SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 24, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 24, 2023

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	No.	Docket	Case
________	1044/21	CA 20 01217	KRISTEN GELLMAN V CHARLES PRIORE
________	954	CA 20 01094	CHARLES GUTTMAN V COVERT TOWN BOARD
________	978	KA 18 01959	PEOPLE V DWAYNE C. HENDRICKS
________	988	CA 21 01708	UNIVERSITY HILL REALTY, LTD V RONDA AKL
________	990	CA 22 00097	SHAKIRAH M. GILBERT V LAUREN E. DANIELS
________	996	CA 22 00482	CARLA L. PARKES V NIAGARA FALLS WATER BOARD
________	998	KA 16 02353	PEOPLE V DAVID S. ALCARAZ-UBILES
________	1056	CA 22 00679	PATRICIA SZTORC V THOMAS K. HEANEY
________	27	CAF 21 01656	Mtr of SHDAYA B.
________	49	KA 15 01369	PEOPLE V WENDELL D. SMITH
________	75	KA 18 00150	PEOPLE V PATRICK D. BROOKS
________	78	KA 18 00943	PEOPLE V ERIC D. SHARP
________	79	CAF 21 01138	JEROME ALLEN V ALEXIS M. MATTHEWS
________	85	CA 22 01014	WILLIAM METZGER V CITY OF BUFFALO
________	90	KA 18 00450	PEOPLE V JARED KOEBERLE
________	97	KA 22 00438	PEOPLE V ADRIAN MCDOWELL
________	99	KA 20 01206	PEOPLE V FIDENCIO GONZALEZ
________	113	KA 20 01087	PEOPLE V DECARRIO SANDERS
________	138	KA 18 02328	PEOPLE V MAKIESHA D. HAWKINS
________	143	CA 22 00739	THE CANANDAIGUA NATIONAL BANK & TRU V BRIGHTON SECURITIES CORP.
________	158	KA 22 01383	PEOPLE V ADAM BURGIO
________	161	CAF 21 00467	Mtr of XANDRIEA M.
________	167	CA 22 00549	ANTHONY ROMANO V ANTHONY J. ANNUCCI
________	174	KA 19 01415	PEOPLE V CARVIS MCCUTCHEON

_________	196	KA 20 00060	PEOPLE V LOUIS MCMORRIS
_________	204	KA 19 00817	PEOPLE V DARNELL WALLACE
_________	205	CAF 21 01654	SKYE H. BECK V DAVID E. BECK
_________	211	CAF 21 01702	SKYE H. BECK V DAVID E. BECK
_________	213	CA 22 00721	MARCO TACOMUL V ANTHONY J. ANNUCCI
_________	215	CAF 21 01602	SHARI B. MCCASLIN V DAVID E. BECK
_________	238	KA 15 01502	PEOPLE V RYAN J. NEWMAN
_________	239	KA 22 00522	PEOPLE V RAYMOND CONGDON
_________	240	KA 19 01494	PEOPLE V MICHAEL V. COLEY
_________	243	KA 21 01282	PEOPLE V WILLIAM J CORNISH
_________	247	CAF 21 01747	DEBRA S. HOLIDAY V KENDRA HOLIDAY
_________	266	CAF 21 01714	Mtr of AMARION M.
_________	280	KA 20 01480	PEOPLE V DRAHCIR PARSON
_________	283	KA 22 00631	PEOPLE V DWIGHT GILES
_________	284	KA 21 00945	PEOPLE V WILLIE DAN NASH, JR.
_________	285	CAF 22 00474	DORCELIA M. HARVEY V TIMOTHY P. HARVEY
_________	287	CAF 21 01164	Mtr of MOLLIE W.

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

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CAF 21-01656

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

IN THE MATTER OF SHDAYA B., KAYLITA B.-M., CARLEIJAHZE B.-M., CARLITO B.-M., AND KHAZWUAN B.-M.

MEMORANDUM AND ORDER

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

RAHDASHA B., RESPONDENT.

CARLTON M., APPELLANT.

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered September 23, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, granted the petition to modify a prior order of fact-finding and disposition and placed the subject children in the custody of petitioner.

It is hereby ORDERED that said appeal is dismissed insofar as it concerns respondent's oldest child and the order is unanimously modified on the law by denying the petition with respect to appellant's children and vacating the provisions with respect to those children and as modified the order is affirmed without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, non-respondent father appeals from an order that, inter alia, granted the petition of Onondaga County Department of Children and Family Services seeking to modify a prior order of fact-finding and disposition by removing the subject children from their respective relative placements and placing them in foster care until the next permanency hearing.

Initially, as he correctly concedes, the father does not have standing to contest the order insofar as it relates to respondent's oldest child, to whom he is not related. We therefore dismiss the appeal insofar as it relates to that child's placement (*see generally* Family Ct Act § 1035 [d]; *Matter of Andreija N. [Michael N.-Tiffany O.]*, 206 AD3d 1081, 1082 [3d Dept 2022]).

We agree with the father that the remainder of the appeal has not

been rendered moot despite the expiration of the order and the issuance of subsequent permanency orders. Generally, where an order has expired by its own terms, an appeal from that order is rendered moot (*see Matter of Juliette R. [Jordan R.T.]* [appeal No. 2], 203 AD3d 1678, 1678-1679 [4th Dept 2022]; *Matter of Lil B. J.-Z. [Jessica N.J.]* [appeal No. 2], 194 AD3d 1413, 1414 [4th Dept 2021]). Similarly, a challenge to a dispositional order is generally moot where a superseding permanency order has been entered (*see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). This is so because "the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal," and the courts therefore are unable to address "academic, hypothetical, moot, or otherwise abstract questions" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *see also Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 198-199 [2d Dept 2017]). Thus, a court generally will refrain from deciding the merits of a matter "unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see Hearst*, 50 NY2d at 714; *see also Elizabeth C.*, 156 AD3d at 199). However, the Social Services Law provides that, whenever a child "shall have been in foster care for [15] months of the most recent [22] months . . . the authorized agency having care of the child *shall* file a petition" to terminate parental rights unless, as relevant here, "the child is being cared for by a relative" (§ 384-b [3] [l] [i] [A] [emphasis added]). Thus, we agree with the father that his appeal from the order moving his children from relative placement to foster care is not moot because that change in placement "may, in future proceedings, affect [his] status or parental rights" (*Matter of Alexis AA. [John AA.]*, 97 AD3d 927, 928 [3d Dept 2012] [internal quotation marks omitted]; *see Matter of Kenneth QQ. [Jodi QQ.]*, 77 AD3d 1223, 1224 [3d Dept 2010]; *see generally Matter of Justyce HH. [Andrew II.]*, 136 AD3d 1181, 1182 [3d Dept 2016]) by altering the obligations of petitioner with respect to a future petition to terminate the father's parental rights.

With respect to the merits, we agree with the father that Family Court erred in granting the petition with respect to his children, and we therefore modify the order accordingly. Pursuant to Family Court Act § 1061, the court may "set aside, modify, or vacate any order issued in the course of a child protective proceeding [f]or good cause shown" (*Matter of Alexa S. [Rachel J.S.]*, 198 AD3d 972, 973 [2d Dept 2021] [internal quotation marks omitted]). We conclude that petitioner failed to show good cause to modify the placement of the children.

With respect to the placement of the father's two youngest children with their paternal grandmother, petitioner alleged that a change in placement was warranted because the grandmother employed corporal punishment and because she failed to secure a larger living space to accommodate the children. The evidence adduced at the hearing established that the grandmother did engage in a single instance of corporal punishment by hitting the youngest child on her

bottom. However, there was no evidence that the punishment was excessive (*see generally Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1413 [4th Dept 2022]; *Matter of Elisa V. [Hung V.]*, 159 AD3d 827, 828 [2d Dept 2018]; *Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d 685, 686-687 [2d Dept 2014]) and there was no evidence that the grandmother's conduct was part of a pattern of excessive corporal punishment (*see generally Matter of Nicholas W. [Raymond W.]*, 90 AD3d 1614, 1615 [4th Dept 2011]). Further, with respect to the issue of housing, there was no evidence contradicting the grandmother's testimony that she was unable to obtain more spacious housing because, although the children were placed in her care, she could not obtain a voucher for larger housing without proof that the children were placed in her custody permanently.

With respect to the placement of the father's two oldest children with their paternal aunt, petitioner alleged that a change in placement was warranted because the aunt permitted corporal punishment and because she went on vacation and left the children with an inappropriate caregiver. Although the caseworker testified at the hearing that one of the children had reported to school staff that she was fearful of the aunt and uncle, the caseworker did not speak to that child or to the aunt about the issue, but only to one of the child's siblings, who indicated that the uncle had spanked the child after she intentionally broke a television. Thus, we conclude that, even if the alleged incident did occur, "there was no indication that the physical contact rose to a level beyond that of proportionate disciplinary measures" (*Forrest v Forrest*, 212 AD2d 475, 476 [1st Dept 1995]; *see Anastasia L.-D.*, 113 AD3d at 686-687). Further, there is no evidence that the aunt was informed that corporal punishment was not permitted or that she was even aware that the uncle had allegedly engaged in such conduct (*see generally Matter of Dontay B. [Octavia F.]*, 81 AD3d 539, 540 [1st Dept 2011]). According to the family support therapist with whom the children were working, the aunt was engaged in the children's services and the children had "been doing very well" in her custody. The family support therapist wrote that the children "have a strong relationship with their aunt and uncle," as well as their cousins, and that she believed "it could be very disruptive to separate the older children". Nor did good cause exist based on the aunt's decision not to bring the children in her care, who were under the age of 10, on a pre-planned vacation to celebrate her oldest child's 21st birthday. The aunt left the children in the care of a relative with whom petitioner had previously placed two children for a brief period of time, and there was no evidence that the aunt was aware that the relative should not babysit the children. In light of the passage of over a year and a half since the entry of the order granting the petition to modify the placement of the subject children and because it is unclear whether relative placement would be in the children's best interest, we remit the matter to Family Court for a hearing to determine whether the best interests of the father's children require modification of their placement (*see Matter of Hannah D.*, 292 AD2d 867, 867-868 [4th Dept 2002]; *Matter of Alexis E.*, 272

AD2d 935, 936 [4th Dept 2000]).

Entered: March 24, 2023

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 15-01369

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENDELL D. SMITH, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 23, 2015. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (three counts), criminally using drug paraphernalia in the second degree (three counts) 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 following a jury trial of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]). The conviction arises from an incident in which defendant was arrested after the police executed a no-knock search warrant at his residence and found a large quantity of cocaine in the kitchen and a loaded firearm hidden in a fake fireplace on the first floor.

Defendant contends that County Court erred in denying his request to admit in evidence at trial a sworn statement from a man who claimed that the gun and drugs in question belonged to him and that defendant did not know that they were in the house. The declarant did not testify at trial and, according to the People, he recanted his statement almost immediately after he signed it in the presence of defendant and his attorney. According to defendant, the statement, although hearsay, was admissible as a declaration against penal interest. We reject defendant’s contention.

“The hearsay exception for declarations against penal interest

applies where (1) the declarant is unavailable to testify; (2) the declarant was aware when making the declaration that it was contrary to his or her penal interest; (3) the declarant had competent knowledge of the relevant facts; and (4) there is 'sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability' " (*People v Thibodeau*, 151 AD3d 1548, 1553 [4th Dept 2017], *affd* 31 NY3d 1155 [2018], quoting *People v Brensic*, 70 NY2d 9, 15 [1987]). There is no dispute that defendant satisfied the first three requirements for admission of the statement and, thus, only the fourth requirement, concerning the statement's reliability and trustworthiness, is at issue here.

With respect to the fourth requirement, the Court of Appeals has held that, "[t]o circumvent fabrication and insure the reliability of . . . statements [against penal interest], there must be some evidence, independent of the declaration itself, which fairly tends to support the facts asserted therein" (*People v Settles*, 46 NY2d 154, 168 [1978]). "When considering the reliability of a declaration, courts should also consider the circumstances of the statement, such as, among other things, the declarant's motive in making the statement—i.e., whether the declarant exculpated a loved one or inculpated someone else, the declarant's personality and mental state, and 'the internal consistency and coherence of the declaration' " (*People v DiPippo*, 27 NY3d 127, 137 [2016], quoting *People v Shortridge*, 65 NY2d 309, 313 [1985]).

Here, we conclude that defendant failed to establish that the hearsay statement was reliable and that the court therefore did not err in refusing to admit it in evidence (*see Thibodeau*, 151 AD3d at 1553). Although the declarant stated that "[t]he drugs were never in [defendant's] presence," the undisputed evidence at trial established that defendant was in the kitchen with more than four ounces of cocaine on the counter in plain view when the police entered his residence. There were also smaller bags of cocaine in the kitchen cupboard and freezer, along with paraphernalia used to make and package crack cocaine. Additionally, the declarant does not explain in his brief statement why he brought a loaded firearm to defendant's residence or why he felt the need to hide the weapon from defendant. Under the circumstances, we cannot conclude that the court abused its discretion in refusing to admit the hearsay statement as a declaration against penal interest.

Entered: March 24, 2023 | 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 18-00150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

PATRICK D. BROOKS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 20, 2017. The judgment convicted defendant upon a jury verdict of murder 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 a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1]), arising from an incident in which defendant's estranged wife and one of his daughters were stabbed to death. We affirm.

Contrary to defendant's contention, we conclude that County Court properly refused to suppress tangible evidence and statements he made to the police (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]; *People v Yukl*, 25 NY2d 585, 589 [1969], *rearg denied* 26 NY2d 845 [1970], *cert denied* 400 US 851 [1970]; *People v Clark*, 139 AD3d 1368, 1368-1370 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]).

Defendant further contends that the court erred in denying his motion for a mistrial when a police officer testified, in violation of the court's pretrial ruling, that defendant had told him that he had recently been in prison. "[T]he decision to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292 [1981]). Here, we conclude that the court did not abuse its discretion in denying defendant's motion for a mistrial and instead sustaining defendant's objection to the improper testimony, striking it from the record, and "providing the jury with a curative instruction directing them to disregard the improper testimony, which 'the jury is presumed to have followed' " (*People v*

Urrutia, 181 AD3d 1338, 1338-1339 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *see People v McKay*, 197 AD3d 992, 992 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]).

We also reject defendant's contention that the court abused its discretion in admitting, over his objection, allegedly inflammatory photographs of the two deceased victims, including crime scene and autopsy photographs. "The general rule is that photographs of the deceased are admissible [where, as here,] they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered" (*People v Pobliner*, 32 NY2d 356, 369 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; *see People v Wood*, 79 NY2d 958, 960 [1992]; *People v Fedora*, 186 AD2d 982, 983 [4th Dept 1992], *lv denied* 81 NY2d 762 [1992]). "Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant" (*Pobliner*, 32 NY2d at 370), and that is not the case here. The photographs "were probative of the serious nature of the injuries sustained by the victim[s] and were thus admissible to establish that defendant intentionally killed the victim[s]" (*People v Lynch*, 60 AD3d 1479, 1481 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]; *see People v Morris*, 138 AD3d 1408, 1409 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]) and to elucidate and corroborate the testimony of the Medical Examiner concerning the victims' injuries and causes of death (*see People v Stevens*, 76 NY2d 833, 836 [1990]; *People v Spencer*, 181 AD3d 1257, 1261 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]; *People v Hayes*, 71 AD3d 1477, 1477-1478 [4th Dept 2010], *lv denied* 15 NY3d 751 [2010]). In addition, the photographs illustrating the chaotic, blood-spattered crime scene, when coupled with the evidence that defendant cut his hand, elucidated other relevant evidence that defendant's blood was found at the crime scene on the driver's license of one of the victims (*see generally Pobliner*, 32 NY2d at 369; *People v Giles*, 20 AD3d 863, 864 [4th Dept 2005], *lv denied* 5 NY3d 806 [2005]).

We have considered defendant's remaining contentions concerning the court's evidentiary rulings and we conclude that they lack merit.

Defendant concedes that his contention that he was denied a fair trial by prosecutorial misconduct on summation is not preserved for our review inasmuch as no objection was made to the allegedly improper remarks (*see* CPL 470.05 [2]; *People v Sanford*, 148 AD3d 1580, 1583 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Sanford*, 148 AD3d at 1583).

We reject defendant's contentions that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to support the

conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Specifically, we conclude that defendant's commission of the crimes was " 'established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was . . . the perpetrator' " (*People v Daniels*, 125 AD3d 1432, 1433 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015], *reconsideration denied* 26 NY3d 928 [2015]; *see generally People v Geroyianis*, 96 AD3d 1641, 1642-1643 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012], *reconsideration denied* 19 NY3d 1102 [2012]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: March 24, 2023

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 18-00943
PRESENT: WHALEN, P.J., SMITH, CURRAN, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. SHARP, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Charles A. Schiano, Jr., J.), rendered November 13, 2017. The judgment convicted defendant upon a nonjury verdict 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: Defendant appeals from a judgment convicting him following a nonjury trial 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 [3]). We affirm.

Defendant contends that he was denied his right to be present at a material stage of the trial when Supreme Court conducted an in-chambers and off-the-record conference in his absence at which there was discussion regarding the People's previously submitted, written *Sandoval* application (*see People v Dokes*, 79 NY2d 656, 662 [1992]). We reject that contention. Although defendant was not present at the in-chambers conference, the court held a subsequent proceeding in open court in defendant's presence, at which the court offered defendant an opportunity to be heard on the People's application. Defense counsel declined. The court then made, and explained, its ruling on the People's application. Under those circumstances, we conclude that defendant was afforded a meaningful opportunity to participate at the court's subsequent de novo inquiry and his absence from the initial conference does not require reversal (*see People v Reid*, 117 AD3d 1448, 1449 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]; *People v Lynch*, 216 AD2d 929, 929 [4th Dept 1995], *lv denied* 87 NY2d 904 [1995]; *People v Vargas*, 201 AD2d 963, 964 [4th Dept 1994], *lv denied* 83 NY2d 859 [1994]).

Defendant's contention that the statutes under which he was convicted are unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]) is not preserved for our review (*see People v Jacque-Crews*, — AD3d —, 2023 NY Slip Op 00785, *1 [4th Dept 2023]; *see generally People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]).

Finally, we reject defendant's contention that the loss of certain video exhibits admitted in evidence at trial deprived him of effective appellate review. We conclude that the videos are not "needed to resolve the issues raised on appeal" (*People v Yavru-Sakuk*, 98 NY2d 56, 60 [2002]; *cf. People v Jackson*, 98 NY2d 555, 560 [2002]).

All concur except CURRAN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and vote to reverse the judgment and grant a new trial because, after improperly conducting a *Sandoval* hearing in his absence (*see People v Dokes*, 79 NY2d 656, 662 [1992]), Supreme Court did not give defendant an opportunity to meaningfully participate in the purported de novo *Sandoval* hearing it conducted in his presence. In my view, the court's mere offer to defense counsel of an opportunity to be heard on the *Sandoval* application in defendant's presence—standing alone—was insufficient to constitute a de novo hearing on the issue. Consequently, defendant was denied his right "to be present during proceedings that involve factual matters for which the defendant possesses peculiar knowledge of the salient facts" (*People v Wilkins*, 37 NY3d 371, 378 [2021]; *see Dokes*, 79 NY2d at 660-661).

The relevant facts are undisputed. Specifically, prior to trial, the court conducted an off-the-record conference in chambers during which the *Sandoval* issue was addressed by both sides. Defendant was not present during that off-the-record discussion. Sometime thereafter, now back on the record and in defendant's presence, the court informed defense counsel that it was "going to make a ruling" and cursorily asked him if he "want[ed] to be heard, . . . on the . . . *Sandoval*" application. Defense counsel declined the court's invitation, stating that he "would stand by our discussion in chambers." The court did not seek the prosecutor's input on the *Sandoval* application at that time, and the prosecutor did not offer any contribution on the issue. In short, neither party reasserted their position on *Sandoval* on the record at the court's invitation. At that point, the court merely proceeded to state its decision on the *Sandoval* application.

In my view, the court's purported de novo hearing, described above, did not provide defendant with a meaningful opportunity to participate in the *Sandoval* hearing (*see People v Monclavo*, 87 NY2d 1029, 1031 [1996]; *People v Favor*, 82 NY2d 254, 267 [1993], *rearg denied* 83 NY2d 801 [1994]; *Dokes*, 79 NY2d at 661-662). During the purported de novo hearing, the court did not "entertain[ ] argument from both counsel" (*People v Vargas*, 201 AD2d 963, 964 [4th Dept

1994], *lv denied* 83 NY2d 859 [1994])—i.e., the People failed to "detail[ ] the convictions [they] intended to use, [and] defense counsel [never] questioned the[ ] use [thereof]" (*People v Smith*, 186 AD2d 976, 976 [4th Dept 1992], *affd* 82 NY2d 254 [1993]). Indeed, as summarized above, the record demonstrates that the court's ultimate *Sandoval* ruling was based entirely on the "discussion in chambers," conducted outside of defendant's presence. To that end, I conclude that the majority's reliance on *People v Reid* (117 AD3d 1448 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]) and *People v Lynch* (216 AD2d 929 [4th Dept 1995], *lv denied* 87 NY2d 904 [1995]) is misplaced because, in each of those cases, and unlike in this case, the trial court conducted some form of a de novo *Sandoval* hearing in the defendant's presence.

Also supporting my conclusion that the court's brief, on-the-record discussion of *Sandoval* was insufficient to constitute a de novo hearing, I note that the Court of Appeals has held that when "a preliminary informal *Sandoval* conference" is followed by a subsequent "discussion" of the issue on the record in the defendant's presence at which the trial court announces its *Sandoval* decision, the later conference is "not a new *Sandoval* hearing [if] there was no opportunity for the defendant to meaningfully participate and no argument about what convictions or bad acts could be brought out by the prosecutor" (*Monclavo*, 87 NY2d at 1030-1031 [internal quotation marks omitted]). *Monclavo* is particularly instructive, in my view, because the Court of Appeals attached to its decision, as an appendix, a transcript of Supreme Court's on-the-record discussion of the *Sandoval* issue. In my view, the discussion in that case—which the Court of Appeals found to be insufficient as a de novo hearing—was *far* more substantial than the fleeting discussion here (*see id.* at 1031-1033). Consequently, it is hard to see how a brief one-line offer to defense counsel provided defendant a meaningful opportunity to be heard on *Sandoval*, such that it was a proper de novo hearing on the issue.

Further, the People do not contend on appeal—nor does the majority conclude—that defense counsel waived defendant's right to participate in the *Sandoval* hearing by declining to be heard in open court on that issue. Nor could they make such an argument inasmuch as nothing in the record supports the conclusion that defendant voluntarily relinquished a known right (*see generally People v Geraci*, 85 NY2d 359, 366 n 2 [1995]; *People v Veaudry*, 133 AD2d 524, 524 [4th Dept 1987], *lv denied* 70 NY2d 804 [1987]). Indeed, I note that defendant's right to be present was of singular importance here, particularly given defendant's peculiar knowledge of the salient facts pertaining to the *Sandoval* ruling (*see Dokes*, 79 NY2d at 660-661; *cf. Wilkins*, 37 NY3d at 378).

Finally, I also respectfully disagree with the majority's conclusion that the court "made" its *Sandoval* ruling during the purported de novo hearing conducted in defendant's presence (*cf. Reid*, 117 AD3d at 1449). The record of the court's ruling is equivocal on that point, and we will never know what occurred in chambers precisely

because that conference was held off the record. Ultimately, the equivocal nature of the record only bolsters my conclusion that the court's mere offer to defense counsel to be heard on the *Sandoval* application was insufficient to cure the error in conducting the off-the-record colloquy outside of defendant's presence, thereby requiring a new trial.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

79
CAF 21-01138
PRESENT: WHALEN, P.J., SMITH, CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF ALEXIS M. MATTHEWS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JEROME ALLEN, CHANTELLE ALLEN AND
DEQUAN R. JEFFERSON, RESPONDENTS-RESPONDENTS.

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-APPELLANT.

GREGG A. STARCZEWSKI, UTICA, FOR RESPONDENTS-RESPONDENTS JEROME ALLEN AND CHANTELLE ALLEN.

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-RESPONDENT DEQUAN R. JEFFERSON.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 30, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole physical custody of the subject child to respondents Jerome Allen and Chantelle Allen.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, determined following a hearing that respondents Jerome Allen and Chantelle Allen (grandparents), the subject child's paternal grandfather and his wife, established extraordinary circumstances, determined that it was in the best interests of the child to remain in the care of the grandparents, and awarded sole physical custody of the child to the grandparents and regular parenting time to the mother. We affirm.

" '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the

best interests of the child' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]). That rule " 'applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist' " (*Matter of Wolfford v Stephens*, 145 AD3d 1569, 1570 [4th Dept 2016]; *see Byler*, 185 AD3d at 1404; *Orlowski*, 147 AD3d at 1446). Here, there is no prior determination of extraordinary circumstances, and thus the grandparents had the burden of establishing them.

When the nonparent seeking custody is a grandparent of the child, extraordinary circumstances may be demonstrated by "an extended disruption of custody, specifically: (1) a 24-month separation of the parent and child, which is identified as prolonged, (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household" (*Matter of Suarez v Williams*, 26 NY3d 440, 448 [2015] [internal quotation marks omitted]; *see* Domestic Relations Law § 72 [2]). Evaluating those three elements in light of the facts of this case, we agree with the grandparents that they met their burden of establishing extraordinary circumstances, thereby giving them standing to seek custody of the child. It is undisputed that the child has lived in the grandparents' home since, at the latest, September 2017, when the mother consented to give temporary custody of the child to respondent Chantelle Allen while the mother was homeless and living in a shelter. The mother requested that the grandparents return the child to her in late 2017 or early 2018, after Family Court issued a default order granting custody of the child to the grandparents, but the mother did not tell the grandparents where she would be living, the grandparents refused, and the mother did not seek intervention from the court. Evidence presented at the hearing showed that the mother later requested visitation with the child, but that she did not request to have the child returned permanently or seek intervention from the court until she commenced this modification proceeding in September 2020. The evidence therefore establishes that the mother did not make "any serious attempts to regain custody or resume a parental role in the child's life" for more than 24 months (*Orlowski*, 147 AD3d at 1447). Although the mother had weekly phone calls or video chats with the child, "[v]oluntary relinquishment does not require the complete severance of all ties between a parent and a child, and may be found where . . . a parent continues to maintain contact" (*Matter of Karen Q. v Christina R.*, 170 AD3d 1446, 1448 [3d Dept 2019]; *see Suarez*, 26 NY3d at 453).

We further conclude that the mother met her burden, as petitioner, of establishing that a change in circumstances had occurred since entry of the order granting custody of the child to the grandparents on default (*see generally Matter of Driscoll v Mack*, 183 AD3d 1229, 1230 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *Matter of McNeil v Deering*, 120 AD3d 1581, 1582-1583 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014]). Although Supreme Court failed to make that determination, " 'this Court has the authority to independently

review the record' to ascertain whether the requisite change in circumstances existed" (*Matter of Curry v Reese*, 145 AD3d 1475, 1475 [4th Dept 2016]). Here, the mother established that since the time of the default order, she had found stable employment and suitable housing, and she had regained custody of two of her other children. Thus, we conclude that the mother established the requisite change in circumstances (*see Matter of Sweeney v Daub-Stearns*, 166 AD3d 1340, 1341-1342 [3d Dept 2018]; *Matter of Maerz v Maerz*, 165 AD3d 1404, 1405 [3d Dept 2018], *lv denied* 32 NY3d 914 [2019]).

Contrary to the mother's further contention, we conclude that the court properly determined that it is in the child's best interests to award sole physical custody of the child to the grandparents (*see Matter of Greeley v Tucker*, 150 AD3d 1646, 1647 [4th Dept 2017]; *see generally Prall v Prall*, 156 AD3d 1351, 1352 [4th Dept 2017]). The record establishes, inter alia, that the child has a close bond with the grandparents and that, while she remains in their custody, she has regular visits with her father and two of her siblings. Further, the grandparents have encouraged and facilitated the child's education and extracurricular activities, whereas the mother was unable to state in her testimony what activities the child was engaged in or which grade the child was in. We therefore conclude that there is a sound and substantial basis in the record supporting the court's determination.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

85
CA 22-01014
PRESENT: SMITH, J.P., CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF WILLIAM METZGER, ET AL.,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO PLANNING
BOARD AND JC PROPERTIES QOZB LLC,
RESPONDENTS-APPELLANTS.

CARIN S. GORDON, BUFFALO, FOR RESPONDENTS-APPELLANTS CITY OF BUFFALO AND CITY OF BUFFALO PLANNING BOARD.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENT-APPELLANT JC PROPERTIES QOZB LLC.

LAW OFFICE OF STEPHANIE ADAMS, PLLC, BUFFALO (STEPHANIE A. ADAMS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 16, 2022 in a proceeding pursuant to CPLR article 78. The order, insofar as appealed from, denied the motions of respondents to dismiss the petition.

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

Memorandum: Respondent JC Properties QOZB LLC submitted a major site plan application to respondent City of Buffalo Planning Board (Planning Board) seeking approval of the construction of four apartment buildings near the Buffalo River. On November 8, 2021, the Planning Board issued a negative declaration pursuant to the State Environmental Quality Review Act (ECL article 8) and a waterfront consistency review finding that the project was consistent with the City of Buffalo Local Waterfront Revitalization Program. On January 10, 2022, the Planning Board voted to approve the site plan with conditions; it filed its decision with the City Clerk two days later.

Petitioners commenced this CPLR article 78 proceeding on March 6, 2022, seeking, inter alia, to annul the November 8 waterfront consistency review finding and the January 10 conditional site plan approval. Respondents moved to dismiss the petition on the ground that all causes of action were time-barred. Supreme Court denied the

motions, and respondents appeal.

Initially, we note that, although no appeal as of right lies from an intermediate order in a CPLR article 78 proceeding (*see* CPLR 5701 [b] [1]), we treat the notices of appeal as applications for leave to appeal from the order and grant the applications (*see Matter of Sliz v County of Erie*, 17 AD3d 1161, 1161 [4th Dept 2005]; *Matter of Conde v Aiello*, 204 AD2d 1029, 1029 [4th Dept 1994]).

We agree with respondents that the court erred in denying the motions. Petitioners' challenge to the Planning Board's conditional site plan approval is untimely because the proceeding was not commenced within the requisite 30 days (*see* General City Law § 27-a [11]; *Matter of Citizens Against Sprawl-Mart v City of Niagara Falls*, 35 AD3d 1190, 1191 [4th Dept 2006], *lv dismissed* 9 NY3d 858 [2007]; *Matter of Gilmore v Planning Bd. of Town of Ogden*, 16 AD3d 1074, 1075 [4th Dept 2005]). We reject petitioners' contention that their challenge to the Planning Board's waterfront consistency review finding is subject to the longer four-month statute of limitations set forth in CPLR 217 (1). " '[I]n order to determine what event triggered the running of the Statute of Limitations, [courts] must first ascertain what administrative decision petitioner is actually seeking to review and then find the point when that decision became final and binding and thus had an impact upon petitioner' " (*Matter of Haggerty v Planning Bd. of Town of Sand Lake*, 166 AD2d 791, 792 [3d Dept 1990], *affd* 79 NY2d 784 [1991]). Here, "the [waterfront consistency review finding] challenged by petitioners was made during the course of consideration by respondent Planning Board . . . of an application for site plan approval, a process which culminated in the Planning Board's formal approval of the site plan" on January 10 (*id.*). The 30-day statute of limitations for challenges to determinations of the Planning Board thus controls (*see generally id.*; *Matter of Casement v Town of Poughkeepsie Planning Bd.*, 162 AD2d 685, 687 [2d Dept 1990], *appeal dismissed* 76 NY2d 930 [1990], *rearg denied* 76 NY2d 1018 [1990]), and this proceeding is time-barred.

Entered: March 24, 2023

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 18-00450
PRESENT: WHALEN, P.J., CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARED KOEBERLE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 8, 2017. The appeal was held by this Court by order entered January 28, 2022, decision was reserved and the matter was remitted to Ontario County Court for further proceedings (201 AD3d 1298 [4th Dept 2022]). The proceedings were held and completed.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of two counts of incest in the first degree is unanimously dismissed and the judgment is modified on the law by directing that the periods of postrelease supervision imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of rape in the first degree (Penal Law § 130.35 [4]), two counts of sexual abuse in the first degree (§ 130.65 [4]), two counts of incest in the first degree (§ 255.27), and one count of endangering the welfare of a child (§ 260.10 [1]). We previously held this case, reserved decision, and remitted the matter to County 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 Koeberle*, 201 AD3d 1298 [4th Dept 2022]). On remittal, the court denied the motion.

Initially, we reject defendant’s contention that the court erred in permitting expert testimony on child sexual abuse accommodation syndrome. Such testimony has long been admissible “for the purpose of explaining behavior that might be puzzling to a jury” (*People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *see People v Nicholson*, 26 NY3d 813, 828 [2016]). The expert’s testimony “educates the jury on a scientifically-recognized ‘pattern of secrecy,

helplessness, entrapment [and] accommodation' " experienced by child victims (*Nicholson*, 26 NY3d at 828). Contrary to defendant's contention, we conclude that the expert's testimony, "grounded in [her] professional knowledge and training, provided relevant information outside the ken of the jurors and was properly admitted" (*id.* at 829; *see People v Young*, 206 AD3d 1631, 1632 [4th Dept 2022]).

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 under count 1 of the indictment and incest in the first degree under count 8 of the indictment (*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[s] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Pereau*, 45 AD3d 978, 981 [3d Dept 2007], *lv denied* 9 NY3d 1037 [2008]). We further conclude that the verdict, viewed in light of the elements of all of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The sentences imposed on the conviction of rape in the first degree, endangering the welfare of a child, and sexual abuse in the first degree are not unduly harsh or severe. In light of defendant's resentencing on the conviction of both counts of incest in the first degree, we do not consider his challenge to the severity of the original sentences imposed on those counts, and we dismiss the appeal from the judgment to that extent (*see People v Richardson*, 128 AD3d 1377, 1379 [4th Dept 2015], *lv denied* 25 NY3d 1206 [2015]). Finally, although not raised by defendant, we conclude that the court erred in imposing consecutive periods of postrelease supervision. Penal Law § 70.45 (5) (c) requires that when a person is subject to two or more periods of postrelease supervision, those periods merge with and are satisfied by the service of the period having the longest unexpired time to run (*see People v Kennedy*, 78 AD3d 1477, 1479 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]). Because we cannot allow an illegal sentence to stand (*see People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]), we modify the judgment accordingly.

Defendant's remaining contentions are not preserved for our review (*see People v Williams*, 199 AD3d 1480, 1481 [4th Dept 2021], *lv denied* 38 NY3d 931 [2022]; *People v Motzer*, 107 AD3d 1450, 1451 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 24, 2023

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 22-00438

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN MCDOWELL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT W. WARD, OF THE MASSACHUSETTS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

ADRIAN MCDOWELL, DEFENDANT-APPELLANT PRO SE.

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 October 12, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: 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]) arising from a traffic stop that resulted in a search of defendant's vehicle and discovery of, inter alia, a loaded handgun behind the glove box. We reject defendant's contention in his main and pro se supplemental briefs that County Court erred by refusing to suppress the physical evidence recovered from his vehicle. The initial traffic stop of defendant's vehicle was justified by the officer's observation of an expired vehicle registration, as printed on the temporary license plate (*see People v Bethea*, 191 AD3d 1487, 1487 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]). During the course of the police encounter, the officer observed in plain view what he identified as, and what defendant admitted to be, a bag of marihuana. That observation provided the officer and his partner with probable cause to search the vehicle (*see generally People v Babadzhanov*, 204 AD3d 685, 686 [2d Dept 2022], *lv denied* 38 NY3d 1069 [2022], *reconsideration denied* 39 NY3d 939 [2022]; *People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *People v Harrington*, 30 AD3d 1084, 1084-1085 [4th Dept 2006], *lv denied* 7 NY3d 848 [2006]). That

probable cause " 'justifie[d] the search of every part of the vehicle and its contents that may conceal the object of the search,' " (*People v Ellis*, 62 NY2d 393, 398 [1984], quoting *United States v Ross*, 456 US 798, 825 [1982]). To the extent that defendant also challenges, in his main and pro se supplemental briefs, the court's decision to credit the officer's testimony at the hearing, "[t]he evaluation of credibility by the hearing court is entitled to great weight and its determination will not be disturbed where, as here, it is supported by the record" (*People v Goins*, 191 AD3d 1399, 1400 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021] [internal quotation marks omitted]). Defendant's contention in his main and pro se supplemental briefs that the search of his vehicle was unlawfully destructive is belied by the record, and the court likewise properly credited the officer's testimony regarding the nature of the search (*see generally id.*). Defendant's remaining contention regarding the legality of the search of his vehicle is not preserved for our review (*see People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]).

Defendant further contends in his main brief that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Inasmuch as defendant failed to raise a constitutional challenge before the court, any such challenge is not preserved for our review (*see People v Reese*, 206 AD3d 1461, 1462 [3d Dept 2022]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]).

As defendant contends in his main brief and the People correctly concede, the sentence promised to defendant as part of his guilty plea and imposed upon him at sentencing, i.e., 8 years to life imprisonment, is illegal because it fell below the statutory minimum (*see* Penal Law §§ 70.08 [3] [b]; 265.03). Contrary to defendant's contention, however, the remedy at this stage is not to vacate his guilty plea, but to remit the matter to County Court (*see People v Paige*, 137 AD3d 1659, 1660 [4th Dept 2016]). On remittal, the court will have the discretion to either, if possible, " 'resentence defendant in a manner that ensures that he receives the benefit of his sentencing bargain or permit both parties the opportunity to withdraw from the agreement' " (*People v Collier*, 22 NY3d 429, 432 [2013]; *see Paige*, 137 AD3d at 1660).

Entered: March 24, 2023

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 20-01206

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FIDENCIO GONZALEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered September 2, 2020. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child and rape in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of predatory sexual assault against a child (Penal Law § 130.96) and rape in the second degree (§ 130.30 [1]), defendant contends that Supreme Court abused its discretion in permitting the People's expert to testify about child sexual abuse accommodation syndrome (CSAAS). We reject that contention. Expert testimony concerning CSAAS "is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Drake*, 138 AD3d 1396, 1398 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]). Here, "[a]lthough some of the testimony discussed behavior similar to that alleged by the [victim] in this case, the expert spoke of such behavior in general terms" and, "[i]n addition, the jury heard the expert testify that she was not aware of the facts of the particular case, did not speak with the [victim or anyone from her family,] and was not rendering an opinion as to whether sexual abuse took place" (*People v Diaz*, 20 NY3d 569, 575-576 [2013]; *see People v Slaughter*, 207 AD3d 1185, 1186 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]; *People v Young*, 206 AD3d 1631, 1632 [4th Dept 2022]). Contrary to defendant's contention, we conclude that "the expert's testimony, grounded in [her] professional knowledge and training, provided relevant information outside the ken of the jurors and was properly

admitted" (*People v Nicholson*, 26 NY3d 813, 829 [2016]).

Defendant further contends that the court committed a fundamental error during jury selection. During voir dire, the prosecutor exercised a peremptory challenge to prospective juror number 13. In response, the court discharged prospective juror number 14, presumably by mistake. Neither the prosecutor nor defense counsel objected, and prospective juror number 13 ended up serving on the jury. Although defendant correctly concedes that his contention is unpreserved for our review, he asserts that the court's handling of the prosecutor's peremptory challenge constitutes a mode of proceedings error that is "immune from normal preservation principles" (*People v Silva*, 24 NY3d 294, 299 [2014], *rearg denied* 24 NY3d 1216 [2015]). We reject that contention. "Not every procedural misstep in a criminal case is a mode of proceedings error," a term that is "reserved for the most fundamental flaws" in a criminal proceeding (*People v Becoats*, 17 NY3d 643, 651 [2011], *cert denied* 566 US 964 [2012]), such as shifting the burden of proof from the People to the defense (*see People v Patterson*, 39 NY2d 288, 296 [1976], *affd* 432 US 197 [1977]). In our view, the court's mistaken discharge of prospective juror number 14 instead of number 13 does not rise to the level of a mode of proceedings error, and we decline to exercise our power to address defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), particularly given that defendant has failed to demonstrate how he was prejudiced by the error (*see generally People v Rodriguez*, 32 AD3d 1203, 1204 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: March 24, 2023

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 20-01087
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DECARRIO SANDERS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered March 21, 2019. The judgment convicted defendant, upon a plea of guilty, of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude his challenge to County Court's refusal to suppress certain identifications made by witnesses to the crime (*see generally People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we reject that contention.

The challenged show-up identification procedures, which occurred within minutes of defendant's detention, in proximity to the scene of the crime, and at a time when defendant was not handcuffed, were " 'reasonable under the circumstances' " (*People v Cedeno*, 27 NY3d 110, 123 [2016], *cert denied* — US —, 137 S Ct 205 [2016]; *see People v Norman*, 183 AD3d 1240, 1240 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]). Those procedures were "part of a continuous, ongoing police investigation" and were "conducted as soon as practicable following defendant's apprehension" (*People v Johnson*, 202 AD3d 1471, 1472 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022] [internal quotation marks omitted]; *see People v Duuvon*, 77 NY2d 541, 544-545 [1991]; *People v Swain*, 109 AD3d 1090, 1091 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014]).

Contrary to defendant's further contention, the photo array used

during the challenged photo identification procedure was not unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]). Although the array had a greenish tint that impacted each of the photographs uniformly, " '[t]he composition and presentation of the photo array[] were such that there was no reasonable possibility that the attention of the witness[ ] would be drawn to defendant as the suspect chosen by the police' " (*People v Butler*, 140 AD3d 1610, 1611 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]).

Defendant failed to preserve for our review his remaining contention, regarding the legality of his initial detention (*see generally* CPL 470.05 [2]; *People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

138
KA 18-02328
PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAKIESHA D. HAWKINS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (Vincent M. Dinolfo, J.), rendered September 6, 2018. The judgment convicted defendant upon a nonjury verdict of criminal sale of a controlled substance in the third degree (four counts), criminal possession of a controlled substance in the third degree (five counts) and criminally using drug paraphernalia in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed on each of counts 1 through 8 to a determinate term of three years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of four counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), five counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and two counts of criminally using drug paraphernalia in the first degree (§ 220.55).

Viewing the evidence in light of the elements of counts 1 through 4 of the indictment in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the sentence is unduly harsh and severe, and we therefore modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the sentence on each of counts 1 through 8 to a determinate term of imprisonment of three years, to be followed by the two years of postrelease supervision imposed by County Court, which thereby

produces an aggregate term of imprisonment of 12 years.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

143
CA 22-00739
PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF THE CANANDAIGUA NATIONAL
BANK & TRUST COMPANY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIGHTON SECURITIES CORP., RESPONDENT,
JOHN R. ACCORSO AND KATHLEEN E. ACCORSO,
RESPONDENTS-APPELLANTS.

TREVETT CRISTO, ROCHESTER (DAVID H. EALY OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

UNDERBERG & KESSLER LLP, ROCHESTER (ERICKA B. ELLIOTT OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Anne Marie Taddeo, J.), entered November 24, 2021. The amended order, inter alia, directed respondent Brighton Securities Corp. to turn over certain funds to petitioner.

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

Memorandum: Petitioner commenced this special proceeding pursuant to CPLR 5225 (b) and 5227 seeking an order directing respondent Brighton Securities Corp. (Brighton) to turn over to petitioner's counsel funds held by Brighton in a joint brokerage account belonging to respondents-appellants, John R. Accorso and Kathleen E. Accorso (collectively, respondents), to satisfy a judgment against John R. Accorso. Supreme Court granted the petition, and respondents appeal. We affirm.

Contrary to respondents' contention, the court properly granted the petition and ordered turnover of all funds in the joint brokerage account. "In a summary proceeding such as a turnover proceeding pursuant to CPLR 5225 (b), a court is authorized to make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised . . . A court in a turnover proceeding will apply summary judgment analysis and[,] absent a factual issue requiring a trial, the matter will be summarily determined on the papers presented" (*Matter of Centerpointe Corporate Park Partnership 350 v MONY*, 96 AD3d 1401, 1402 [4th Dept 2012], *lv dismissed* 19 NY3d 1097 [2012] [internal quotation marks omitted]). Here, respondents admitted in their answer that their interests in the

brokerage account were that of joint tenants with the right of survivorship. "[E]ach named tenant is possessed of the whole account so as to make the account vulnerable to the levy of a money judgment by the judgment creditor of one of the joint tenants" (*Tayar v Tayar*, 208 AD2d 609, 610 [2d Dept 1994] [internal quotation marks omitted]; *see RP Old Riverhead, Ltd. v Hudson City Sav. Bank*, 106 AD3d 914, 914 [2d Dept 2013]). We therefore conclude that all funds held in the joint brokerage account are subject to the levy of a money judgment by petitioner.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

158

KA 22-01383

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM BURGIO, DEFENDANT-APPELLANT.

JULIE A. CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered July 22, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). As defendant correctly concedes, he failed to preserve for our review his contentions that a downward departure was warranted on the bases of, inter alia, his significant adult relationship with his wife, probationary sentence, and response to mental health treatment, inasmuch as he did not assert those grounds for a downward departure at the SORA hearing (*see People v Burgess*, 191 AD3d 1256, 1256-1257 [4th Dept 2021]; *People v Colon*, 186 AD3d 1730, 1731 [2d Dept 2020], *lv denied* 36 NY3d 903 [2020]). In any event, defendant's contentions lack merit. Even assuming, arguendo, that defendant "satisfied his burden with respect to the first two steps of the three-step analysis required in evaluating a request for a downward departure," we conclude that Supreme Court did not abuse its discretion in denying defendant's request (*People v Cornwell*, — AD3d —, —, 2023 NY Slip Op 00566, *1 [4th Dept 2023]; *see People v Pritchard*, — AD3d —, —, 2023 NY Slip Op 00549, *1 [4th Dept 2023]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Upon weighing the mitigating circumstances against the aggravating circumstances, including " 'the quantity and nature of the child pornography used by defendant, . . . and the extremely young children depicted therein' " (*People v Varin*, 158 AD3d 1311, 1312 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]), we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as

“defendant’s presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism” (*Burgess*, 191 AD3d at 1257; *see generally People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

161
CAF 21-00467
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF XANDRIEA M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMAL M., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 25, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudged that the father neglected the subject child. We affirm.

Contrary to the father's contention, petitioner established that he neglected the child inasmuch as petitioner showed by a preponderance of the evidence that the child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and . . . that the actual or threatened harm to the child is a consequence of the failure of the [father] to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1046 [b] [i]). Here, the evidence at the hearing established that the father refused to allow the child to return home after he learned that she was lying to him and instead informed the child and the caseworker for Child Protective Services that the child should go to a shelter. The evidence also established that the father was not willing to cooperate with the caseworker in arranging for the child's appropriate care or eventual return home, thereby placing the child in imminent risk of harm (*see Matter of Ashley B. [Lavern B.]*, 137 AD3d 1696, 1697 [4th Dept 2016]; *Matter of Chantel ZZ.*, 279 AD2d

669, 672 [3d Dept 2001]). Thus, we conclude that there is a sound and substantial basis in the record supporting Family Court's determination that the father neglected the child (*see generally Matter of Gina R. [Christina R.]*, 211 AD3d 1483, 1484 [4th Dept 2022]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

167
CA 22-00549
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF ANTHONY ROMANO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (MICHAEL J. MANUSIA OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 30, 2022 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the Parole Board's determination denying his request for release to parole supervision. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in January 2023 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; *Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see Matter of Porter v Annucci*, 148 AD3d 1779, 1779 [4th Dept 2017]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

174

KA 19-01415

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARVIS MCCUTCHEON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 30, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and robbery in the second degree (§ 160.10 [1]).

Contrary to defendant's contention, Supreme Court did not err in refusing to suppress a gun seized after a search of defendant's person and statements that defendant made to the police. Here, the People established the existence of probable cause to arrest defendant for the robbery based upon a witness's identification of defendant by his street name and in a subsequent photo array (*see People v Woodard*, 96 AD3d 1619, 1620 [4th Dept 2012], *lv denied* 19 NY3d 1030 [2012]; *People v Radcliffe*, 23 AD3d 301, 301 [1st Dept 2005], *lv denied* 6 NY3d 817 [2006]; *People v Higgins*, 178 AD2d 199, 199 [1st Dept 1991], *lv denied* 80 NY2d 832 [1992]). Further, the court's credibility determinations regarding whether the police officers were, in fact, placing defendant under arrest for the robbery are supported by the record and we see no basis to disturb them (*see People v Robles-Pizarro*, 198 AD3d 1379, 1379 [4th Dept 2021], *lv denied* 37 NY3d 1664 [2022]). Inasmuch as defendant's arrest was lawful, we reject defendant's contention that the court erred in refusing to suppress the property seized in a search incident to the lawful arrest (*see People v Harlow*, 195 AD3d 1505, 1507 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *People v Taylor*, 294 AD2d 825, 826 [4th Dept 2002]) and the statements

defendant subsequently made to the police (*see People v Edwards*, 187 AD3d 1687, 1690 [4th Dept 2020]; *People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

The sentence is not unduly harsh or severe. Defendant's remaining contention is without merit.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

196

KA 20-00060

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS MCMORRIS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 6, 2019. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, defendant’s waiver of the right to appeal is invalid inasmuch as County Court’s explanation that the waiver would foreclose any review by a higher court “utterly ‘mischaracterized the nature of the right [that] defendant was being asked to cede’ ” (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1228-1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

204
KA 19-00817
PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL WALLACE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 6, 2019. The judgment convicted defendant upon his plea of guilty of manslaughter in the second degree and criminal sale of a controlled substance in the third degree (six counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]) and six counts of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). We agree with defendant that the waiver of the right to appeal is invalid. A waiver of the right to appeal is not effective where, as here, it is not mentioned until sentencing, after defendant pleaded guilty (*see People v Weir*, 174 AD3d 1465, 1466 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]; *People v Brown*, 148 AD3d 1562, 1562-1563 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Mason*, 144 AD3d 1589, 1589 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]).

Defendant further contends that Supreme Court erred in failing to redact from the preplea investigation report statements that defendant made during the preplea investigation interview, because those statements were made without the presence of counsel. Contrary to the People’s contention, defendant preserved the issue for our review by moving to redact the statements from the preplea investigation report (*cf. People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *People v Tyo*, 140 AD3d 1697, 1698 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *see generally People v Griswold*, 186 AD3d 1104, 1104 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]). The court stated that it was reserving decision, but there

is no indication in the record that the court ever issued a decision. It is well settled that a court’s failure to rule on a motion cannot be deemed a denial thereof (*see People v Desius*, 178 AD3d 1422, 1422-1423 [4th Dept 2019], *lv denied* 36 NY3d 1096 [2021]; *People v Mack*, 122 AD3d 1444, 1445 [4th Dept 2014]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to determine defendant’s motion.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

205
CAF 21-01654
PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF SKYE H. BECK,
PETITIONER-RESPONDENT,

V ORDER

DAVID E. BECK, RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Steuben County (Chauncey J. Watches, J.), entered November 1, 2021 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

211
CAF 21-01702
PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF SKYE H. BECK,
PETITIONER-RESPONDENT,

V   MEMORANDUM AND ORDER

DAVID E. BECK, RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an amended order of the Family Court, Steuben County (Chauncey J. Watches, J.), entered November 12, 2021 in a proceeding pursuant to Family Court Act article 8. The amended order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an amended order of protection issued in a proceeding pursuant to Family Court Act article 8 upon a finding that he committed an unspecified family offense against petitioner, his daughter. At the fact-finding hearing, petitioner testified that respondent made two telephone calls to her that made her upset and sent text messages insulting her and threatening to disown her.

Initially, we note that Family Court failed to set forth its essential findings of fact and also failed to specify the family offense or offenses upon which the amended order of protection was predicated (*see Matter of Benson v Smith*, 170 AD3d 1640, 1641 [4th Dept 2019]; *Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1414 [4th Dept 2018]). Remittal is not necessary, however, because the record is sufficient for this Court to conduct an independent review of the evidence (*see White*, 163 AD3d at 1414; *Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]). Upon that review, we conclude that the evidence presented at the fact-finding hearing failed to establish by a preponderance of the evidence that respondent committed any of the family offenses alleged in the petition (*see* Family Ct Act §§ 812 [1]; 832; *see generally Matter of Robinson v Robinson*, 158 AD3d 1077, 1078 [4th Dept 2018]).

Entered: March 24, 2023   Ann Dillon Flynn
Clerk of the Court

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

213
CA 22-00721
PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF THE APPLICATION OF
MARCO TACOMUL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 18, 2022 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the Parole Board's determination denying his request for early conditional parole for deportation only. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in January 2023. Consequently, this appeal must be dismissed as moot (*see generally Matter of Crittleton v Annucci*, 201 AD3d 1302, 1302 [4th Dept 2022]; *Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see Hill*, 149 AD3d at 1541; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

215
CAF 21-01602
PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF SHARI B. MCCASLIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID E. BECK, RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Steuben County (Chauncey J. Watches, J.), entered November 1, 2021 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an order of protection issued in a proceeding pursuant to Family Court Act article 8 upon a finding that he committed an unspecified family offense against petitioner, the mother of two of his children. At the fact-finding hearing, petitioner testified that respondent was verbally abusive to her when talking to her by degrading her, accusing her of not keeping a clean home, and blaming her for his poor relationship with his daughter.

Initially, we note that Family Court failed to set forth its essential findings of fact, and also failed to specify the family offense or offenses upon which the order of protection was predicated (*see Matter of Benson v Smith*, 170 AD3d 1640, 1641 [4th Dept 2019]; *Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1414 [4th Dept 2018]). Remittal is not necessary, however, because the record is sufficient for this Court to conduct an independent review of the evidence (*see White*, 163 AD3d at 1414; *Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]). Upon that review, we conclude that the evidence presented at the fact-finding hearing failed to establish by a preponderance of the evidence that respondent committed the family offense of harassment in the first degree (Penal Law § 240.25) or harassment in the second degree under any subdivision (§ 240.26) (*see* Family Ct Act §§ 812 [1]; 832; *see generally Matter of Robinson v*

Robinson, 158 AD3d 1077, 1078 [4th Dept 2018]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

238

KA 15-01502

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. NEWMAN, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 27, 2015. The appeal was held by this Court by order entered December 23, 2021, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (200 AD3d 1656 [4th Dept 2021]). The proceedings were held and completed (Meredith A. Vacca).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal trespass in the third degree under count three of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of menacing a police officer or peace officer (Penal Law § 120.18) and one count of criminal trespass in the third degree (§ 140.10 [a]). We previously held the case, reserved decision, and remitted the matter to County Court for a hearing on defendant's motion to set aside the verdict pursuant to CPL 330.30 (2) on the ground of misconduct during jury deliberations, which had been summarily denied by the court (*People v Newman*, 182 AD3d 1067 [4th Dept 2020]). Upon remittal, the court conducted a hearing, but the jurist did not render a decision and order denying the motion until after he had begun sitting as an Acting Supreme Court Justice, thereby effectively transferring the proceeding to Supreme Court. Upon resubmission, we therefore again held the case, reserved decision, and remitted the matter to County Court to rule on defendant's motion based on the evidence presented at the hearing that was conducted following the first remittal (*People v Newman*, 200 AD3d 1656 [4th Dept 2021]). Upon remittal, the court denied defendant's motion.

Contrary to defendant's contention, the court did not err in denying his motion to set aside the verdict on the ground of juror misconduct. CPL 330.30 (2) provides that a verdict may be set aside on the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, . . . which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict." Upon a hearing on a CPL 330.30 motion, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40 [2] [g]). At the hearing on defendant's motion, defendant relied entirely on inadmissible out-of-court statements, the trustworthiness and reliability of which "were not confirmed by sufficient competent evidence independent of the statement[s]" (*People v Wallace*, 270 AD2d 823, 824 [4th Dept 2000], *lv denied* 95 NY2d 806 [2000]). We reject defendant's contention that due process required that the court admit hearsay evidence at the hearing. Even assuming, arguendo, that the due process exception applies in the context of a motion to set aside the verdict, we conclude that defendant failed to establish, as required to invoke that exception (*see People v Burns*, 6 NY3d 793, 795 [2006]), that the jurors were unavailable to testify.

To the extent that it is preserved for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we reject defendant's contention that the evidence is not legally sufficient to support the conviction of two counts of menacing a police officer or peace officer (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crime of menacing a police officer or peace officer as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*id.; see People v Kalinowski*, 118 AD3d 1434, 1436 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

We agree with defendant, however, that the court erred in granting the People's request to charge criminal trespass in the third degree as a lesser included offense of burglary in the third degree. "To establish that a count is a lesser included offense in accordance with CPL 1.20 (37), a [party] must establish 'that it is theoretically impossible to commit the greater crime without at the same time committing the lesser' " (*People v Repanti*, 24 NY3d 706, 710 [2015], quoting *People v Glover*, 57 NY2d 61, 64 [1982]). As charged here, "[a] person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders" (Penal Law § 140.10 [a]). The plain language of that statute "clearly requires that both buildings and real property be fenced or otherwise enclosed in order to increase the level of culpability from trespass . . . to criminal trespass in the third degree" (*People v Moore*, 5 NY3d 725, 726-727 [2005]). Inasmuch as that requirement is not an element of burglary in the third degree

(*see* § 140.20), it is theoretically possible to commit burglary in the third degree without committing criminal trespass in the third degree under section 140.10 (a), and thus “a violation of that section cannot qualify as a lesser included offense of third-degree burglary” (*People v Santiago*, 143 AD3d 545, 546 [1st Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *see People v Ocasio*, 167 AD3d 412, 413 [1st Dept 2018], *lv denied* 32 NY3d 1208 [2019]). We therefore modify the judgment by reversing that part convicting defendant of criminal trespass in the third degree and dismissing count three of the indictment.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

239

KA 22-00522

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND CONGDON, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, 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 (Gordon J. Cuffy, A.J.), rendered January 20, 2022. The judgment convicted defendant upon a nonjury verdict of promoting a sexual performance by a child (eight counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss the indictment is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges to another grand jury.

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of eight counts of promoting a sexual performance by a child as a sexually motivated felony (Penal Law §§ 130.91, 263.15), defendant contends that reversal is required based on errors committed by the prosecutor during the grand jury proceedings. We agree. Here, the prosecutor failed to instruct the grand jury, pursuant to the holding in *People v Kent* (19 NY3d 290 [2012]), that some "affirmative act" is required to prove the crime, and that "viewing computer images of a sexual performance by a child on a computer does not by itself constitute promotion of such images" (CJI2d[NY] Penal Law § 263.15). Although it is well established that a grand jury "need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law" (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]), we conclude under the circumstances of this case that the deficiencies in the prosecutor's charge impaired the integrity of the grand jury proceeding and gave rise to the possibility of prejudice. We further conclude that the potential for prejudice was increased by the prosecutor's cross-examination of defendant during the grand jury presentation in a manner that was "calculated to unfairly create a distinct implication that [defendant] was lying" (*People v Nunez*, 74 AD2d 805, 806 [1st Dept 1980]; *see generally People v Hazlett*, 167 AD2d 867, 868 [4th Dept 1990], *lv*

denied 77 NY2d 878 [1991]).

Contrary to defendant's further contention, 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Nevertheless, defendant's "conviction after trial does not cure [the] defective [g]rand [j]ury proceedings" (*People v Huston*, 88 NY2d 400, 411 [1996]; *see People v Connolly*, 63 AD3d 1703, 1704-1705 [4th Dept 2009]; *People v Samuels*, 12 AD3d 695, 697 [2d Dept 2004]). We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to dismiss the indictment, and dismiss the indictment without prejudice to the People to re-present any appropriate charges to another grand jury (*see Connolly*, 63 AD3d at 1705).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

240
KA 19-01494
PRESENT: PERADOTTO, J.P., CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

MICHAEL V. COLEY, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered June 4, 2018. The judgment convicted defendant upon his plea of guilty of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law § 110.00, 160.15 [4]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was not knowingly, voluntarily and intelligently entered (*see People v Terry*, 203 AD3d 1578, 1578 [4th Dept 2022], *lv denied* 38 NY3d 1010 [2022]), we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

We note, however, that the certificate of conviction erroneously states that defendant was convicted of attempted burglary in the first degree, and it must be amended to reflect that defendant was convicted of attempted robbery in the first degree (*see generally People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]).

Entered: March 24, 2023   Ann Dillon Flynn
                                                           Clerk of the Court

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

243

KA 21-01282

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. CORNISH, DEFENDANT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered July 13, 2021. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [2]), defendant contends that his plea was not knowing, voluntary, and intelligent because County Court failed to advise him of all the rights he would be forfeiting upon pleading guilty (*see Boykin v Alabama*, 395 US 238, 243 [1969]) and failed to advise him that, upon his guilty plea, he would be required to pay a supplemental sex offender victim fee. Defendant's contentions are not preserved for our review because he did not move to withdraw his plea or move to vacate the judgment of conviction (*see People v Bentley*, 191 AD3d 1392, 1392 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Gerald*, 103 AD3d 1249, 1249 [4th Dept 2013]). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

247
CAF 21-01747
PRESENT: PERADOTTO, J.P., CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF DEBRA S. HOLIDAY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KENDRA L. HOLIDAY, RESPONDENT-RESPONDENT,
AND DYLAN W. BUSH, RESPONDENT-APPELLANT.

SARK LAW, LLC, HORSEHEADS (SUJATA RAMAIAH OF COUNSEL), FOR
RESPONDENT-APPELLANT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered December 6, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, awarded petitioner maternal grandmother sole custody of the subject child. The record establishes, however, that the father consented to the order and it is well settled that "no appeal lies from an order entered upon the parties' consent" (*Matter of Heinsler v Sero*, 177 AD3d 1316, 1317 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Tina G.*, 242 AD2d 980, 980 [4th Dept 1997]). Although the father contends for the first time on appeal that he did not voluntarily consent to the order with respect to the award of legal custody, we note that "the proper procedural vehicle for [him] to pursue that claim is a motion to vacate the order" (*Matter of Maria J. [Peter J.]*, 129 AD3d 1660, 1661 [4th Dept 2015]; *see generally Matter of Michelle F.*, 280 AD2d 969, 969 [4th Dept 2001]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

266
CAF 21-01714
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF AMARION M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FAITH W., RESPONDENT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

AYOKA A. TUCKER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 12, 2022 in a proceeding pursuant to Family Court Act article 10. The order determined, inter alia, that respondent neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order determining, inter alia, that she neglected the subject child. We affirm.

To establish neglect, the petitioner must establish, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). Although a parent may use reasonable force to discipline their child and to promote the child's welfare (*see Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the infliction of excessive corporal punishment constitutes neglect (*see* § 1012 [f] [i] [B]). A single incident of excessive corporal punishment can be sufficient to support a finding of neglect (*see Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]). Further, the fact that a child's injuries do not require medical attention does not preclude a finding of neglect based on the infliction of excessive

corporal punishment (*see Matter of Tyson T. [Latoyer T.]*, 146 AD3d 669, 670 [1st Dept 2017]).

Here, we conclude that there is a sound and substantial basis in the record for Family Court's determination that the mother neglected the child by inflicting excessive corporal punishment on him (*see generally* Family Ct Act § 1012 [f] [i] [B]). The evidence presented by petitioner at the fact-finding hearing established that the mother intended to harm the child when she engaged in a physical altercation with him after he failed to comply with her request that he take out the trash. It was uncontested that the mother choked the child during that encounter. Further, petitioner presented evidence establishing that the mother made various admissions regarding her role in the encounter to a caseworker—namely, that she initiated the encounter, that she "kicked [the child's] ass," that she was not going to let the child "run over her," and that she was not going to let him think that she was "a little bitch"—all of which belied the mother's argument that she acted in self-defense during the altercation (*see Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *see generally Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1413 [4th Dept 2022]). Petitioner also presented evidence establishing that the child's physical, mental or emotional condition was impaired by the mother (*see Balle S.*, 194 AD3d at 1395). In particular, petitioner presented evidence establishing that the child feared her as a result of the altercation, and that the child had red marks, bruises and broken blood vessels on his neck and experienced breathing difficulties after the mother choked him.

Although the mother presented her own testimony, which arguably supports a contrary conclusion, she also presented the testimony of the child, which was largely consistent with petitioner's evidence and supportive of the court's determination of neglect. We conclude that the conflicting evidence presented by the mother does not require a different result inasmuch as the court declined to credit her efforts to minimize or explain her behavior and instead credited the testimony of, inter alia, the child with respect to the altercation (*see Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1345-1346 [4th Dept 2017]). Indeed, we note that, "[i]n reviewing the court's determinations, we must accord great weight and deference to them, including [the court's] drawing of inferences and assessment of credibility, and we will not disturb those determinations, where, as here, they are supported by the record" (*Jayla A.*, 151 AD3d at 1792-1793 [internal quotation marks omitted]; *see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

280
KA 20-01480
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DRAHCIR PARSON, DEFENDANT-APPELLANT.

HUNT LAW OFFICE PLLC, SYRACUSE (MARSHA A. HUNT 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 (Thomas J. Miller, J.), rendered July 31, 2020. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree (three counts) and scheme to defraud 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, inter alia, three counts of grand larceny in the third degree (Penal Law § 155.35 [1]). Contrary to defendant's contention, County Court did not err in failing to order an alcohol and substance abuse evaluation before denying his application for judicial diversion pursuant to CPL 216.05. "According to the plain language of CPL 216.05 (1), '[s]uch an evaluation is permissive' . . . , and the determination whether to order such an evaluation 'clearly lies within the discretion of the court' " (*People v Carper*, 124 AD3d 1319, 1319-1320 [4th Dept 2015], *lv denied* 25 NY3d 949 [2015]). Here, we perceive no abuse of discretion. Moreover, we conclude that the court did not err in denying defendant's application. "Courts are afforded great deference in making judicial diversion determinations" (*People v Williams*, 105 AD3d 1428, 1428 [4th Dept 2013], *lv denied* 21 NY3d 1021 [2013]), and here the determination is supported by defendant's "extensive criminal history and threat to public safety" (*People v Powell*, 110 AD3d 1383, 1384 [3d Dept 2013]; *see Carper*, 124 AD3d at 1320).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

283

KA 22-00631

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT GILES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 2, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of stolen property in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of criminal possession of stolen property in the third degree (Penal Law § 165.50) to criminal possession of stolen property in the fourth degree (§ 165.45 [1]) and vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for sentencing on that conviction.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of stolen property in the third degree (Penal Law § 165.50). This prosecution stems from a burglary with respect to which the victims reported a number of items missing from their home, including a laptop, an electronic tablet, and approximately $750 in cash. Defendant was acquitted of a burglary charge arising from the incident. We agree with defendant that the conviction is not supported by legally sufficient evidence that the value of the stolen property exceeded $3,000 (*id.*). Although the evidence at trial established that defendant possessed some of the items stolen during the burglary, the People offered no evidence from which the jury could infer without speculation that defendant ever possessed the stolen cash (*see generally People v Slack*, 137 AD3d 1568, 1569-1570 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]). Thus, even viewing the evidence in a light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]) and assuming, arguendo, that there was sufficient evidence of either the market value or replacement value of the stolen electronic tablet and laptop (*see* Penal Law § 155.20 [1]; *People v Geroyianis*, 96 AD3d 1641, 1644 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012],

reconsideration denied 19 NY3d 1102 [2012]), we conclude that the value of the stolen items found in defendant's possession fails to meet the statutory threshold. The evidence is legally sufficient, however, to establish that defendant committed the lesser included offense of criminal possession of stolen property in the fourth degree (*see* § 165.45 [1]; *Geroyianis*, 96 AD3d at 1645). We therefore modify the judgment accordingly, and we remit the matter to County Court for sentencing on that conviction. We have reviewed defendant's remaining contentions and conclude that none warrants further modification or reversal of the judgment.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

284

KA 21-00945

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE DAN NASH, JR., DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered June 2, 2021. The judgment convicted defendant upon a nonjury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [2]). Defendant's contention that the conviction is not supported by legally sufficient evidence is not preserved for our review inasmuch as he failed to renew his motion to dismiss after presenting proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). Nonetheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012] [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Here, viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that County Court "failed to give the evidence the weight it should be accorded" (*People v Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]; *see People v Young*, 206 AD3d 1631, 1634 [4th Dept 2022]; *see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to request certain information in a bill of particulars. Under the circumstances of this case, even if defense counsel should have requested the information, we cannot conclude that the failure to do so is tantamount to ineffective assistance (*see People v Buntley*, 286 AD2d

909, 910 [4th Dept 2001], *lv denied* 97 NY2d 751 [2002]). Moreover, viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

285
CAF 22-00474
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF DORCELIA M. HARVEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY P. HARVEY, RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered March 11, 2022 in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection against respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection entered upon a finding that he committed the family offense of harassment in the second degree against petitioner, respondent's mother (*see* Penal Law § 240.26 [1]; *see also* Family Ct Act § 812 [1]). We affirm.

"A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Washington v Davis*, 207 AD3d 1078, 1079 [4th Dept 2022], *lv denied* 39 NY3d 902 [2022] [internal quotation marks omitted]; *see Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113 [4th Dept 2012]). "The determination of whether a family offense was committed is a factual issue to be resolved by the [court], and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record" (*Washington*, 207 AD3d at 1079 [internal quotation marks omitted]; *see Matter of Scroger v Scroger*, 68 AD3d 1777, 1778 [4th Dept 2009], *lv denied* 14 NY3d 705 [2010]). As relevant here, a person commits harassment in the second degree when, "with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same" (Penal Law § 240.26 [1]). Petitioner testified at the fact-finding hearing that respondent struck her in the back of the head as she drove and that he threatened to harm her. We therefore conclude that, contrary to respondent's contention, petitioner established by a preponderance of the evidence that respondent committed

acts constituting harassment in the second degree (*see Matter of Cousineau v Ranieri*, 185 AD3d 1421, 1422 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

287
CAF 21-01164
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF MOLLIE W., MADELINE W., AND ALEXANDER W.-G.
--- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

CORINNE W., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 10, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding and disposition that, inter alia, determined that she neglected her three children. Contrary to the mother's contention, there is a sound and substantial basis in the record supporting Family Court's determination that petitioner met its burden of establishing, by a preponderance of the evidence, the mother's neglect of the subject children (*see* Family Ct Act § 1046 [b] [i]; *Matter of Henry G. [Danny T.]*, 175 AD3d 1802, 1802 [4th Dept 2019]). " 'In reviewing a determination of neglect, we must accord great weight and deference to the determination of [the court], including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record' " (*Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]). The evidence at the fact-finding hearing established that the children were living in deplorable conditions, with dirty dishes, animal feces, garbage, and flies present throughout the home. The children had hygiene issues, including bad body odor, dirty and ripped clothing, and persistent lice, which had a negative impact on the children's relationships with their peers at school. The conditions continued for several years, and the mother

failed to address them despite having been contacted on numerous occasions by a child protective services caseworker and a school social worker. The evidence further established that the mother had left the home several months before the petition was filed to be with her boyfriend, leaving the children in the filthy home with the father. The record reflects that the mother "knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child[ren] and failed to act accordingly" (*Matter of Crystiana M. [Crystal M.—Pamela J.*], 129 AD3d 1536, 1537 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Danaryee B. [Erica T.]*, 145 AD3d 1568, 1568 [4th Dept 2016]; *Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592-1593 [4th Dept 2014]).

The mother further challenges the dispositional part of the order on the ground that the court did not hold a dispositional hearing. Inasmuch as permanent orders of custody were subsequently entered granting custody of the eldest child to the paternal grandmother and custody of the two younger children to the maternal grandmother, the mother's appeal from the order to the extent that it concerns the disposition is moot (*see Matter of Dezerea G. [Lisa G.]*, 97 AD3d 933, 935 [3d Dept 2012]; *Matter of Dustin B. [Donald M.]*, 71 AD3d 1426, 1427 [4th Dept 2010]; *Matter of Jacob SS.*, 59 AD3d 825, 826 [3d Dept 2009]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

954
CA 20-01094
PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND MONTOUR, JJ.

IN THE MATTER OF CHARLES GUTTMAN AND
SHIRLEY LADD, PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

COVERT TOWN BOARD, RESPONDENT-RESPONDENT,
PAUL MIKESKA AND HEIDI MIKESKA,
RESPONDENTS-RESPONDENTS-APPELLANTS.

THE CROSSMORE LAW OFFICE, ITHACA (ANDREW P. MELENDEZ OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

SHARON M. SULIMOWICZ, ITHACA, FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

PATRICK J. MORRELL, SENECA FALLS, FOR RESPONDENT-RESPONDENT.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered May 15, 2020 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition in part.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to respondent Covert Town Board for further proceedings in accordance with the following memorandum: Petitioners appeal and Paul Mikeska and Heidi Mikeska (respondents) cross-appeal from a judgment that, inter alia, granted in part petitioners' CPLR article 78 petition seeking, among other things, to annul the determination of respondent Covert Town Board (Town Board) granting respondents' application for a variance from the requirement that they must obtain a building permit before making improvements to their property. When this matter was previously before us, we concluded that, "although the Town Board held a public hearing and a meeting to discuss respondents' application and engaged in a lengthy discussion regarding that application, the Town Board failed to articulate its reasons for granting the variance and failed to set forth any findings of fact to support its determination" (*Matter of Guttman v Covert Town Bd.*, 197 AD3d 1009, 1010 [4th Dept 2021]). We therefore held the case, reserved decision and remitted the matter to the Town Board to set forth the factual basis for its determination (*id.*). Following motion practice before this Court in which the Town Board was compelled to comply with our prior order, the Town Board eventually submitted, in relevant part, an unsworn document signed solely by its attorney purporting to constitute findings of fact.

Generally, "[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination" (*Matter of South Blossom Ventures, LLC v Town of Elma*, 46 AD3d 1337, 1338 [4th Dept 2007], *lv dismissed* 10 NY3d 852 [2008] [internal quotation marks omitted]; *see Matter of Livingston Parkway Assn., Inc. v Town of Amherst Zoning Bd. of Appeals*, 114 AD3d 1219, 1219-1220 [4th Dept 2014]). Here, we conclude that the Town Board has once again precluded intelligent judicial review of its determination inasmuch as its "purported findings of fact are speculative and mere conclusions and contain very little[, if any,] factual matter" (*Matter of Harrison Orthodox Minyan v Town Bd. of Harrison*, 159 AD2d 572, 574 [2d Dept 1990]; *see Matter of Seaford Jewish Ctr. v Board of Zoning Appeals of Town of Hempstead*, 48 AD2d 686, 686 [2d Dept 1975]). The Town Board "must do more than merely restate the terms of the applicable ordinance" and the procedural history preceding and subsequent to the determination; rather, the Town Board must set forth "findings of the facts essential to its conclusion" to grant the variance in the first instance—i.e., the determination that is the subject of the appeal (*Seaford Jewish Ctr.*, 48 AD2d at 686). Given that the Town Board has "failed to articulate the reasons for its determination and failed to set forth [appropriate] findings of fact" (*Matter of Fike v Zoning Bd. of Appeals of Town of Webster*, 2 AD3d 1343, 1344 [4th Dept 2003]; *see generally Matter of Foxluger v Gossin*, 65 AD2d 922, 922-923 [4th Dept 1978]), we continue to hold the case, reserve decision and remit the matter to the Town Board to properly set forth the factual basis for its determination within 30 days of the date of entry of the order of this Court. We remind the parties that "[a]n attorney or party who fails to comply with a[n] . . . order of th[is C]ourt . . . shall be subject to such sanction as [we] may impose" upon motion or our own initiative after the attorney or party has a reasonable opportunity to be heard (22 NYCRR 1250.1 [h]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

978

KA 18-01959

PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE C. HENDRICKS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Melchor E. Castro, A.J.), rendered July 6, 2018. 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 following a jury trial of robbery in the first degree (Penal Law § 160.15 [3]). Defendant contends that County Court erred in admitting certain of his statements in evidence inasmuch as those statements were hearsay and did not qualify as admissions because they were exculpatory in nature. That contention is unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, is without merit. Even assuming, arguendo, that the statements constituted hearsay, we conclude that they were properly admitted as “inconsistent with innocence” (*People v Ward*, 107 AD3d 1605, 1605 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013] [internal quotation marks omitted]), “inconsistent with [defendant’s] position on trial” (*People v Jackson*, 29 AD3d 409, 412 [1st Dept 2006], *affd* 8 NY3d 859 [2007] [internal quotation marks omitted]), and as “evidence that defendant has given a false alibi” (*People v Thomas*, 300 AD2d 1034, 1035 [4th Dept 2002], *lv denied* 99 NY2d 633 [2003]; *see People v Leyra*, 1 NY2d 199, 208 [1956]; *see also People v Ficarrota*, 91 NY2d 244, 250 [1997]). Inasmuch as the statements were properly admissible, we reject defendant’s related contention that defense counsel was ineffective in failing to object to them (*see People v Sampson*, 184 AD3d 1123, 1125 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]).

With respect to defendant’s remaining claims of ineffective assistance of counsel, defendant has failed to establish “the absence of strategic or other legitimate explanations for counsel’s allegedly

deficient conduct" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]; *see People v Jones*, 155 AD3d 1547, 1549 [4th Dept 2017], *amended on rearg* 156 AD3d 1493 [4th Dept 2017], *lv denied* 32 NY3d 1205 [2019]; *People v Loret*, 56 AD3d 1283, 1283 [4th Dept 2008], *lv denied* 11 NY3d 927 [2009]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

To the extent that defendant contends that he was penalized for exercising his right to a trial, that contention is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]). Defendant's sentence is not unduly harsh or severe.

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

988

CA 21-01708

PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

UNIVERSITY HILL REALTY, LTD,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RONDA AKL AND ROSETTE AKSTEROWICZ, AS
TRUSTEES OF THE MILAD HATEM IRREVOCABLE
TRUST UNDER AGREEMENT DATED JANUARY 14, 2015,
AND THE MILAD HATEM IRREVOCABLE TRUST UNDER
AGREEMENT DATED JANUARY 14, 2015,
DEFENDANTS-RESPONDENTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

ABRAHAM LAW, PLLC, SYRACUSE (IMAN ABRAHAM OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered October 7, 2021. The order granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiff commenced this breach of contract and unjust enrichment action, alleging that it is entitled to a real estate broker's commission based on, inter alia, an implied extension of a brokerage contract between it and defendants. Plaintiff appeals from an order granting defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). We agree with plaintiff that Supreme Court erred in granting the motion, and we therefore reverse.

"When a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the] plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

We conclude that the complaint alleges a cognizable claim for breach of implied contract. "Whether an implied-in-fact contract was formed and, if so, the extent of its terms, involves factual issues regarding the intent of the parties and the surrounding circumstances" (*Arell's Fine Jewelers v Honeywell, Inc.*, 147 AD2d 922, 923 [4th Dept 1989]; *see Rocky Point Props. v Sear-Brown Group*, 295 AD2d 911, 912 [4th Dept 2002]). Contrary to the court's determination, whether plaintiff "can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]) and, here, plaintiff's allegations sufficiently state a cause of action for breach of an implied contract arising from an implicit agreement to extend the brokerage contract (*see Herzog v New York City Dist. Council of Carpenters Pension Fund*, 141 AD3d 497, 498 [1st Dept 2016]; *see generally Dulberg v Mock*, 1 NY2d 54, 57 [1956]). Similarly, the complaint sufficiently alleges the elements of a claim for unjust enrichment (*see generally Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]), and thus the court erred in dismissing that cause of action.

The court also erred insofar as it granted the motion with respect to the cause of action for breach of implied contract based on documentary evidence. "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]). Although contracts are among the types of documentary evidence that may be considered for purposes of CPLR 3211 (a) (1) (*see Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1563 [4th Dept 2021]), we conclude that the contract submitted by defendants in support of their motion failed to "utterly refute . . . plaintiff's allegations [that the contract was implicitly extended] or conclusively establish a defense as a matter of law" (*Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1183 [4th Dept 2017] [internal quotation marks omitted]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

990
CA 22-00097
PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

SHAKIRAH M. GILBERT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAUREN E. DANIELS AND KATHRYN M. DANIELS,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (DEANNA D. RUSSELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, CURVIN AND BANKER, BUFFALO (JAMES P. BURGIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 11, 2022. The order and judgment granted the motion of defendants for summary judgment and dismissed the amended complaint.

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

Memorandum: In this action to recover damages for injuries allegedly sustained in an automobile accident, plaintiff appeals from an order and judgment that granted defendants' motion for summary judgment dismissing the amended complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We reverse.

Initially, we note that plaintiff does not challenge on appeal Supreme Court's conclusion that defendants met their initial burden on the motion with respect to causation and every applicable category of serious injury, and plaintiff therefore has abandoned any issue with respect thereto (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We agree with plaintiff, however, that in response to defendants' submissions, she met her burden of "coming forward with evidence indicating a serious injury causally related to the accident" (*Pommells v Perez*, 4 NY3d 566, 579 [2005]; *see Overhoff v Perfetto*, 92 AD3d 1255, 1256 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]).

We conclude that plaintiff submitted evidence raising triable issues of material fact on the issue of serious injury based on the submissions of her experts, who concluded that there was objective

evidence of injury to plaintiff's head, neck, and back (*see Gamblin v Nam*, 200 AD3d 1610, 1612-1613 [4th Dept 2021]; *Snyder v Daw*, 175 AD3d 1045, 1046 [4th Dept 2019]).

Further, we conclude that plaintiff's experts raised a triable issue of fact on the issue of causation. With respect to plaintiff's head injury, the expert neurologist reviewed the post-accident MRI of the brain and concluded that the abnormal findings were caused by the accident. Further, with respect to the injuries to plaintiff's neck and back, plaintiff's expert chiropractor specifically "address[ed] the manner in which plaintiff's physical injuries were causally related to the accident in light of [her] past medical history" (*Stroh v Kromer*, 207 AD3d 1125, 1126 [4th Dept 2022] [internal quotation marks omitted]). In particular, the expert explained that he reviewed the MRI films of each body part taken before and after the accident and concluded that changes evidenced by the post-accident MRI were traumatically aggravated, exacerbated, and caused and contributed to by the subject accident (*cf. Stroh*, 207 AD3d at 1126; *Overhoff*, 92 AD3d at 1256). We note that the court erred in concluding that there was no evidentiary value to the chiropractor's comparison of the pre- and post-accident MRI reports; contrary to the court's assertion, a chiropractor is "competent to render an opinion based on CT or MRI film studies" (*Mays v Green*, 165 AD3d 1619, 1621 [4th Dept 2018]; *see Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]).

Ultimately, this case presents a classic battle of the experts, and "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]; *see Hines-Bell v Criden*, 145 AD3d 1537, 1538 [4th Dept 2016]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

996/22
CA 22-00482
PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

CARLA L. PARKES, PLAINTIFF-RESPONDENT,

V ORDER

NIAGARA FALLS WATER BOARD, DEFENDANT-APPELLANT.

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

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 14, 2022. The order denied the motion of defendant to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 9, 2022,

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

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

998

KA 16-02353

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

DAVID S. ALCARAZ-UBILES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 3, 2016. The judgment convicted defendant upon a jury verdict of assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends, inter alia, that Supreme Court erred in relying on evidence at trial to determine that the pretrial identification of him in a photograph by a prosecution witness was confirmatory, thus obviating the requirement that the People provide notice of the identification to defendant pursuant to CPL 710.30. We agree and therefore "remit the matter to the trial court for a hearing to determine whether the witness knew defendant so well that no amount of police suggestiveness could have tainted the identification" (*People v Kahley*, 214 AD2d 960, 961 [4th Dept 1995]; *see People v Rodriguez*, 79 NY2d 445, 452-453 [1992]).

The witness in question disclosed on cross-examination at trial that he had identified defendant as the assailant in a photograph shown to him by the police. The People's CPL 710.30 notice did not reference this identification. Defense counsel thus asked the court to strike the witness's testimony on the ground of lack of notice, but the court, relying on the witness's trial testimony, ruled that the People were not required to give notice because the identification was

confirmatory. That was error. As the Court of Appeals has made clear, "prior familiarity should not be resolved at trial in the first instance" (*Rodriguez*, 79 NY2d at 452; *see also People v Carmona*, 37 NY3d 1016, 1017 [2021]), and, in any event, the witness's trial testimony was not sufficient to establish as a matter of law that the identification was confirmatory.

Although the witness testified that he knew defendant because he had seen him "a couple of times" at the barber shop, and that the two had each other's phone numbers, he also testified that he did not know defendant well, that he knew him only by a common nickname, and that they never spoke again after the assault. A midtrial *Rodriguez* hearing would have allowed defense counsel to flesh out the extent of the relationship between the two men, thereby allowing the court to make a more informed determination as to whether the pretrial identification of defendant was confirmatory as a matter of law.

Finally, we conclude that the error is not harmless because, even assuming, arguendo, that the proof of defendant's guilt, without reference to the error, is overwhelming, it cannot be said that "there is no reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

1044/21
CA 20-01217
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND GREENWOOD, JJ.

KRISTEN GELLMAN, PLAINTIFF-APPELLANT,

V — ORDER

CHARLES PRIORE, DEFENDANT-RESPONDENT.

JASON R. DIPASQUALE, BUFFALO, FOR PLAINTIFF-APPELLANT.

PAUL M. MICHALEK, JR., WEST SENECA, FOR DEFENDANT-RESPONDENT.

CATHERINE E. NAGEL, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 10, 2020. The order, among other things, directed that the subject child attend Bishop Timon-St. Jude High School.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 10, 2023,

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

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

1056
CA 22-00679
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

PATRICIA SZTORC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS K. HEANEY, DEFENDANT-RESPONDENT.

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

ROY & ASSOCIATES, WILLIAMSVILLE (THOMAS W. BENDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered April 5, 2022. The order, insofar as appealed from, denied in part the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for an injury she allegedly sustained when the vehicle she was operating was struck broadside by a minivan operated by defendant. The collision occurred at an intersection controlled by an overhead traffic light, and both parties told the responding police officer that they had the right-of-way. At their respective depositions, both parties again claimed that the light was green in their favor. Following discovery, plaintiff moved for summary judgment on liability, contending that "it is clear" from her testimony and the police report that defendant was negligent and that his negligence was the sole proximate cause of her injuries and that there is no dispute that she sustained a serious injury under Insurance Law § 5102 (d). Supreme Court granted the motion with respect to the issue of serious injury, but denied the motion with respect to the issues of negligence and causation, on the ground that "[t]he parties' competing claims as to which motorist had the right-of-way" raised triable issues of fact. Plaintiff appeals and we now affirm.

Plaintiff initially argues that the court should have determined as a matter of law that defendant was negligent because "it is unrefuted that plaintiff was without fault for the happening of this accident since there is no proof that she was speeding, suffering from visual impairments or obstructions, [or] acting unreasonably for failing to see the defendant's vehicle or for failing to take the

appropriate evasive measures." We reject that contention because, even assuming, arguendo, that plaintiff was "without fault," that does not meet plaintiff's burden on the motion of establishing defendant's negligence (*see generally Rodriguez v City of New York*, 31 NY3d 312, 315 [2018]; *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]).

Plaintiff next contends that defendant was negligent as a matter of law because the deposition testimony of defendant that he had stopped at the intersection for 15 to 20 seconds before the light turned green is self-serving and incredible, and the damage to the vehicles supports the conclusion that defendant's vehicle did not stop before it entered the intersection. We reject that contention. Even assuming, arguendo, that defendant did not stop at the intersection, we conclude that it does not necessarily follow that he was negligent. As the court properly determined, plaintiff's own submissions raise a triable issue of fact whether defendant had the right-of-way when the two vehicles entered the intersection (*see generally Brown v Askew*, 202 AD3d 1501, 1503 [4th Dept 2022]; *Fayson v Rent-A-Center E., Inc.*, 166 AD3d 1569, 1570 [4th Dept 2018]).

Finally, plaintiff contends that, even if defendant had the right-of-way, defendant was negligent as a matter of law because he made no effort to observe plaintiff's vehicle and he failed "to see what was there to be seen" (*Peterson v Ward*, 156 AD3d 1438, 1439 [4th Dept 2017]). We reject that contention because plaintiff's submissions failed to eliminate all triable issues of fact with respect to whether defendant was negligent on that basis (*see generally Godwin v Mancuso*, 170 AD3d 1672, 1673 [4th Dept 2019]; *Sperling v Akesson*, 104 AD3d 840, 841 [2d Dept 2013]). In light of plaintiff's failure to meet her initial burden on the motion, there is no need to consider defendant's submission in opposition thereto (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: March 24, 2023

Ann Dillon Flynn
Clerk of the Court

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

MATTER OF TAMIE JO MOROG, AN ATTORNEY, RESIGNOR. -- Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND BANNISTER, JJ. (Filed Mar. 14, 2023.)

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

MATTER OF THOMAS C. JUNKER, AN ATTORNEY, RESIGNOR. -- Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND BANNISTER, JJ. (Filed Feb. 17, 2023.)