sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). In addition, he failed to renew that motion after presenting proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that he was denied effective assistance of counsel based on a series of alleged errors by defense counsel. We reject that contention. With respect to defendant's assertion that defense counsel was ineffective because he failed to request that the court charge sexual abuse in the third degree as a lesser included offense and to make an adequate motion for a trial order of dismissal, "[i]t is well settled that '[a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make . . . a[n] argument that has little or no chance of success' " (*People v March*, 89 AD3d 1496, 1497 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, viewing the evidence in the light most favorable to defendant (*see People v Martin*, 59 NY2d 704, 705 [1983]), we conclude that there is no reasonable view thereof to support a finding that defendant committed the lesser offense but not the greater (*see generally People v Glover*, 57 NY2d 61, 63 [1982]). Similarly, inasmuch as the evidence is legally sufficient to support the conviction, defense counsel's failure to preserve the legal sufficiency challenges raised on appeal does not constitute ineffective assistance because those challenges would not have been meritorious (*see People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]). With respect to defendant's remaining allegations of ineffective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that he was deprived of a fair trial by allegedly improper comments made by the prosecutor during summation. Defendant's contention is without merit. "Reversal based on prosecutorial misconduct is mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law" (*People v Kerce*, 140 AD3d

1659, 1660 [4th Dept 2016], *lv denied* 28 NY3d 1028 [2016] [internal quotation marks omitted]). Here, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*id*.). In addition, the court properly sustained defense counsel's objection to the prosecutor's statements and gave curative instructions, which the jury is presumed to have followed (*see People v Flowers*, 151 AD3d 1843, 1843-1844 [4th Dept 2017], *lv denied* 30 NY3d 104 [2018]). Thus, any prejudice was alleviated (*see id*.).

We further conclude that defendant failed to "establish that he was denied a fair trial by alleged cumulative errors of defense counsel, the prosecutor and the court" (*People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000]; *see People v West*, 118 AD3d 1450, 1452 [4th Dept 2014], *lv denied* 24 NY3d 1048 [2014]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. Finally, as defendant contends and the People correctly concede, the presentence report (PSR) has not been redacted as the court ordered during sentencing. Therefore, all copies of the PSR must be redacted in accordance with those directives (*see People v Howard*, 124 AD3d 1350, 1351 [4th Dept 2015]; *see also People v Washington*, 170 AD3d 1608, 1610 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

165

CA 21-01095

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

JEFFREY WOZNIAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. DEMUNDA AND NIAGARA APOTHECARY, INC., DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-APPELLANT RICHARD A. DEMUNDA.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-APPELLANT NIAGARA APOTHECARY, INC.

DOLCE FIRM, BUFFALO (AARON C. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered April 19, 2021. The order, among other things, denied the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained when a vehicle owned and operated by defendant Richard A. Demunda, who was working as an employee of defendant Niagara Apothecary, Inc. (Niagara), left the roadway and struck several parked vehicles and pedestrians, including plaintiff. Defendants separately moved for summary judgment dismissing the complaint against them, contending, inter alia, that Demunda suffered an unforeseeable medical emergency that caused him to lose consciousness and that neither he nor Niagara could be charged with negligence as a result thereof (*see generally Dalchand v Missigman*, 288 AD2d 956, 956 [4th Dept 2001]). Plaintiff cross-moved for partial summary judgment on, inter alia, liability. Supreme Court denied the motions and cross motion. Defendants appeal and we now affirm.

It is well settled that "[a] driver 'who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen' " (*id.*; *see Martinez v Grimm*, 151 AD3d 1847, 1848 [4th Dept 2017]; *see generally Fillette v Lundberg*, 150 AD3d 1574, 1575 [3d Dept 2017]; *Serpas v Bell*, 117 AD3d 712, 713 [2d Dept 2014]; *Rivera v New York City Tr. Auth.*, 54 AD3d 545, 549 [1st Dept 2008]). A defendant moving for summary judgment on

the sudden medical emergency doctrine must "establish the existence of the claimed medical emergency and its unforeseeable nature" by "competent or expert medical evidence" (*Pitt v Mroz*, 146 AD3d 913, 914 [2d Dept 2017]; *see Serpas*, 117 AD3d at 713).

Here, even assuming, arguendo, that defendants met their initial burden of proof by establishing that Demunda suffered an unforeseeable medical emergency, we conclude that the court properly denied the motions inasmuch as plaintiff raised triable issues of fact (*see Karl v Terbush*, 63 AD3d 1359, 1360 [3d Dept 2009]; *Thomas v Hulslander*, 233 AD2d 567, 568 [3d Dept 1996]; *cf. State of New York v Susco*, 245 AD2d 854, 855-856 [3d Dept 1997]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

167

CA 21-01108

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

IN THE MATTER OF EVE SHIPPENS, AMY STEINER, JOHN P. SMITH, TIMOTHY LYON AND DONNA DELANO-KERR, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF CITY OF BUFFALO, RESPONDENT-RESPONDENT.

ROBERT T. REILLY, WILLIAMSVILLE (CLAIRE T. SELLERS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

NATHANIEL J. KUZMA, GENERAL COUNSEL, BUFFALO (MARY B. SCARPINE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered January 22, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners, who are teachers and professional staff employed by respondent, commenced this CPLR article 78 proceeding seeking, inter alia, mandamus to compel respondent to offer courses and sequences in the arts during the school day and equitably throughout the City School District of the City of Buffalo (District), in accordance with regulations promulgated by the New York State Commissioner of Education. Supreme Court dismissed the petition. Petitioners now appeal.

Contrary to petitioners' contention, the court properly determined that mandamus to compel does not lie. "A writ of mandamus is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* — US —, 139 S Ct 2651 [2019], *reh denied* — US —, 140 S Ct 18 [2019] [internal quotation marks omitted]). The writ "is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Matter of Maron v Silver*, 14 NY3d 230, 249 [2010], *rearg dismissed* 16 NY3d 736 [2011]). Here, the regulations provide, in relevant part, that the

District "shall offer students the opportunity to complete a three- or five-unit sequence in . . . the arts" (8 NYCRR 100.2 [h] [1]) and must provide that opportunity beginning in ninth grade (*see* 8 NYCRR 100.2 [h] [2]). While the regulations provide that the District must offer students the opportunity for an arts sequence, respondent may exercise discretion in how to do so (*see generally Matter of Curry v New York State Educ. Dept.*, 163 AD3d 1327, 1330 [3d Dept 2018]). Therefore, because the actions that petitioners seek to compel are not ministerial in nature but discretionary, mandamus to compel does not apply (*cf. Brusco*, 84 NY2d at 680; *see generally Matter of Doorley v DeMarco*, 106 AD3d 27, 34 [4th Dept 2013]).

We have reviewed petitioners' remaining contentions and conclude that they are without merit.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

168

CA 21-00071

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

KARLA WILSEY AND ROBERT WILSEY,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

7203 RAWSON ROAD, LLC, AND RSM DEVELOPMENT
COMPANY, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DANIEL EVAN STROLLO, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (James J. Piampiano, J.), entered December 30, 2020. The order and judgment, among other things, granted plaintiffs' motion insofar as it sought summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in its entirety and vacating the second through tenth and the thirteenth decretal paragraphs, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for breach of contract and fraudulent misrepresentation, arising from contracts relating to the sale of a parcel of property and the construction of a residence thereon. Plaintiffs moved for summary judgment on the complaint and for costs, attorneys' fees and sanctions against defendants. Supreme Court granted the motion insofar as it sought summary judgment and awarded plaintiffs damages. The court also granted the motion insofar as it sought costs and granted in part the motion insofar as it sought attorneys' fees by awarding those fees on only the third cause of action and in an amount less than that requested by plaintiffs. The court otherwise denied the motion. Defendants appeal, and plaintiffs cross-appeal.

Although the court granted plaintiffs' motion insofar as it sought summary judgment, it failed to address the burdens of proof or any specific cause of action. In addition, the court awarded costs and attorneys' fees without providing the basis therefor. As noted, this case involved a motion for summary judgment and for costs, attorneys' fees, and sanctions, and the court chose not to write. This is an unacceptable practice (*see generally Kopp v Rhino Room,*

Inc., 192 AD3d 1690, 1692 [4th Dept 2021]; *Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020]; *Doucette v Cuviello*, 159 AD3d 1528, 1528 [4th Dept 2018]). To maximize effective appellate review, we must remind our colleagues in the trial courts to provide their reasoning instead of simply issuing orders.

On their appeal, we agree with defendants that the court erred by granting the motion in part and awarding plaintiffs damages, costs, and attorneys' fees, and we therefore modify the order and judgment accordingly. The law governing the motion insofar as it sought summary judgment on the first and second causes of action, for breach of contract, is well settled. "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015], *lv denied* 27 NY3d 909 [2016] [internal quotation marks omitted]; *see WFE Ventures, Inc. v Mills*, 139 AD3d 1157, 1160 [3d Dept 2016]). Here, defendants do not dispute the existence of contracts between them and plaintiffs, rather defendants challenge plaintiffs' interpretation of the terms of those contracts. With respect to the interpretation of contracts, it is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "[T]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [4th Dept 2009] [internal quotation marks omitted]; *see Centerline/Fleet Hous. Partnership, L.P.–Series B v Hopkins Ct. Apts.*, 176 AD3d 1596, 1597 [4th Dept 2019]; *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 891 [4th Dept 2007]). Where " 'ambiguity or equivocation exists and the extrinsic evidence presents a question of credibility or a choice among reasonable inferences, the case should not be resolved by way of summary judgment' " (*Mohawk Val. Water Auth. v State of New York*, 159 AD3d 1548, 1550 [4th Dept 2018]).

Here, we conclude that plaintiffs did not meet their initial burden on those parts of the motion seeking summary judgment on the first and second causes of action inasmuch as plaintiffs failed to submit sufficient evidence to establish that their interpretation of the relevant contracts is the only reasonable interpretation thereof. Thus, we further conclude that the court erred in granting the motion to that extent and in awarding plaintiffs costs and damages (*see Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1528-1529, 1532 [4th Dept 2017]; *see also Romilly v RMF Prods., LLC*, 106 AD3d 1465, 1466 [4th Dept 2013]).

The court also erred in granting those parts of the motion

seeking summary judgment on the third cause of action, for fraudulent misrepresentation, and seeking attorneys' fees with respect to that cause of action. "It is well settled that a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation" (*Preston v Northside Collision-Dewitt, LLC*, 158 AD3d 1127, 1128 [4th Dept 2018] [internal quotation marks omitted]). On this record, we conclude that, "far from being collateral to the contract, the purported misrepresentation was directly related to a specific provision of the contract" (*id.* [internal quotation marks omitted]; *see Logan–Baldwin v L.S.M. Gen. Contrs., Inc.*, 48 AD3d 1220, 1221 [4th Dept 2008]; *Williams v Coppola*, 23 AD3d 1012, 1012-1013 [4th Dept 2005], *lv dismissed* 7 NY3d 741 [2006]). In addition, CPLR 3016 (b) provides that, "[w]here a cause of action . . . is based upon . . . fraud, . . . , the circumstances constituting the wrong shall be stated in detail," and we conclude that the cause of action here failed to satisfy that requirement (*see Maki v Bassett Healthcare*, 85 AD3d 1366, 1369-1370 [3d Dept 2011], *appeal dismissed* 17 NY3d 870 [2011], *lv denied in part and dismissed in part* 18 NY3d 870 [2012]; *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390-391 [1st Dept 2005]; *cf. Mosca v Kiner*, 277 AD2d 937, 938 [4th Dept 2000]). Consequently, the court erred by granting the motion insofar as it sought summary judgment and attorneys' fees on that cause of action and in awarding plaintiffs damages, costs, and attorneys' fees pursuant to that cause of action.

In light of our determination, plaintiffs' contentions on their cross appeal are academic.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

170

CA 21-00005

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

JAMES S. CONRAD, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. DEMUNDA AND NIAGARA APOTHECARY, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS,

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT RICHARD A. DEMUNDA.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT NIAGARA APOTHECARY, INC.

Appeal and cross appeals from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered December 17, 2020. The order granted in part and denied in part plaintiff's motion for partial summary judgment and denied the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained when a vehicle owned and operated by defendant Richard A. Demunda, who was working as an employee of defendant Niagara Apothecary, Inc. (Niagara), left the roadway and struck several parked vehicles and pedestrians, including plaintiff. Defendants separately moved for summary judgment dismissing the complaint against them, contending, inter alia, that Demunda suffered an unforeseeable medical emergency that caused him to lose consciousness and that neither he nor Niagara could be charged with negligence as a result thereof (*see generally Dalchand v Missigman*, 288 AD2d 956, 956 [4th Dept 2001]). Plaintiff moved for partial summary judgment "on the issue of liability (negligence and serious injury), and dismissing the affirmative defenses of sudden medical emergency/emergency doctrine, and comparative fault/culpable conduct." Supreme Court granted plaintiff's motion with respect to the issue of serious injury and the affirmative defense of comparative fault, but otherwise denied plaintiff's motion and denied defendants' motions on the ground that there are "triable issues of fact as to whether the

affirmative defenses of sudden medical emergency and/or the emergency doctrine preclude[d] defendants' liability in causing the subject incident." Plaintiff appeals and defendants cross-appeal, and we now affirm.

It is well settled that "[a] driver 'who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen' " (*id.*; *see Martinez v Grimm*, 151 AD3d 1847, 1848 [4th Dept 2017]; *see generally Fillette v Lundberg*, 150 AD3d 1574, 1575 [3d Dept 2017]; *Serpas v Bell*, 117 AD3d 712, 713 [2d Dept 2014]; *Rivera v New York City Tr. Auth.*, 54 AD3d 545, 549 [1st Dept 2008]). A defendant moving for summary judgment on the sudden medical emergency doctrine must "establish the existence of the claimed medical emergency and its unforeseeable nature" by "competent or expert medical evidence" (*Pitt v Mroz*, 146 AD3d 913, 914 [2d Dept 2017]; *see Serpas*, 117 AD3d at 713).

With respect to defendants' cross appeals, even assuming, arguendo, that defendants met their initial burden of proof by establishing that Demunda suffered an unforeseeable medical emergency, we conclude that the court properly denied defendants' motions inasmuch as plaintiff's submissions raised triable issues of fact (*see Karl v Terbush*, 63 AD3d 1359, 1360 [3d Dept 2009]; *Thomas v Hulslander*, 233 AD2d 567, 568 [3d Dept 1996]; *cf. State of New York v Susco*, 245 AD2d 854, 855-856 [3d Dept 1997]). For the same reason, we conclude with respect to plaintiff's appeal that the court properly denied his motion with respect to the affirmative defense of sudden medical emergency/emergency doctrine.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

205

KA 18-00876

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL GOODWIN, DEFENDANT-APPELLANT.

MARY WHITESIDE, NORTH HOLLYWOOD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered September 22, 2016. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia 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 controlled substance in the third degree (Penal Law § 220.16 [1]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2]). Initially, we agree with defendant that his waiver of the right to appeal is invalid and thus does not preclude our review of any of his contentions (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Josue F.*, 191 AD3d 1483, 1484 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]).

Defendant contends that he was denied the right to counsel when, during his arraignment in Rochester City Court, that court relied on a statement made by the Public Defender that defendant was not eligible for assigned counsel. Because "the record does not make clear, irrefutably, that a right to counsel violation has occurred," defendant's contention must be raised by way of a motion pursuant to CPL 440.10 (*People v McLean*, 15 NY3d 117, 121 [2010]; *see People v Townsend*, 202 AD3d 447, 448 [1st Dept 2022], *lv denied* — NY3d — [2022]; *People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]).

We have considered defendant's remaining contentions concerning the grand jury presentation, and we conclude that they do not require

modification or reversal of the judgment.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

220

KA 17-01695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS HARTSFIELD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered February 24, 2017 and June 27, 2017. The judgment convicted defendant, upon two jury verdicts, of rape in the first degree, aggravated unlicensed operation of a motor vehicle in the first degree, driving while ability impaired by drugs and operation while registration is suspended.

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

Memorandum: Defendant appeals from a judgment convicting him, upon two jury verdicts, of rape in the first degree (Penal Law § 130.35 [1]), aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]), driving while ability impaired by drugs (§ 1192 [4]), and operation while registration is suspended (§ 512). Supreme Court severed the rape count from the remaining counts in the indictment and directed that separate trials be conducted on the counts involving defendant's operation of a motor vehicle (first trial) and the rape count (second trial).

Defendant contends that the court erred in denying his motion to dismiss the indictment with respect to counts at issue in the first trial due to the alleged insufficiency of the prosecutor's opening statement. We reject that contention. In her opening statement, the prosecutor "stated the nature of the charge[s] and the facts that [she] expected to prove in support of them[,] and thus [her] opening statement was adequate" (*People v Nielsen*, 67 AD3d 1440, 1441 [4th Dept 2009] [internal quotation marks omitted]; *see generally People v Kurtz*, 51 NY2d 380, 384 [1980], *cert denied* 451 US 911 [1981]; *People v Nuffer*, 70 AD3d 1299, 1300 [4th Dept 2010]). Contrary to defendant's assertion, the prosecutor's opening statement made

reference to the fact that the underlying incident occurred on a public road in the City of Rochester—i.e., Monroe County—and therefore the opening statement was not jurisdictionally defective.

Defendant also contends that, at the first trial, the court improperly allowed three employees of the medical examiner's office to testify about the presence of cocaine in defendant's blood because their testimony was cumulative. To the extent that defendant's contention is preserved (*see generally* CPL 470.05 [2]), we conclude that the court did not abuse its discretion in permitting testimony from all three witnesses because evidence of the cocaine in defendant's blood was relevant to establish whether defendant was impaired by the substance beyond a reasonable doubt and "each examiner played a successive role in the analysis" (*People v Hajratalli*, 200 AD3d 1332, 1339 [3d Dept 2021]; *see generally People v Davis*, 43 NY3d 17, 27 [1977], *cert denied* 435 US 998 [1978]).

Contrary to defendant's further contention, we conclude that the court properly denied defendant's motion seeking substitution of counsel at the second trial and that the court did not err in denying the request without conducting an inquiry into defendant's objections with respect to defense counsel. Defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Konovalchuk*, 148 AD3d 1514, 1515-1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *People v Adger*, 83 AD3d 1590, 1591-1592 [4th Dept 2011], *lv denied* 17 NY3d 857 [2011]). Instead, defendant essentially made only " 'vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense' " (*People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction of rape in the first degree at the second trial (*see People v Bleakley*, 69 NY2d 490, 495 [1987]) because there is "a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Carlson*, 184 AD3d 1139, 1140 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]).

Defendant further contends that the court erred in permitting the People at the second trial to elicit testimony from the victim about her knowledge of defendant's prior incarceration. Even assuming, arguendo, that the court erred in permitting the testimony (*cf. People v Croft*, 176 AD2d 1225, 1225-1226 [4th Dept 1991], *lv denied* 79 NY2d 855 [1992]), we conclude that any such error is harmless (*see generally People v Mairena*, 34 NY3d 473, 484-485 [2019]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Here, there can be no dispute that the evidence adduced at trial,

irrespective of the challenged testimony, overwhelmingly established defendant's guilt (*see Mairena*, 34 NY3d at 484-485; *Crimmins*, 36 NY2d at 241-242), i.e., that he engaged in sexual intercourse with the victim by forcible compulsion (*see* Penal Law § 130.35 [1]). It is uncontested that the rape occurred at the church where the victim had worked and worshiped for many years and that it was committed by someone the victim had known for almost two decades. Thus, there is plainly no issue with respect to the perpetrator's identity nor is there confusion about the circumstances under which the rape happened. Further, the victim consistently testified, in great detail, about how defendant forced himself onto her and vaginally penetrated her to the point that she felt as though she was being stabbed in her vagina with a knife. The trial testimony also overwhelmingly established that, after the rape, the victim's vaginal injuries were so severe that she continued to bleed overnight and had to go to the hospital the next day due to the continued pain. Although the victim briefly delayed disclosing the rape, her account thereof was extensively corroborated by the consistent trial testimony of others.

We further conclude that there is no "*significant probability . . . that the jury would have acquitted . . . defendant had it not been for*" the court's presumed error in admitting the challenged testimony (*Crimmins*, 36 NY2d at 242 [emphasis added]; *see Mairena*, 34 NY3d at 485; *People v Hackett*, 166 AD3d 1483, 1486 [4th Dept 2018], *lv denied* 32 NY3d 1204 [2019], *reconsideration denied* 33 NY3d 949 [2019]). The victim's brief testimony about her knowledge of defendant's prior incarceration is the trial's only reference to that fact, which was not mentioned during either opening or closing statements. Additionally, during their brief deliberations, the jury did not ask for a read-back of the challenged testimony or any other trial testimony, and nothing in the record indicates that the jury focused on the challenged testimony or was in any way swayed by it.

The dissent's conclusion that the court's error in admitting the challenged testimony was not harmless because its final limiting instruction, issued during the jury charge, compounded that error is entirely separate from the issue actually before us—i.e., whether the admission of the challenged testimony requires reversal. Defendant never objected to the court's final limiting instruction and, therefore, any error occasioned by that instruction is unpreserved (*see* CPL 470.05 [2]; *People v Dixon*, 214 AD2d 1010, 1011 [4th Dept 1995], *lv denied* 87 NY2d 900 [1995]). Further, we note that defendant has not argued on appeal that the content of the court's final limiting instruction was erroneous; he merely argues that it did not cure the prejudice caused by the challenged testimony. Thus, we conclude that the propriety of the court's final limiting instruction is not before us.

All concur except WHALEN, P.J., and SMITH, J., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent. We cannot agree that, at defendant's trial on the charge of rape in the first degree (Penal Law § 130.35 [1]), Supreme Court's error in permitting the People to elicit testimony from the victim about her knowledge of defendant's prior incarceration

is harmless. Initially, this is not a case in which evidence of the victim's state of mind, specifically her fear of defendant, was probative on the issue of forcible compulsion, an element of the crime charged (*see id.*; *cf. People v Croft*, 176 AD2d 1225, 1225-1226 [4th Dept 1991], *lv denied* 79 NY2d 855 [1992]). The victim testified that she had no suspicion that an assault was forthcoming; instead, when she opened the door to defendant, she was immediately physically overtaken and pushed to the floor. Indeed, the prosecutor never asked the victim any questions that would elicit how her knowledge of defendant's prior incarceration affected her state of mind. The evidence therefore had no probative value under the circumstances of this case and should have been excluded as prejudicial (*cf. People v Newton*, 144 AD3d 1617, 1618 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]).

Further, although the court gave a limiting instruction immediately following the victim's testimony that defendant had been "incarcerated over the years," the court nonetheless later instructed the jury that they could consider the evidence that defendant had previously been incarcerated "on the question of the victim's state of mind." This instruction compounded, rather than alleviated, the court's prior error because, as concluded above, the victim's state of mind was irrelevant to the elements of the charge against defendant under the circumstances of this case (*see generally People v Murray*, 191 AD3d 1324, 1326-1327 [4th Dept 2021]; *People v Hollander*, 177 AD3d 683, 685 [2d Dept 2019]). The court's instruction left the jurors to speculate on the relevance of defendant's prior incarceration and invited them to use that evidence as a reason to credit the victim's testimony (*see People v Shaw*, 160 AD2d 393, 394 [1st Dept 1990]; *see generally People v Gachelin*, 237 AD2d 300, 301 [2d Dept 1997]). Inasmuch as defendant's identity as the victim's attacker was established solely through the victim's testimony, we cannot conclude that the evidence of defendant's guilt, without reference to the victim's improperly bolstered testimony, is overwhelming or that there is no significant probability that the jury would have acquitted defendant had it not been for the error (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]). We would therefore reverse the judgment insofar as it convicted defendant of rape in the first degree and grant a new trial on that count.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

234

CA 21-01091

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

KATHLEEN RENO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WHEATLAND-CHILI CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HARRIS BEACH PLLC, ROCHESTER (JULIEN M. BAUMRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEVE BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered February 5, 2021. The order granted the motion of plaintiff for leave to reargue and, upon reargument, granted the cross motion of plaintiff for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and as modified the order is affirmed without costs.

Memorandum: Defendant-appellant (defendant) appeals from an order that granted plaintiff's motion for leave to reargue a prior order and, upon reargument, granted plaintiff's cross motion for leave to amend the complaint by adding a cause of action for failure to report under Social Services Law § 420 (2). Even assuming, arguendo, that Supreme Court properly granted plaintiff's motion for leave to reargue, we agree with defendant that the court should have adhered to its original denial of the cross motion. It is well established that leave to amend should be denied where, inter alia, "the proposed amendment is palpably insufficient" (*Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d 861, 862 [2d Dept 2018] [internal quotation marks omitted]; *see Dentes v Wetherell*, 139 AD2d 899, 899 [4th Dept 1988]). Here, plaintiff's proposed cause of action under section 420 (2) is palpably insufficient because it neither pleads nor alleges facts tending to establish a necessary element of such a cause of action, i.e., that defendant's alleged failure to report was done "knowingly and willfully" (§ 420 [2]; *see Ibarrondo v Evans*, 191 AD3d 602, 603 [1st Dept 2021]; *Galanova v Safir*, 127 AD3d 686, 687 [2d Dept 2015]; *Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019, 1020 [4th Dept 2005]; *see generally Hong Qin Jiang v Li Wan Wu*, 179 AD3d 1041, 1042 [2d Dept 2020]). We therefore modify the order accordingly.

Defendant’s remaining contention is academic in light of our determination.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

238

KA 17-01153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER N. PRYOR, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 25, 2017. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), arising from an incident in which she repeatedly stabbed her husband, causing his death. Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to disprove defendant's justification defense (*see generally* Penal Law §§ 25.00, 35.00; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The jury was entitled to credit the testimony of the People's witnesses and to consider the many inconsistencies between defendant's testimony at trial and her statements to medical personnel and the police, among others, and we perceive no reason to disturb the jury's credibility determinations in that regard (*see People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). The jury was also entitled to conclude that the physical evidence failed to support defendant's versions of the events during and preceding the fatal stabbing, and we are satisfied that the jury's rejection of the justification defense was not contrary to the weight of the evidence (*see generally People v Goley*, 113 AD3d 1083, 1084 [4th Dept 2014]).

We reject defendant's contention that Supreme Court erred in declining to allow her to introduce her videotaped exculpatory statements in their entirety in response to the prosecutor's cross-examination of her (*see People v Jimenez-Gomez*, 198 AD3d 443, 444 [1st Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Williams*, 217 AD2d 713, 713 [2d Dept 1995], *lv denied* 87 NY2d 1026 [1996]), and we conclude that there was no violation of the rule of completeness (*see generally People v La Belle*, 18 NY2d 405, 410-411 [1966]). "By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. Rather, the trial court must limit the inquiry on redirect to the 'subject-matter of the cross-examination [which] bear[s] upon the question at issue,' " and "the trial court should normally 'exclude *all evidence which has not been made necessary by the opponent's case in reply*' " (*People v Melendez*, 55 NY2d 445, 452 [1982]). Consequently, the prosecutor's use of portions of defendant's statements to impeach her credibility in this case did not entitle defendant to introduce her entire statements to bolster her own credibility (*see People v Ramos*, 70 NY2d 639, 640-641 [1987]).

Defendant objected on only one of several occasions on which she alleges that the prosecutor impermissibly questioned her about her pretrial silence, and thus her contentions with respect to the remaining instances of such questioning are not preserved for our review (*see People v Thomas*, 169 AD3d 1451, 1451 [4th Dept 2019]; *People v Boop*, 118 AD3d 1273, 1273 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). In any event, defendant's contentions with respect to both the preserved and unpreserved instances of questioning lack merit. The general rule that a prosecutor may not use a defendant's pretrial silence to impeach his or her trial testimony does not apply where, as here, " 'a defendant speaks to the police and omits exculpatory information which he [or she] presents for the first time at trial' " (*People v Harris*, 57 AD3d 1523, 1524 [4th Dept 2008], *lv denied* 12 NY3d 817 [2009]; *see People v Smith*, 187 AD3d 1652, 1654 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *see generally People v Savage*, 50 NY2d 673, 680-682 [1980], *cert denied* 449 US 1016 [1980]).

The sentence is not unduly harsh or severe.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

241

KA 18-01574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSIAH D. GARDNER, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered March 29, 2018. The judgment convicted defendant upon a jury verdict of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends, inter alia, that the conviction is not based on legally sufficient evidence and that the verdict is against the weight of the evidence. Assuming, arguendo, that defendant preserved for our review his challenge to the legal sufficiency of the evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude, after viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude, after viewing the evidence in light of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that County Court erred in admitting in evidence a written statement of a prosecution witness as a past recollection recorded. We agree. "[A] memorandum made of a fact known or an event observed in the past of which the witness lacks sufficient present recollection may be received in evidence as a supplement to the witness's oral testimony" (*People v Taylor*, 80 NY2d 1, 8 [1992]). "The foundational requirements for the admissibility of a past recollection recorded are: (1) the witness must have observed the matter recorded; (2) the recollection must have been fairly fresh at the time when it was recorded; (3) the witness must currently be able to testify that the record is a correct representation of his or

her knowledge and recollection at the time it was made; and (4) the witness must lack sufficient present recollection of the information recorded" (*People v Tapia*, 33 NY3d 257, 264 [2019], *cert denied* — US —, 140 S Ct 643 [2019]; *see Taylor*, 80 NY2d at 8).

Here, as defendant contends, the prosecution witness in question did not testify that his written statement accurately represented his knowledge and recollection when made. To the contrary, the witness testified that the statement was not accurate when given because he was under the influence of narcotics at that time (*see People v DiTommaso*, 127 AD3d 11, 12 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]; *People v Wilkinson*, 120 AD3d 521, 522 [2d Dept 2014]). Moreover, because the statement was made more than six months after the alleged events recorded therein, the recollection was not "fairly fresh" when recorded (*DiTommaso*, 127 AD3d at 12; *see Wilkinson*, 120 AD3d at 522; *People v Eli*, 250 AD2d 418, 419 [1st Dept 1998], *lv denied* 92 NY2d 851 [1998]). The court therefore erred in admitting the written statement in evidence over defendant's objection.

Defendant also contends that the court erred in instructing the jury on accomplice liability. In its instructions, the court stated that a person could be liable for the conduct of another "when acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes or *potentially* aids such person to engage in such conduct" (emphasis added). The court repeated that instruction two more times. Penal Law § 20.00 provides that a "person is criminally liable for [the conduct of another] when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or *intentionally* aids such person to engage in such conduct" (emphasis added). Defendant did not object to the incorrect instruction and thus failed to preserve his contention for our review (*see People v Spencer*, 185 AD3d 1440, 1441 [4th Dept 2020]). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the court's use of the phrase "potentially aids" rather than "intentionally aids" significantly prejudiced defendant, who was alleged to have aided and abetted the principal by driving him to and from the crime scene.

Based on the two errors referenced above, we reverse the judgment and grant defendant a new trial. In light of our determination, we do not address defendant's remaining contentions.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

285

KA 18-02071

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROLD YOUNG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 17, 2018. The judgment convicted defendant, upon a plea of guilty, of predatory sexual assault against a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 10 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of predatory sexual assault against a child (Penal Law § 130.96). Defendant contends, and the People correctly concede, that defendant did not validly waive his right to appeal (*see People v Murray*, 197 AD3d 1017, 1017 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]). We agree with defendant that, under the particular circumstances of this case, the sentence of incarceration of 14 years to life is unduly harsh and severe. This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" and may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]). We conclude that a reduction in the sentence is appropriate in light of defendant's lack of criminal history and his history of mental health issues stemming from his own abusive upbringing. Further, in his interview with law enforcement, defendant expressed remorse for his actions and an understanding of the trauma that those actions had inflicted on the victim. Thus, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence imposed to an indeterminate term of incarceration of 10 years to life

(*see generally* Penal Law § 70.00 [2] [a]; [3] [a] [ii]).

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

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

287

KA 19-00869

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CUANSHAREE PALMER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 27, 2018. The judgment convicted defendant upon a jury verdict of manslaughter in the second degree, vehicular manslaughter in the second degree (two counts), aggravated driving while intoxicated (four counts) and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of one count of manslaughter in the second degree (Penal Law § 125.15 [1]), two counts of vehicular manslaughter in the second degree (§ 125.12 [1]), four counts of aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i] [B]), and two counts of endangering the welfare of a child (Penal Law § 260.10 [1]). We affirm.

Defendant contends that Supreme Court erred in rejecting her *Batson* challenge after the People's exercise of a peremptory challenge with respect to one prospective juror because the prosecutor's facially race-neutral reasons for striking that juror were pretextual. A "trial court's determination whether a proffered race-neutral reason is pretextual is accorded 'great deference' on appeal" (*People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]), and we see no reason to disturb that determination (*see People v Smyre*, 195 AD3d 1458, 1459 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *People v Johnson*, 195 AD3d 1510, 1511-1512 [4th Dept 2021]; *People v Escobar*, 181 AD3d 1194, 1196 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]).

Defendant next contends that the court erred in refusing to

suppress her statements to the police and the blood test results because she was in police custody and subject to interrogation without *Miranda* warnings, and her consent to the blood test was involuntary. We reject that contention. "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]). Here, upon review of the relevant factors (*see People v Lunderman*, 19 AD3d 1067, 1068-1069 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]) and giving due deference to the hearing court's credibility determinations (*see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]), we conclude that "the evidence at the [suppression] hearing establishes that defendant was not in custody when [she] made the statements, and thus *Miranda* warnings were not required" (*People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *see People v Rounds*, 124 AD3d 1351, 1352 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]). Specifically, defendant was not in custody at the accident scene when she was placed in the back seat of a patrol car, without handcuffs, and where the brief police questioning was investigatory, not accusatory (*see People v Defio*, 200 AD3d 1672, 1673 [4th Dept 2021], *lv denied* — NY3d — [Mar. 17, 2022]; *People v Chess*, 162 AD3d 1577, 1580-1581 [4th Dept 2018]). Defendant agreed to accompany the officer to the police station (*see Bell-Scott*, 162 AD3d at 1559), and the evidence at the suppression hearing supports the court's determination that defendant's consent to submit to the blood test was voluntary (*see Defio*, 200 AD3d at 1673; *People v O'Hanlon*, 5 AD3d 1012, 1012 [4th Dept 2004], *lv denied* 3 NY3d 645 [2004]). After having her blood drawn, defendant expressed her willingness to return to the police station, and the record supports the court's determination that she was not in custody when she gave her written statement, without police interrogation (*see People v Cordato*, 85 AD3d 1304, 1309-1310 [3d Dept 2011], *lv denied* 17 NY3d 815 [2011]).

Defendant also contends that she was denied a fair trial by prosecutorial misconduct during summation. Defendant's contention is largely unpreserved for our review (*see People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021]; *People v Tucker*, 195 AD3d 1547, 1548 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]). In any event, most of the allegedly improper comments were fair response to the comments made by the defense or fair comment on the evidence (*see Coggins*, 198 AD3d at 1301; *Tucker*, 195 AD3d at 1549). To the extent the prosecutor's comments exceeded those bounds, we conclude that they "were not so egregious as to deprive defendant of a fair trial" (*People v Ali*, 89 AD3d 1412, 1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012] [internal quotation marks omitted]; *see People v Blackshell*, 178 AD3d 1355, 1356 [4th Dept 2019], *lv denied* 35 NY3d 968 [2020]).

We reject defendant's contention that she was denied effective

assistance of counsel. Inasmuch as defendant was not deprived of a fair trial by any alleged improprieties on the part of the prosecutor, we conclude that defense counsel's failure to preserve her contentions regarding prosecutorial misconduct did not deprive her of effective assistance of counsel (*see People v Bagley*, 194 AD3d 1475, 1477 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; *People v Brooks*, 183 AD3d 1231, 1232 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]). In addition, defendant was not denied effective assistance of counsel by defense counsel's failure to move to reopen the suppression hearing (*see People v Sanchez*, 196 AD3d 1010, 1013-1014 [3d Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *People v Blocker*, 128 AD3d 1483, 1484 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). Such a motion would have had "little or no chance of success" (*People v Williams*, 35 NY3d 24, 45 [2020]; *see People v Caban*, 5 NY3d 143, 152 [2005]). Although defense counsel demonstrated a misunderstanding of the law in asserting in his opening statement and motion for a trial order of dismissal that the People had the burden to prove that defendant voluntarily ingested alcohol (*see generally People v Cruz*, 48 NY2d 419, 426-428 [1979], *appeal dismissed* 446 US 901 [1980]), we conclude that the error did not prejudice defendant under the circumstances of this case (*see generally People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Santana*, 114 AD3d 557, 558 [1st Dept 2014], *lv denied* 23 NY3d 1067 [2014]). Viewing the evidence, the law, and the circumstances in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

294

CA 21-01042

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

ROBERT R. DAVIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EVANGELICAL LUTHERAN CHURCH IN AMERICA,
ET AL., DEFENDANTS,
AND UPSTATE NEW YORK SYNOD OF THE EVANGELICAL
LUTHERAN CHURCH IN AMERICA, DEFENDANT-APPELLANT.

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

CHIACCHIA & FLEMING, LLP, HAMBURG (CHERYL KENNEDY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 22, 2021. The order denied the motion of defendant Upstate New York Synod of the Evangelical Lutheran Church in America to dismiss the complaint against it.

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

Memorandum: On appeal, defendant-appellant (defendant) contends that Supreme Court erred in denying its motion to dismiss the complaint against it pursuant to CPLR 3211 (a) (1). We reject that contention.

In order to succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant must proffer documentary evidence that "utterly refute[s]" the factual allegations in the complaint, "conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021] [internal quotation marks omitted]). " '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' " (*Ajaka v Mount Sinai Hosp.*, 189 AD3d 963, 965 [2d Dept 2020]; *see Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1563 [4th Dept 2021]). However, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1)" (*Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923, 925 [2d Dept 2014] [internal quotation marks omitted]; *see Rider*,

192 AD3d at 1563). Here, the documentary evidence submitted by defendant failed to utterly refute the factual allegations in the complaint, and we therefore conclude that the court properly denied the motion.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

306

KA 20-01352

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON J. CONGDON, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, 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 (Philip J. Roche, J.), rendered July 7, 2020. The judgment convicted defendant upon his plea of guilty of attempted strangulation in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted strangulation in the second degree (Penal Law §§ 110.00, 121.12). We affirm.

Initially, defendant's contention that County Court abused its discretion in denying his motion to withdraw the plea survives his purported waiver of the right to appeal (*see People v Stafford*, 195 AD3d 1466, 1467 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]). Nevertheless, we reject that contention. "The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court" (*People v Smith*, 122 AD3d 1300, 1301-1302 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015] [internal quotation marks omitted]). Defendant contends that he was coerced into pleading guilty based on, inter alia, the unfulfilled "promise" of the court that he would be admitted into a shock incarceration program. Contrary to defendant's contention, however, the plea colloquy transcript establishes that "neither [his] eligibility for the shock incarceration program . . . , nor his ultimate admission to that program was a condition of the plea" (*People v Demick*, 138 AD3d 1486, 1486 [4th Dept 2016], *lv denied* 27 NY3d 1150 [2016] [internal quotation marks omitted]). Indeed, the court specifically advised defendant that it could only recommend that he be enrolled in a shock incarceration program, that the ultimate decision of his enrollment belonged to the New York State Department of Corrections and Community

Supervision (DOCCS), and that if DOCCS did not "choose" to enroll defendant in a shock incarceration program, the prison sentence would stand (*cf. People v Regan*, 199 AD3d 1067, 1068-1069 [3d Dept 2021]; *People v Smith*, 160 AD3d 1475, 1475-1476 [4th Dept 2018]). To the extent defendant contends that he was promised enrollment in a shock incarceration program based on off-the-record statements, we note that his contention involves matters outside the record on appeal and must be raised via a motion pursuant to CPL 440.10 (*see People v Beardsley*, 173 AD3d 1722, 1724 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]; *People v Hodge*, 226 AD2d 1124, 1124 [4th Dept 1996], *lv denied* 88 NY2d 986 [1996]).

Defendant also contends that the court erred in denying his motion to withdraw his plea because the People violated his right to testify before the grand jury (*see generally* CPL 190.50 [5]). We conclude, however, that defendant waived that particular contention inasmuch as it is undisputed that he did not move to dismiss the indictment "*on that ground* within five days after he was arraigned" (*People v Linder*, 170 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019] [internal quotation marks omitted]; *see* CPL 190.50 [5] [c]; *People v McCoy*, 174 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020]).

Finally, even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

326

KA 19-02364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 30, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We affirm.

Defendant's challenges to the voluntariness of his guilty plea are unpreserved (*see People v Rodriguez*, 199 AD3d 1458, 1458-1459 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]) and, in any event, are without merit (*see People v Alexander*, 19 NY3d 203, 219 [2012]; *People v Adams*, 201 AD3d 1311, 1313 [4th Dept 2022]; *People v Rathburn*, 178 AD3d 1421, 1422 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020]). Moreover, although defendant correctly contends that he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 562-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we nevertheless conclude that his sentence is not unduly harsh or severe. Additionally, defendant's specific request for a sentence of parole supervision to be served, in part, at the Willard Drug Treatment Campus is now moot given the recent closure of that facility. To the extent that defendant sought a sentence of parole supervision to be served in part at a different facility, his contemporaneous conviction for hindering prosecution in the first degree (*see People v Brown* [appeal No. 2], — AD3d —, — [Apr. 29, 2022] [4th Dept 2022]) made him

ineligible for such a sentence on the instant crimes (*see* CPL 410.91 [2]). We note that *People v Young* (184 AD3d 443, 443-444 [1st Dept 2020], *lv denied* 35 NY3d 1071 [2020]) involved a defendant's eligibility for judicial diversion under CPL article 216 and has no bearing on a defendant's eligibility for a sentence of parole supervision under CPL 410.91.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

332

KA 19-02365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 30, 2019. The judgment convicted defendant, upon his plea of guilty, of hindering prosecution in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of hindering prosecution in the first degree (Penal Law § 205.65). We affirm.

Defendant's challenges to the voluntariness of his guilty plea are unpreserved for appellate review (*see People v Rodriguez*, 199 AD3d 1458, 1458-1459 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]), and the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case because defendant said "[n]othing . . . during the plea colloquy itself" that negated an element of the pleaded-to crime or otherwise called into doubt the voluntariness of his plea (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see also People v Romanowski*, 196 AD3d 1081, 1082 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]). Contrary to defendant's assertion, which finds support in a line of Third Department cases that we declined to follow in *Mobayed* (*see e.g. People v Gresham*, 151 AD3d 1175, 1178 [3d Dept 2017]), we reiterate that a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's voluntariness "based upon comments made by [the] defendant during . . . sentencing" (*Mobayed*, 158 AD3d at 1223; *see People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017]; *People v Garbarini*, 64 AD3d 1179, 1179 [4th Dept 2009], *lv denied* 13 NY3d 744

[2009]; *People v Sands*, 45 AD3d 414, 415 [1st Dept 2007], *lv denied* 10 NY3d 816 [2008]).

As the Court of Appeals emphasized in *Lopez* itself, the trial court's duty of further inquiry is triggered only when a defendant makes a negating or undermining statement *before* the trial court "accepts" his or her guilty plea (71 NY2d at 666). Indeed, the entire *Lopez* rule is framed around the trial court's "duty" to "not *accept*" a negated guilty plea unless the defendant, during a further inquiry, provides sufficient assurances of the plea's voluntariness (*id.* [emphasis added]). The *Lopez* rule thus cannot be applied to statements made by the defendant *after* the plea's valid acceptance, and to our knowledge the Court of Appeals has never extended *Lopez* to require the sua sponte reopening of a plea colloquy based upon the defendant's *post-plea* statements. Contrary to the Third Department's position (*see e.g. Gresham*, 151 AD3d at 1178), the Court of Appeals did not expand the *Lopez* rule to such post-plea statements in *People v Pastor* (28 NY3d 1089 [2016]); rather, the Court of Appeals' memorandum in that case noted that the defendant "said nothing during the plea colloquy or the sentencing proceeding that negated an element of the crime or raised the possibility of a justification defense" (*id.* at 1090-1091), and it declined to apply the *Lopez* rule under those circumstances. *Pastor* never explicitly held that the *Lopez* rule would have been triggered had the defendant said something at sentencing that negated an element of the crime to which he had already pleaded guilty, and the Court of Appeals' subsequent characterization of *Pastor* and related caselaw in *People v Delorbe* (35 NY3d 112, 119-121 [2020]) further confirms our conclusion that *Pastor* did not implicitly extend the *Lopez* rule to a defendant's post-plea statements. Indeed, the Third Department's interpretation of *Pastor* incentivizes defendants to forgo formal plea-withdrawal motions in favor of oblique negating commentary at sentencing; after all, since the *Lopez* rule *forbids* the acceptance and approval of a negated guilty plea without sufficient follow-up assurances from the defendant personally (*see* 71 NY2d at 666), applying that rule to post-plea commentary would effectively afford every defendant the unfettered option to withdraw his or her guilty plea at sentencing simply by negating an element of the pleaded-to crime and thereafter refusing to offer the follow-up assurances contemplated by *Lopez*. We cannot countenance such a procedure; "the law favors the finality of guilty pleas and they are not to be undone lightly or at the whim of the defendant" (*People v White*, 137 AD2d 859, 859 [2d Dept 1988]).

In any event, defendant said nothing at the sentencing hearing that negated an element of the crime to which he previously pleaded guilty (*compare* Penal Law § 205.65, *with* § 20.00; *see generally People v Fisher*, 28 NY3d 717, 722-725 [2017]). Moreover, defendant's substantive challenges to the voluntariness of his guilty plea are without merit (*see People v Alexander*, 19 NY3d 203, 219 [2012]; *People v Adams*, 201 AD3d 1311, 1313 [4th Dept 2022]; *People v Rathburn*, 178 AD3d 1421, 1422 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020]). Finally, although defendant correctly contends that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 562-563

[2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that his sentence is not unduly harsh or severe.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

355

KA 18-01172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MASTER T. GLOVER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 30, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree (two counts), criminal sale of a controlled substance in the third degree, and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and one count of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant was indicted after the execution of a search warrant by police officers acting on information provided by a confidential informant. After an in camera *Darden* hearing (*see People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]; *see generally People v Edwards*, 95 NY2d 486, 493-494 [2000]), County Court determined that the confidential informant "actually existed and . . . [had] engaged in the drug transactions as referenced in the search warrant application." On appeal, defendant contends that the court erred in its determination. We have reviewed the sealed transcript of the *Darden* hearing, as well as the court's summary report that was made available to defendant, and we conclude that the court properly determined that "the informant existed and . . . provided the information to the police concerning the . . . drug sales at the specified location" that was the subject of the search warrant (*People v Wilson*, 48 AD3d 1099, 1100 [4th Dept 2008], *lv denied* 10 NY3d 845 [2008]; *see People v Williams*, 184 AD3d 1125, 1127 [4th Dept 2020], *affd* 37 NY3d 314 [2021]).

Contrary to defendant's further contention, the period of postrelease supervision is not unduly harsh or severe.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

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

362

CA 21-00781

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

TERI ELLIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NATA PARNES, M.D., TRI-COUNTY ORTHOPEDICS AND CARTHAGE AREA HOSPITAL, INC., DEFENDANTS-APPELLANTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SNYDER LAW FIRM, PLLC, SYRACUSE (DAVID B. SNYDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 11, 2021. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: In this medical malpractice action, defendants appeal from an order to the extent that it denied their motion for summary judgment insofar as it sought the dismissal of the first cause of action. We affirm. Although plaintiff acknowledges that defendants met their initial burden on the motion, we conclude that, contrary to defendants' contention, plaintiff raised a triable issue of fact regarding the first cause of action in opposition to the motion (*see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Defendants failed to preserve their further contention that defendant Tri-County Orthopedics lacks capacity to be sued (*see Fischer v Chevra Machziket H'Shechuna*, 295 AD2d 227, 228 [1st Dept 2002]; *cf. Admiral Ins. Co. v Marriott Intl., Inc.*, 67 AD3d 526, 526 [1st Dept 2009]). Defendants' remaining contention does not warrant modification or reversal of the order insofar as appealed from.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

371

KA 21-00509

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD POTTER, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered February 16, 2021. The judgment convicted defendant, upon a plea of guilty, of possessing an obscene sexual performance by a child.

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

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

387

KA 19-00886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS CAPITANO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 20, 2019. The appeal was held by this Court by order entered October 1, 2021, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (198 AD3d 1324 [4th Dept 2021]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the term of probation, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs as a class D felony (Vehicle and Traffic Law §§ 1192 [4-a]; 1193 [1] [c] [ii-a]). We previously held this case, reserved decision, and remitted the matter to Supreme Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had reserved decision but failed to rule (*People v Capitano*, 198 AD3d 1324 [4th Dept 2021]). Upon remittal, the court denied the motion.

We reject defendant's contention that the evidence is legally insufficient to support the conviction. "Legal sufficiency review requires that we view the evidence in the light most favorable to the prosecution, and, when deciding whether a jury could logically conclude that the prosecution sustained its burden of proof, [w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Allen*, 36 NY3d 1033, 1034 [2021] [internal quotation marks omitted]; *see People v Hampton*, 21 NY3d 277, 287-288 [2013]; *People v Delamota*, 18 NY3d 107, 113 [2011]). Viewed in that light, we conclude that the evidence is legally sufficient to

establish that defendant "operate[d] a motor vehicle while [his] ability to operate such motor vehicle [was] impaired by the combined influence of drugs" (Vehicle and Traffic Law § 1192 [4-a]; *see People v Hogue*, 136 AD3d 1351, 1352 [4th Dept 2016], *lv denied* 27 NY3d 1133 [2016]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime in this nonjury case (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Hogue*, 136 AD3d at 1352; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, as defendant contends and as the People correctly concede, the sentence is illegal insofar as the court directed that defendant serve a term of five years of probation, with an ignition interlock device for a period thereof, consecutive to the indeterminate term of imprisonment of 1 to 3 years on his conviction for violating Vehicle and Traffic Law § 1192 (4-a) (*see* Penal Law §§ 60.01 [2] [d]; 60.21; *People v Giacona*, 130 AD3d 1565, 1566 [4th Dept 2015]; *People v Flagg*, 107 AD3d 1613, 1614 [4th Dept 2013], *lv denied* 22 NY3d 1138 [2014]). We therefore modify the judgment by vacating the term of probation.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

411

KA 20-00391

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMERON GRADY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered December 12, 2019. The judgment convicted defendant upon a jury verdict of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) stemming from his conduct in entering a convenience store at night, threatening the cashier with a knife, and taking money from the register. At trial, the cashier identified defendant as the perpetrator, and two people who were familiar with defendant identified him in a surveillance video.

Defendant contends that County Court erred in admitting in evidence his arrest photograph. "An arrest photograph may be admitted into evidence in order to establish that a defendant's appearance was different at the time of the commission of the crime than at trial" (*People v Ahmr*, 22 AD3d 593, 594 [2d Dept 2005], *lv denied* 6 NY3d 752 [2005]). The court must weigh the probative value of the evidence against its prejudice to defendant (*see People v Buskey*, 13 AD3d 1058, 1059 [4th Dept 2004]). Here, the court found that the probative value of the photograph was significant in that it was taken just three days after the robbery and 15 months prior to the trial. In addition, the prejudice to defendant was minimal inasmuch as the jury was advised that the photograph was taken at the time of defendant's arrest for this charge (*see People v Thiessen*, 158 AD2d 737, 740 [3d Dept 1990], *mod on other grounds* 76 NY2d 816 [1990]; *People v Johnston*, 43 AD3d 1273, 1274 [4th Dept 2007], *lv denied* 9 NY3d 1007 [2007]). The court thus properly admitted the photograph in evidence to show defendant's appearance at the time of the crime (*see People v Gadson*, 236 AD2d

421, 422 [2d Dept 1997], *lv denied* 89 NY2d 1011 [1997]; *Thiessen*, 158 AD2d at 740; *People v Greenridge*, 46 AD2d 947, 948 [3d Dept 1974]).

Defendant failed to preserve for our review his contention that the court erred in allowing one of the witnesses to identify defendant in the surveillance video (*see People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001], *lv denied* 97 NY2d 733 [2002]). In any event, that contention is without merit. "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury" (*People v Mosley*, 200 AD3d 1658, 1659 [4th Dept 2021] [internal quotation marks omitted]; *see People v Russell*, 165 AD2d 327, 336 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]; *People v Graham*, 174 AD3d 1486, 1487-1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]). Here, the witness had known defendant for several years and had worked with him. Besides identifying defendant from his appearance, the witness identified defendant in the video from the "way he[] walk[s]" and his "whole demeanor." In addition, the witness could identify defendant in the video based on his voice. We therefore conclude that the court did not abuse its discretion in permitting the testimony " 'to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant' " (*Mosley*, 200 AD3d at 1659; *see People v Gambale*, 158 AD3d 1051, 1053 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]).

Defendant contends that the prosecutor improperly bolstered the credibility of the identification witnesses by a certain question asked during direct examination and that the prosecutor improperly shifted the burden of proof on summation. Defendant failed to preserve those contentions for our review because he either failed to object or did not set forth the reasons for his objection (*see People v Wolff*, 103 AD3d 1264, 1265 [4th Dept 2013], *lv denied* 21 NY3d 948 [2013]). We decline to exercise our power to review his contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was punished for exercising his right to trial (*see People v Nowlin*, 145 AD3d 1447, 1451 [4th Dept 2016], *lv denied* 29 NY3d 1035 [2017]). The sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted upon a plea of guilty, and it must therefore be amended to reflect that he was convicted upon a jury verdict.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

414

KA 19-00672

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO LEON, DEFENDANT-APPELLANT.

LAW OFFICE OF NELSON S. TORRE, BUFFALO (NELSON S. TORRE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 26, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, we conclude that Supreme Court did not err in discharging a juror over his objection. The trial court is generally "accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL 270.35" (*People v Rodriguez*, 71 NY2d 214, 219 [1988]), and " '[a] determination whether a juror is . . . grossly unqualified, and subsequently to discharge such a juror, is left to the broad discretion of the court' " (*People v Jean-Philippe*, 101 AD3d 1582, 1582 [4th Dept 2012]). Here, upon the court's " 'probing and tactful inquiry' into the facts of the situation" (*People v Harris*, 99 NY2d 202, 213 [2002]), the juror admitted that he recognized a spectator in the courtroom from certain drug activity of the juror's friend, a bartender, and that he knew the spectator was part of a group who would come into the bar to compel the juror's friend to pay money he owed for drugs. The juror admitted that he was worried about the possibility of encountering the spectator after a guilty verdict and was concerned for the safety of his family. Recognizing that "[t]he decision to disqualify turns on the facts of each particular case, and according deference to the court's evaluation of the juror's answers and demeanor," we perceive no basis to disturb the court's determination (*People v Abdul-Jaleel*, 142 AD3d 1296, 1297 [4th Dept

2016], *lv denied* 29 NY3d 946 [2017] [internal quotation marks omitted]; *see People v Ocasio*, 258 AD2d 303, 303-304 [1st Dept 1999], *lv denied* 93 NY2d 975 [1999]).

Defendant further contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Butler*, 140 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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]) and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 645 [2006]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his challenge to the admission in evidence of testimony that defendant made a threatening gesture toward a witness after the crime (*see generally People v Reibel*, 181 AD3d 1268, 1269 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that the court erred in admitting in evidence, under the excited utterance exception to the hearsay rule, statements made by an eyewitness seconds after the murder (*see People v Monroe*, 39 AD3d 1279, 1280 [4th Dept 2007], *lv denied* 9 NY3d 867 [2007]).

Finally, we conclude the sentence is not unduly harsh or severe.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

416

KA 19-02347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. REEDER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Seneca County Court (Richard M. Healy, A.J.), rendered November 16, 2018. The judgment convicted defendant upon a nonjury verdict of criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). Defendant contends that County Court erred in refusing to suppress the drugs seized following the stop of the vehicle in which defendant was a passenger. We reject that contention. An automobile stop is lawful "when based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Hinshaw*, 35 NY3d 427, 430 [2020]). The evidence at the suppression hearing established that the police had observed defendant engaging in drug transactions and had prepared a felony complaint against him. When the police observed defendant in the subject vehicle the following month, they had reasonable suspicion that he had committed a crime and thus the stop was lawful (*see People v Pate*, 52 AD3d 1118, 1118-1119 [3d Dept 2008], *lv denied* 11 NY3d 740 [2008]).

Defendant further contends that the verdict is against the weight of the evidence because the police, through a confidential informant, entrapped him into possessing the drugs. We note that defendant did not raise a defense of entrapment before the court (*see People v Santana*, 70 AD3d 448, 449 [1st Dept 2010], *lv denied* 14 NY3d 844 [2010]; *People v Rivera*, 47 AD3d 515, 516 [1st Dept 2008], *lv denied* 10 NY3d 815 [2008]; *see also People v Douglas*, 17 AD3d 380, 381 [2d Dept 2005]). The affirmative defense of entrapment, which must be proven by a defendant by a preponderance of the evidence (*see* Penal

Law §§ 25.00 [2]; 40.05), requires a defendant "to demonstrate that: (1) he [or she] was actively induced or encouraged to commit the offense by a public official; and (2) such inducement or encouragement created a 'substantial risk' that the offense would be committed by defendant who was not otherwise disposed to commit it" (*People v Brown*, 82 NY2d 869, 871 [1993]; *see* § 40.05; *People v Vickers*, 168 AD3d 1268, 1273 [3d Dept 2019], *lv denied* 33 NY3d 1036 [2019]). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that it cannot be said that the court failed to give the evidence the weight it should be accorded in rejecting any such defense (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence established that the police involvement with the confidential informant on the date of the incident "merely afforded defendant an opportunity to commit the offense, which standing alone is insufficient" to establish the affirmative defense of entrapment (*Brown*, 82 NY2d at 872; *see Vickers*, 168 AD3d at 1273). Moreover, the evidence, including defendant's own testimony that he was a drug user, established that he was predisposed to possess drugs (*see generally People v Castro*, 299 AD2d 557, 558 [2d Dept 2002], *lv denied* 99 NY2d 626 [2003]; *People v Cole*, 224 AD2d 540, 541 [2d Dept 1996], *lv denied* 88 NY2d 965 [1996]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

417

KA 17-01666

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BALTAZAR LOPEZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 28, 2017. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [4]).

Initially, we conclude that defendant's purported waiver of the right to appeal does not encompass his contention that Supreme Court erred in imposing an enhanced term of incarceration based on postplea conduct (*see People v Laskowski*, 46 AD3d 1383, 1384 [4th Dept 2007]; *People v Parker*, 271 AD2d 63, 68 [4th Dept 2000], *lv denied* 95 NY2d 967 [2000]; *see also People v Forest*, 148 AD3d 1585, 1586 [4th Dept 2017], *lv denied* 29 NY3d 1091 [2017]). Nonetheless, we further conclude that the court, following an evidentiary hearing, properly determined that, in violation of the express conditions of the plea agreement, defendant gave the probation department an account of his criminal conduct which was inconsistent with statements made during the plea allocution and denied committing the offense (*see People v Stanley*, 140 AD3d 1757, 1758 [4th Dept 2016]; *see also People v Scott*, 200 AD3d 1729, 1730 [4th Dept 2021]; *see generally People v Hicks*, 98 NY2d 185, 189 [2002]).

As defendant further contends and the People correctly concede, the court improperly sentenced defendant as a second felony offender on the basis of his prior federal drug conspiracy conviction.

Defendant's contention would survive even a valid waiver of the right to appeal (*see People v Bell-Bradley*, 179 AD3d 1539, 1540 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Lopez*, 164 AD3d 1625, 1625 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *People v Sumter*, 157 AD3d 1125, 1126 [3d Dept 2018]) and, although he failed to preserve that contention for our review (*see People v Smith*, 73 NY2d 961, 962-963 [1989]), we conclude that this case "falls within the narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the . . . record" (*People v Santiago*, 22 NY3d 900, 903 [2013]; *see Sumter*, 157 AD3d at 1126). Here, the record establishes that the predicate felony was based on defendant's previous conviction in federal court of conspiracy to possess with intent to distribute 500 grams or more of cocaine (21 USC § 846; *see* § 841 [a] [1]; [b]). However, "under New York's 'strict equivalency' standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes" (*People v Ramos*, 19 NY3d 417, 418 [2012]; *see Sumter*, 157 AD3d at 1126; *People v Hall*, 149 AD3d 1610, 1610 [4th Dept 2017]; *People v Robinson*, 148 AD3d 1639, 1640-1641 [4th Dept 2017]). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing (*see Ramos*, 19 NY3d at 421; *Hall*, 149 AD3d at 1610).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

418

CA 21-00692

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

ARLISA MAYS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TYLER LEE GREEN, POWER & CONSTRUCTION GROUP, INC., AND LIVINGSTON ASSOCIATES, LLC, DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE RUSSELL FRIEDMAN LAW GROUP, LLP, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 27, 2021. The order denied the motion of defendants for a reduction of a jury award based upon collateral sources.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and reducing the award of damages by $230,029.12, and as modified the order is affirmed without costs.

Memorandum: In this personal injury action arising out of a motor vehicle accident, defendants appeal from an order denying their motion under CPLR 4545 (a) to reduce the award of damages for plaintiff's lost wages by the amount that she purportedly recovered from collateral sources. We agree with defendants that plaintiff's Retirement and Social Security Law article 15 disability retirement benefits "replace the income [she] would have earned if she did not have to retire early due to her . . . disability-causing injury" (*Andino v Mills*, 31 NY3d 553, 562 [2018]; *see Terranova v New York City Tr. Auth.*, 49 AD3d 10, 18-20 [2d Dept 2007], *lv denied* 11 NY3d 708 [2008]). Supreme Court thus erred in denying defendants' motion insofar as it sought to reduce the award for lost wages by the $224,151 in disability retirement benefits that plaintiff will receive during the period for which such damages were awarded (*see Andino*, 31 NY3d at 557-563; *Terranova*, 49 AD3d at 18-20; *see generally* CPLR 4545 [a]). We therefore modify the order accordingly. Moreover, plaintiff concedes that defendants are entitled to an additional offset of $5,878.12 against the award of lost wages, and we therefore further modify the order accordingly (*see generally Rose Park Place, Inc. v State of New York*, 120 AD3d 8, 13 [4th Dept 2014]). Defendants,

however, failed to meet their initial burden of establishing their entitlement to any further collateral-source reduction in the award (*see McKnight v New York City Tr. Auth.*, 150 AD3d 840, 842-843 [2d Dept 2017]; *Boshnakov v Board of Educ. of Town of Eden*, 277 AD2d 996, 997 [4th Dept 2000], *lv denied* 96 NY2d 703 [2001]).

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

428

CA 22-00086

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

IN THE MATTER OF THE CAMPAIGN FOR BUFFALO HISTORY, ARCHITECTURE & CULTURE, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND ADM MILLING, CO., RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONER-APPELLANT.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENT-RESPONDENT CITY OF BUFFALO.

MARKARIAN MAGAVERN GRIMM, LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), AND PERSONIUS MELBER LLP, FOR RESPONDENT-RESPONDENT ADM MILLING, CO.

LIPPES MATHIAS LLP, BUFFALO (CARMEN A. VACCO OF COUNSEL), FOR DOUGLAS DEVELOPMENT CORPORATION AND DOUGLAS JEMAL, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 5, 2022 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition and vacated a temporary restraining order.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition and temporary restraining order are reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination ordering an emergency demolition of a structure located in respondent City of Buffalo (City) known as the Great Northern Grain Elevator (Grain Elevator). The Grain Elevator was designated as a City landmark in 1990. After a significant windstorm caused part of the northern wall of the Grain Elevator to collapse in December 2021, the Commissioner of the City's Department of Permit and Inspection Services (Commissioner), after an investigation, made the determination in question upon concluding that the Grain Elevator was structurally unsound, in imminent danger of collapse, and posed an immediate threat to the health, welfare, and safety of the public. As a result, the City issued a notice of condemnation to respondent ADM Milling, Co. (ADM), the building's

owner, declaring the building condemned and ordering demolition as soon as possible.

Petitioner sought to annul the Commissioner's determination on the ground, inter alia, that it lacked a rational basis. In support of the petition, petitioner attached an unsworn and unsigned expert affidavit from a licensed architect who opined that the Grain Elevator could be adequately repaired and did not need to be demolished. Although Supreme Court determined that a fact-finding hearing was necessary to evaluate whether the Commissioner's determination had a rational basis (*see generally* CPLR 7804 [h]; *Matter of Pasta Chef v State Liq. Auth.*, 54 AD2d 1112, 1112 [4th Dept 1976], *affd* 44 NY2d 766 [1978]), the court refused to permit, inter alia, testimony from petitioner's expert on the ground that it was not relevant. At the hearing, the court permitted only the testimony of the Commissioner. Thereafter, the court issued a judgment in which it vacated a previously issued temporary restraining order prohibiting demolition of the Grain Elevator, denied petitioner's request for a preliminary injunction, and dismissed the petition. Petitioner now appeals.

As an initial matter, we reject petitioner's contention that the Commissioner acted outside of his emergency authority under the Buffalo City Code. Generally, when an application is made to the Commissioner for the demolition of a building that has been designated as a landmark, the Commissioner is required to provide written notice of any proposed order or direction concerning the application to the City Preservation Board (Board) and give the Board 10 days in which to comment prior to taking further action (*see* Buffalo City Code § 337-28 [B]). However, in situations where the Commissioner issues an order of demolition "to remedy emergency conditions, determined to be imminently dangerous to life, health or property," formal prior notice to the Board is not required (§ 337-28 [A]). Thus, the only issue on this appeal is whether the Commissioner's determination, ordering that the building be demolished because it poses a threat to public health and safety, was arbitrary and capricious.

Petitioner contends that the court erred in refusing to permit it to introduce certain proposed expert testimony and other evidence at the fact-finding hearing. Here, the record establishes that petitioner requested that it be permitted to present such evidence at the hearing. Thus, contrary to ADM's assertion, petitioner preserved that contention for our review (*see generally* CPLR 5501 [a] [3]; *cf. Matter of McGovern v Mount Pleasant Cent. Sch. Dist.*, 25 NY3d 1051, 1053 [2015]; *Matter of Brown v Feehan*, 125 AD3d 1499, 1502 [4th Dept 2015]).

With respect to the merits, we conclude, initially, that the court appropriately directed the hearing on the limited issue of how the Commissioner reached his determination and, specifically, whether the Commissioner had a rational basis for issuing the order for demolition (*see Monroe-Livingston Sanitary Landfill v Bickford*, 107 AD2d 1062, 1062 [4th Dept 1985], *lv dismissed* 65 NY2d 604, 610, 923, 1025 [1985]). We agree with petitioner, however, that, while petitioner is not entitled to a de novo hearing on the Commissioner's

determination (*see id.*), the court erred in refusing to consider petitioner's proposed evidence inasmuch as it should have afforded petitioner the opportunity to submit " 'any competent and relevant proof . . . bearing on the triable issue here presented and showing that any of the underlying material on which the [Commissioner] based [his] determination has no basis in fact' . . . , or that the determination was irrational or arbitrary" (*ADC Contr. & Constr. Corp. v New York City Dept. of Design & Constr.*, 25 AD3d 488, 489 [1st Dept 2006]; *see Matter of Mandle v Brown*, 5 NY2d 51, 65 [1958]; *Matter of Newbrand v City of Yonkers*, 285 NY 164, 178 [1941]). We therefore reverse the judgment, reinstate the petition and temporary restraining order, and remit the matter to Supreme Court for a hearing consistent with our decision.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court