SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 9, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

635

CA 22-01550

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

STATE OF NEW YORK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER P. WILLIAMS, II, ALSO KNOWN AS CHRISTOPHER WILLIAMS, DEFENDANT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SEAN P. MIX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANTHONY J. PIETRAFESA, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered April 11, 2022. The order granted the motion of defendant for summary judgment and dismissed plaintiff's 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, State of New York (State), commenced this action by asserting a single cause of action under a theory of quantum meruit seeking, inter alia, payment for medical services rendered to defendant by SUNY Upstate Medical University. Supreme Court granted defendant's motion for summary judgment dismissing the complaint as time-barred. We reverse.

Pursuant to CPLR 213, a six-year limitations period applies to a cause of action premised upon quantum meruit (*see CB Richard Ellis-Buffalo, LLC v Kunvarji Hotels, Inc.*, 94 AD3d 1458, 1458 [4th Dept 2012]). Defendant met his initial burden of establishing that the State's cause of action accrued on January 4, 2015, and thus that the action commenced on August 17, 2021 was untimely (*see generally Meredith v Siben & Siben, LLP*, 130 AD3d 791, 791-792 [2d Dept 2015], *lv denied* 26 NY3d 910 [2015]). We agree with the State, however, that the action was timely commenced (*see generally Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]).

"A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020], *rearg denied* 36 NY3d 962 [2021]). "[T]he period of the toll

is excluded from the calculation of the time in which the plaintiff can commence an action" (*id.*). In response to the COVID-19 pandemic, on March 20, 2020, the Governor issued Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8), which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . . from the date of this order until April 19, 2020." The Governor later issued a series of nine subsequent executive orders that extended the tolling period through November 3, 2020 (*see* Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28], 202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]). Thus, here, the statute of limitations was tolled from March 20, 2020, at which time 289 days remained in the limitations period, until November 3, 2020, and thereafter the "statute of limitations began to run again, expiring on [August 19, 2021]" (*Matter of New York City Tr. Auth. v American Tr. Ins. Co.*, 211 AD3d 643, 643 [2d Dept 2022]). The action was therefore timely commenced on August 17, 2021 (*see Murphy*, 210 AD3d at 411; *Brash v Richards*, 195 AD3d 582, 585 [2d Dept 2021]; *cf. Matter of Roach v Cornell Univ.*, 207 AD3d 931, 933 [3d Dept 2022]).

Although the court concluded that the toll is inapplicable here because the State could have commenced the action within the statute of limitations at any point between January 4, 2015 and March 20, 2020, as well as between November 3, 2020 and January 4, 2021, we disagree. "[A] toll operates to compensate a claimant for the shortening of the statutory period in which it must commence . . . an action, irrespective of whether the stay has actually deprived the claimaint of *any* opportunity to do so" (*Lubonty v U.S. Bank, N.A.*, 34 NY3d 250, 256 [2019], *rearg denied* 34 NY3d 1149 [2020]; *see Matter of Hickman [Motor Veh. Acc. Indem. Corp.]*, 75 NY2d 975, 977 [1990]). Thus, the State was entitled to the benefit of tolling of the statute of limitations for the 228-day period set forth in the executive orders.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

765

CA 22-01951

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

NICOLE GRAHAM AND BRAD GRAHAM,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, J.K. TOBIN CONSTRUCTION CORP. CO., INC., AND SALT SPRINGS PAVING CORP.,
DEFENDANTS-APPELLANTS.

SUSAN R. KATZOFF, CORPORATION COUNSEL, SYRACUSE (DANIELLE R. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT CITY OF SYRACUSE.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANTS-APPELLANTS J.K. TOBIN CONSTRUCTION CORP. CO., INC., AND SALT SPRINGS PAVING CORP.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA T. MASTRIANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 1, 2022. The order denied the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants J.K. Tobin Construction Corp. Co., Inc. and Salt Springs Paving Corp. in part and dismissing the complaint and cross-claims against them, and granting the motion of defendant City of Syracuse and dismissing the complaint against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Nicole Graham (plaintiff) allegedly sustained when she tripped and fell on an uneven surface on a roadway in defendant City of Syracuse (City). Defendant J.K. Tobin Construction Corp. Co., Inc. (Tobin) and defendant Salt Springs Paving Corp. (SSPC) are contractors who worked on projects in the City. Tobin and SSPC together moved for, inter alia, summary judgment dismissing the complaint and all cross-claims against them, and the City separately moved for summary judgment dismissing the complaint against it. Supreme Court denied both motions. Defendants appeal.

With respect to the appeal of Tobin and SSPC, we agree with Tobin and SSPC that, in their motion, they established as a matter of law

that, as contractors, they did not owe a duty of care to plaintiff, i.e., a third party to the contract (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]), and none of the exceptions identified in *Espinal* apply inasmuch as Tobin and SSPC did not perform any work at or near the location where plaintiff fell (*see Cohen v Schachter*, 51 AD3d 847, 848 [2d Dept 2008]; *see generally Espinal*, 98 NY2d at 140). In opposition, plaintiffs failed to raise an issue of fact (*see Cohen*, 51 AD3d at 848). We therefore modify the order by granting the motion of Tobin and SSPC in part and dismissing the complaint and cross-claims against them.

With respect to the City's appeal, we agree with the City that it met its initial burden on its motion by establishing that it had not received prior written notice of the condition that allegedly caused plaintiff's injuries, as required by section 8-115 (1) of the Charter of the City of Syracuse (*see Poirier v City of Schenectady*, 85 NY2d 310, 314 [1995]). Plaintiffs failed to raise "a triable issue of fact concerning the applicability of [an] exception to the prior written notice requirement, i.e., whether the City created the allegedly dangerous condition through an affirmative act of negligence" (*Davison v City of Buffalo*, 96 AD3d 1516, 1518 [4th Dept 2012] [internal quotation marks omitted]; *see Smith v City of Syracuse*, 298 AD2d 842, 842-843 [4th Dept 2002]). The exception is limited to work by the City that immediately results in the existence of a dangerous condition. Although the record supports the inference that the City may have created a dangerous condition by failing to replace a temporary cold patch with a permanent repair, the resulting allegedly dangerous condition here developed over a period greater than a year and did not "immediately result" from the City's work (*Yarborough v City of New* York, 10 NY3d 726, 728 [2008]; *see Thompson v City of New York*, 172 AD3d 485, 485 [1st Dept 2019]; *Davison*, 96 AD3d at 1518). We therefore further modify the order by granting the City's motion and dismissing the complaint against it.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

884

KA 19-00949

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONKAVIUS D. HOWARD, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 7, 2019. The judgment convicted defendant upon a jury verdict of burglary in the first degree, assault in the second degree, aggravated criminal contempt and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [2]), assault in the second degree (§ 120.05 [3]), and aggravated criminal contempt (§ 215.52 [1]). The charges arose from an incident in which defendant broke into the house of his estranged wife, assaulted her in violation of an order of protection, and then attacked a police officer who responded to the 911 calls to the residence. The incident was captured on police body camera videos and on recorded 911 calls.

Defendant initially contends that the indictment must be dismissed because the prosecutor's opening statement was insufficient. We reject that contention. "The people must deliver an opening address to the jury" (CPL 260.30 [3]), which "should be a capsulized version 'of the evidence that [the prosecutor] expects to present, and the claim that [the prosecutor] will make with reference thereto, to the end that the jury, upon listening to the evidence, may better understand and appreciate its connection and bearing upon the case' " (*People v Kurtz*, 51 NY2d 380, 384 [1980], *cert denied* 451 US 911 [1981]). In criminal jury cases, "a trial court may not dismiss after opening unless it shall appear from the statement that the charge[s] cannot be sustained under any view of the evidence and it may dismiss then only after the prosecutor has been given an opportunity to

correct any deficiency" (*Matter of Timothy L.*, 71 NY2d 835, 838 [1988]; *see People v Lewis*, 272 AD2d 890, 890 [4th Dept 2000], *lv denied* 95 NY2d 891 [2000]). Moreover, " 'absent bad faith or undue prejudice, a trial will not be undone' simply because there was some defect in the prosecutor's opening to the jury" (*Kurtz*, 51 NY2d at 385; *see People v Robbins*, 229 AD2d 1008, 1008 [4th Dept 1996]). Here, although the prosecutor did not specifically delineate any of the "particular offenses" (*Kurtz*, 51 NY2d at 384), we conclude that her opening statement "was sufficient to apprise the jury of the nature of the case" (*People v Nuffer*, 70 AD3d 1299, 1300 [4th Dept 2010]) and that there is no indication of bad faith here that would warrant dismissal of the indictment based on any defect in the prosecutor's opening statement.

Defendant further contends that Supreme Court's jury instructions rendered the indictment duplicitous and confused the jury. Inasmuch as defendant did not object to those instructions, he failed to preserve his contentions for our review (*see People v Wright*, 213 AD3d 1196, 1196 [4th Dept 2023]; *People v Vail*, 174 AD3d 1365, 1366 [4th Dept 2019]; *see also People v Ortiz*, 217 AD3d 1550, 1551 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *see generally People v Allen*, 24 NY3d 441, 449 [2014]), and, inasmuch as any alleged errors in the instructions could easily have been corrected had defendant objected in a timely manner, we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was denied effective assistance of counsel. Contrary to defendant's contention, defense counsel did not become a witness against defendant "by explaining [defense counsel's] performance in response to defendant's general complaints about defense counsel," and "[d]efense counsel's explanations did not create a conflict of interest" (*People v Avent*, 178 AD3d 1403, 1405 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *see People v Burney*, 204 AD3d 1473, 1474-1475 [4th Dept 2022]; *see generally People v Nelson*, 7 NY3d 883, 884 [2006]). We also reject defendant's claim that defense counsel was ineffective because, in the course of cross-examining the People's witnesses, he elicited evidence of prior bad acts committed by defendant and because he failed to seek redaction of a criminal conviction mentioned on the order of protection issued in favor of the victim against defendant. This case "lack[ed] . . . any viable defense beyond attacking the credibility of the People's witnesses" (*People v Harriger*, 199 AD3d 1482, 1483 [4th Dept 2021]; *cf. People v Wiggins*, 213 AD2d 965, 966 [4th Dept 1995]), and defendant has failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's" actions (*People v Nicholson*, 26 NY3d 813, 831 [2016]; *see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

All concur except OGDEN and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent inasmuch as we conclude that defendant was denied effective assistance of counsel as a result of defense counsel's failure to ensure that an order of protection admitted in evidence was redacted to exclude defendant's criminal history and defense counsel's actions in improperly opening the door to, among other things, evidence of defendant's criminal history and prior bad acts.

Meaningful representation is "reasonable competence, not perfect representation" (*People v Carver*, 27 NY3d 418, 422 [2016] [internal quotation marks omitted]). "However it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense . . . and who is familiar with, and able to employ at trial basic principles of criminal law and procedure" (*People v Droz*, 39 NY2d 457, 462 [1976]). "Whether counsel has adequately performed these functions is necessarily a question of degree, in which cumulative errors particularly on basic points essential to the defense, are often found to be determinative" (*id*.).

Here, when the People sought to introduce the order of protection in evidence, defense counsel failed to seek removal of the portion of that order stating the crimes for which defendant had previously been convicted, despite the fact that Supreme Court previously denied the People's *Sandoval* application. Moreover, as a direct result of defense counsel's open-ended questions, a witness stated during cross-examination that defendant was previously incarcerated. Most critically, however, defense counsel's open-ended questioning of the victim during cross-examination revealed that defendant had, on a prior occasion, broken into her home through the basement window. In this prosecution for, inter alia, burglary in the first degree, we cannot foresee evidence being more prejudicial than testimony elicited by his own counsel that defendant previously committed the same criminal act against the same victim.

In our view, defense counsel's conduct "lacked a strategic or tactical rationale" (*People v Stackhouse*, 194 AD3d 113, 124 [4th Dept 2021]) and was instrumental "in bringing this highly prejudicial [information] to the attention of the jury" (*Droz*, 39 NY2d at 462; *see People v Webb*, 90 AD3d 1563, 1564 [4th Dept 2011], *amended on rearg* 92 AD3d 1268 [4th Dept 2012]). We would therefore reverse the judgment and grant a new trial.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

915

CA 23-00236

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

MINERVA STEFANSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSHUA D. HUNTRESS, ET AL., DEFENDANTS,
AND DAVID S. STEFANSKI, DEFENDANT-RESPONDENT.

STEVE BOYD, P.C., BUFFALO (LEAH COSTANZO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, BUFFALO (JONATHAN H. DOMINIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered August 17, 2022. The order granted the motion of defendant David S. Stefanski for summary judgment and dismissed the complaint against him.

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 against defendant David S. Stefanski.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained in a motor vehicle accident. At the time of the accident, plaintiff was a passenger on a motorcycle operated by David S. Stefanski (defendant). The motorcycle was struck by an oncoming vehicle that crossed the center line of the road after its operator, who was under the influence of methamphetamine, Xanax, and other drugs at the time of the collision, fell asleep while driving. Defendant moved for summary judgment dismissing the complaint against him, contending, as relevant here, that the emergency doctrine applied and that his actions were reasonable under the circumstances. The motion was served while depositions and discovery remained outstanding, thereby staying disclosure (*see* CPLR 3124 [b]). Given the outstanding discovery, plaintiff's accident reconstruction expert was unable to issue a formal report. Plaintiff timely moved to lift the discovery stay, but was unable to obtain such an order until after the deadline to file papers in opposition to defendant's motion.

After lifting the stay, Supreme Court permitted the parties to submit supplemental papers—which included the formal report of plaintiff's accident reconstruction expert—but ultimately refused to consider the supplemental proof in determining the motion. The court granted defendant's motion, noting that plaintiff's supplemental

proof, even if it had been considered, would not have raised a triable issue of fact. Plaintiff appeals, and we reverse.

In this motor vehicle accident case, defendant, "as the movant for summary judgment, had the burden of establishing as a matter of law that he was not negligent or that, even if he was negligent, his negligence was not a proximate cause of the accident" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]). Under the emergency doctrine, "when a [driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration . . . , the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context . . . , provided the [driver] has not created the emergency" (*Stewart v Kier*, 100 AD3d 1389, 1389-1390 [4th Dept 2012] [internal quotation marks omitted]; *see generally Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). Additionally, a driver is "not required to anticipate that [another] vehicle, traveling in the opposite direction, would cross over into [the driver's] lane of travel" (*Cardot v Genova*, 280 AD2d 983, 983 [4th Dept 2001]; *see Fiore v Mitrowitz*, 280 AD2d 919, 920 [4th Dept 2001]).

Contrary to plaintiff's contention, defendant met his initial burden on the motion (*see Stewart*, 100 AD3d at 1390; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We agree with plaintiff, however, that under the circumstances of this case, the court erred in refusing to consider her supplemental expert proof inasmuch as defendant was permitted to respond and there was no evidence of prejudice (*see Ostrov v Rozbruch*, 91 AD3d 147, 155 [1st Dept 2012]; *Ashton v D.O.C.S. Continuum Med. Group*, 68 AD3d 613, 613 [1st Dept 2009]; *see generally Park Country Club of Buffalo, Inc. v Tower Ins. Co. of N.Y.*, 68 AD3d 1772, 1774 [4th Dept 2009]). We further agree with plaintiff that the expert's report and conclusions were neither speculative nor conclusory, but had a factual basis in the record and thus raised a triable issue of fact with respect to the reasonableness of defendant's conduct (*see Esposito v Wright*, 28 AD3d 1142, 1143-1144 [4th Dept 2006]). The court thus erred in granting the motion. In light of our determination, we do not address plaintiff's remaining contention.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

917

CA 22-01728

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

PAUL TRIEST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIXON EQUIPMENT SERVICES, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

SEGAR & SCIORTINO PLLC, ROCHESTER (STEPHEN A. SEGAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered September 27, 2022. The order denied the motion of plaintiff for partial summary judgment.

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

Same memorandum as in *Triest v Nixon Equip. Servs., Inc.* ([appeal No. 2] — AD3d — [Feb. 9, 2024] [4th Dept 2024]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

918

CA 23-00360

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND NOWAK, JJ.

PAUL TRIEST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIXON EQUIPMENT SERVICES, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

SEGAR & SCIORTINO PLLC, ROCHESTER (STEPHEN A. SEGAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered January 25, 2023. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained at his employer's premises while he was unloading an alignment jack from the back of a van owned by defendant. Plaintiff's employer had hired defendant to repair a defective alignment jack and, at the time of the accident, defendant's principal was delivering a temporary replacement jack (loaner jack) to be used while defendant was performing its repair. Plaintiff and defendant's principal moved the loaner jack to the edge of the van bed in preparation for lifting the device onto a four-wheeled cart. Plaintiff was injured when he and defendant's principal lifted the loaner jack to place it onto the cart. In appeal No. 1, plaintiff appeals from an order denying his motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action. In appeal No. 2, plaintiff appeals from a subsequent order granting defendant's motion for summary judgment dismissing the complaint.

Initially, we dismiss the appeal from the order in appeal No. 1. The right to appeal therefrom terminated upon entry of the final order in appeal No. 2 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *see also*

CPLR 5501 [c]). Furthermore, the appeal from the final order in appeal No. 2 does not bring up for review the propriety of the order in appeal No. 1 inasmuch as the order *denying* plaintiff's motion did not necessarily affect the final order in this case (*see Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025-1026 [2022], *rearg denied* 38 NY3d 1170 [2022]; *see generally* CPLR 5501 [a] [1]).

In appeal No. 2, we conclude that Supreme Court properly granted that part of defendant's motion with respect to the Labor Law § 240 (1) cause of action on the ground that plaintiff was not subject to an elevation-related risk at the time of the accident. "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). The protections of that provision, therefore, "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal quotation marks omitted]).

The bed of a truck or similar vehicle does not constitute an elevated work surface for purposes of Labor Law § 240 (1) (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 407-408 [2005]; *Grabar v Nichols, Long & Moore Constr. Corp.*, 147 AD3d 1489, 1490 [4th Dept 2017], *lv denied* 29 NY3d 909 [2017]; *Tillman v Triou's Custom Homes*, 253 AD2d 254, 257 [4th Dept 1999]), and the protections of Labor Law § 240 (1) do not apply where a plaintiff is injured while unloading equipment from the bed of a vehicle (*see Cabezas v Consolidated Edison*, 296 AD2d 522, 522-523 [2d Dept 2002]; *Tillman*, 253 AD2d at 255, 257; *see also Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 21 [2d Dept 2016], *lv denied* 29 NY3d 913 [2017]). Inasmuch as there is no dispute that plaintiff's injury occurred as he helped lift the loaner jack from the bed of defendant's vehicle, the court properly determined that Labor Law § 240 (1) does not apply.

We agree with plaintiff, however, that the court erred in granting that part of defendant's motion with respect to the Labor Law § 200 and common-law negligence causes of action, and we modify the order accordingly. Where, as here, a plaintiff's injuries stem from the manner in which the work was being performed, no liability attaches to a defendant "under the common law or under Labor Law § 200 unless it is shown that the [defendant] had the authority to supervise or control the performance of the work" (*Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014] [internal quotation marks omitted]; *see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Here, we conclude that defendant failed to meet its initial burden on the motion inasmuch as its own submissions raise questions of fact whether defendant's principal actually directed or controlled the work that resulted in plaintiff's injuries (*see generally Ross*, 81 NY2d at 505-506). Furthermore, even though it is undisputed that defendant

was not the owner of the premises or a general contractor, defendant's submissions raise questions of fact whether it was an agent of the owner to the extent that the owner—i.e., plaintiff's employer—delegated to defendant the activity, and thus control of the activity, that resulted in the accident (*see generally Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Locke v URS Architecture & Eng'g-N.Y., P.C.*, 202 AD3d 505, 505-506 [1st Dept 2022]).

Finally, we agree with plaintiff that the court erred in concluding with respect to the Labor Law § 200 cause of action that defendant established, as a matter of law, that plaintiff was a volunteer who "offer[ed] his . . . services gratuitously" when he helped defendant's principal lift the loaner jack (*Luthringer v Luthringer*, 59 AD3d 1028, 1029 [4th Dept 2009] [internal quotation marks omitted]; *see generally Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Defendant's submissions raise questions of fact insofar as they suggest that plaintiff was required to offer his services to defendant in unloading the loaner jack and that defendant had an understanding with plaintiff's employer that the latter's employees would be available for defendant's use when it delivered the loaner jack (*see generally Lysiak v Murray Realty Co.*, 227 AD2d 746, 747-748 [3d Dept 1996]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

959

KA 21-01200

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES ROBERTO, DEFENDANT-APPELLANT.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered July 7, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, attempted criminal possession of a weapon in the second degree and criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]), and criminal contempt in the first degree (§ 215.51 [b] [ii]).

Defendant's challenge to the factual sufficiency of the plea allocution "is foreclosed by [his] valid waiver of the right to appeal" and, further, defendant "failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction" (*People v Peter*, 141 AD3d 1115, 1116 [4th Dept 2016]; *see People v Hicks*, 128 AD3d 1358, 1359 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]). In any event, the allocution was legally sufficient inasmuch as " 'nothing that defendant said or failed to say in [his] allocution negated any element of the offense[s] to which [he] pleaded . . . or otherwise called into question [his] admitted guilt' " (*People v Smith*, 39 AD3d 1228, 1228 [4th Dept 2007], *lv denied* 9 NY3d 881 [2007], *reconsideration denied* 9 NY3d 993 [2007]).

While defendant's contention that Supreme Court erred in imposing an enhanced sentence based upon his postplea conduct survives his valid waiver of the right to appeal (*see People v O'Brien*, 98 AD3d 1264, 1264 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]; *cf. People*

v Sampson, 149 AD3d 1486, 1487-1488 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]), the contention "is not preserved for our review because defendant did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction" (*People v Sprague*, 82 AD3d 1649, 1649 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]). In any event, because "defendant violate[d] . . . condition[s] of the plea agreement" by, inter alia, admittedly attempting to contact an individual in violation of an order of protection, "the court [was] no longer bound by the agreement and [was] free to impose a greater sentence" (*id.* [internal quotation marks omitted]) without the need "to afford defendant an opportunity to challenge the foundation of his postplea arrest[ ]" (*People v Figgins*, 87 NY2d 840, 841 [1995]; *see People v Outley*, 80 NY2d 702, 712-713 [1993]).

Because the court advised defendant of the maximum sentence that could be imposed upon a violation of the plea agreement, "the waiver by defendant of the right to appeal encompasses [his] further contention that the enhanced sentence is unduly harsh [and] severe" (*People v May*, 169 AD3d 1365, 1365 [4th Dept 2019] [internal quotation marks omitted]).

Finally, we have considered defendant's remaining contentions regarding jurisdiction and conclude that none warrants reversal or modification of the judgment.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

965

CA 22-01726

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

STATE OF NEW YORK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER WALKER, DEFENDANT-APPELLANT.

ANTHONY J. PIETRAFESA, SYRACUSE, FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SEAN P. MIX OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered October 11, 2022. The order denied the motion of defendant to, inter alia, vacate a default judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted in part, the judgment entered by the Onondaga County Clerk on October 7, 2014, is vacated and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant appeals from an order denying his motion seeking, among other things, to vacate the default judgment that the Onondaga County Clerk entered against him in this action. Defendant contended in support of his motion that Supreme Court lacked personal jurisdiction over him because plaintiff's process server did not meet the due diligence requirement of CPLR 308 (4) and that he was not properly served with the summons with notice by substituted service under CPLR 308 (4). He also contended, among other things, that the Clerk lacked authority to enter the judgment because the claim is not for a sum certain.

Initially, we agree with defendant that the Clerk lacked authority under CPLR 3215 (a) to enter the default judgment. "CPLR 3215 (a) allows a party to seek a default judgment by application to the clerk if the claim is 'for a sum certain or for a sum which can by computation be made certain' " (*Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 222 [2d Dept 2011]). "The limitation of clerk's judgments to claims for a sum certain contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due" (*id.* [internal quotation marks omitted]; *see Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]). "The statute is intended to apply to only the most liquidated and undisputable of claims, such as actions on money

judgments and negotiable instruments" (*Stephan B. Gleich & Assoc.*, 87 AD3d at 222). Under the circumstances of this case, we conclude that this action, which seeks to recover damages for medical services, is not for a sum certain or for a sum that by computation can be made certain (*see Primary Care Ambulance Corp. v Simpson*, 148 AD3d 943, 943-944 [2d Dept 2017]; *see generally Stephan B. Gleich & Assoc.*, 87 AD3d at 222). We therefore conclude that the court should have granted defendant's motion insofar as it sought to vacate the judgment on that basis.

Defendant further contends that he was not properly served with the summons with notice pursuant to CPLR 308 (4) and that the court should therefore have granted his motion insofar as it sought to vacate the default judgment on that ground and to dismiss the action or, in the alternative, to hold an inquest on damages if service was determined to be proper. "Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served" (*Cach, LLC v Ryan*, 158 AD3d 1193, 1194 [4th Dept 2018] [internal quotation marks omitted]; *see Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept 2017]). Although "bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing" (*Cach, LLC*, 158 AD3d at 1194 [internal quotation marks omitted]). Here, defendant's submissions raised a genuine question on the issue whether service was properly effected (*see Garvey v Global Asset Mgt. Solutions, Inc.*, 192 AD3d 1597, 1598 [4th Dept 2021]; *Cach, LLC*, 158 AD3d at 1195). Defendant submitted an affidavit in which he averred, inter alia, that he lived in the upstairs apartment of a two-story, two-family house, and that, because his apartment was not specified on the papers described in the process server's affidavit of service, he never received service (*see L&W Supply Corp. v Built-Rite Drywall Corp.*, 220 AD3d 1205, 1206 [4th Dept 2023]). In light of the foregoing, we reverse the order, grant defendant's motion in part, vacate the Clerk's judgment, and remit the matter to Supreme Court to conduct a traverse hearing on the issue whether service was properly effectuated pursuant to CPLR 308 (4) and to determine, following the hearing, defendant's motion to the extent that it sought dismissal of the action based on the lack of proper service or, in the alternative, an inquest on damages.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1030

KA 22-00176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY HENDERSON, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered November 9, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia 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 Cayuga County Court for resentencing.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and one count of criminally using drug paraphernalia in the second degree (§ 220.50 [3]), defendant contends that County Court erred in refusing to suppress tangible evidence found, along with statements he made to the State Police, following a stop of his motor vehicle. We reject that contention.

This prosecution arises from an incident in which a New York State Trooper observed two vehicles parked in an otherwise empty parking lot, aligned so that their driver’s side windows were facing each other. The parking lot served only a closed business and was marked with a “no trespassing” sign. The Trooper testified that the business was located in a rural, relatively high crime area where significant drug activity and burglaries had occurred and that it was unusual for people to pull into that lot to park after business hours. He also testified that he was familiar with the owners of the business and that the vehicles he observed that evening did not belong to the owners or anyone else that was supposed to be at the business at that time. Based upon the Trooper’s experience in investigating hundreds of narcotics cases, he suspected that a crime, possibly a drug deal,

trespass or burglary, was transpiring. The Trooper then pulled into the entrance of the parking lot, partially blocking it, and proceeded to question defendant and the driver of the other vehicle. During questioning, defendant admitted to possessing marihuana and, in a subsequent search following his arrest, was found to also be in possession of a scale, a large amount of cash, and cocaine.

We agree with defendant that, as the People correctly concede, the Trooper effectuated a seizure of defendant's vehicle when he pulled his patrol car into the entrance of the parking lot where defendant was parked, partially blocking defendant from leaving (*see People v Jennings*, 45 NY2d 998, 999 [1978]). We reject, however, defendant's contention that he was unlawfully seized and conclude that the court properly determined that, based on the totality of the observations by the Trooper, he had a reasonable suspicion that defendant was involved in either a drug transaction (*see People v Wright*, 158 AD3d 1125, 1126 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]) or a criminal trespass (*see People v Davis*, 199 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]; *see also People v Amuso*, 44 AD3d 781, 783 [2d Dept 2007], *lv denied* 9 NY3d 1030 [2008]).

Additionally, while defendant does not raise the issue, the People correctly note that the court erred in failing to "pronounce sentence on each count" on which defendant was convicted (CPL 380.20; *see People v Brady*, 195 AD3d 1545, 1546 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1035

KA 22-01848

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY L. LEE, SR., DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered September 21, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (three counts), criminal possession of a firearm, menacing in the first degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and on the facts by granting that part of defendant's omnibus motion seeking to suppress the switchblade knife and defendant's statements relating to the switchblade knife, reversing those parts convicting defendant of criminal possession of a weapon in the third degree under count 4 of the indictment, criminal possession of a firearm, menacing in the first degree and endangering the welfare of a child under count 8 of the indictment and dismissing counts 3, 4, 6 and 8 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1], [8]), one count of criminal possession of a firearm (§ 265.01-b [1]), one count of menacing in the first degree (§ 120.13), and two counts of endangering the welfare of a child (§ 260.10 [1]).

The prosecution arises from a domestic dispute during which defendant held an operable automatic handgun to the head of his longtime girlfriend, in the presence of their 15-year-old daughter. A second child, the couple's son, was also in the home, but he was asleep in another room during the incident. The daughter called 911 to report the incident and, when a law enforcement officer arrived, described to him the handgun that defendant had held to her mother's

head. Defendant was then taken into custody, but was not in possession of any firearms. After defendant was secured and all known occupants of the home, including the son, were outside of the apartment building, an officer entered defendant's residence without a warrant and discovered a switchblade knife in plain view on a table. Simultaneously, a second officer was alerted by defendant's neighbor to a bag that she had just discovered on her balcony, which was connected to defendant's balcony. The bag contained a handgun, matching the description previously given by the daughter, as well as a high-capacity magazine. Defendant was indicted on eight counts. He was charged with three counts relating to his possession of the handgun: criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [1] [a]); CPW in the third degree (§ 265.02 [1]); and criminal possession of a firearm (§ 265.01-b [1]). Defendant was further charged with CPW in the third degree relating to his possession of the switchblade knife (§ 265.02 [1]); CPW in the third degree relating to his possession of the high-capacity magazine (§ 265.02 [8]); menacing in the first degree relating to his holding of the handgun against his girlfriend's head (§ 120.13); endangering the welfare of a child relating to the daughter (§ 260.10 [1]); and endangering the welfare of a child relating to the son (§ 260.10 [1]).

We agree with defendant that, as the People correctly concede, County Court erred in refusing to suppress the statements that he made to the police following his arrest in which he admitted to owning the switchblade knife. The People failed to meet their burden of establishing beyond a reasonable doubt that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights before being questioned (*see People v Teixeira-Ingram*, 199 AD3d 1240, 1242 [3d Dept 2021]; *cf. People v Kithcart*, 85 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 17 NY3d 818 [2011]).

We also agree with defendant that the court erred in refusing to suppress the switchblade knife seized by the police during the search of his residence. " '[S]ubject only to carefully drawn and narrow exceptions, a warrantless search of an individual's home is per se unreasonable and hence unconstitutional' " (*People v Jenkins*, 24 NY3d 62, 64 [2014]), and no exception applies here. The court reasoned that the officer's entry into defendant's residence was justified under the emergency exception to the warrant requirement, which permits a warrantless search where " '(1) the police . . . have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief [is] grounded in empirical facts; (2) the search [is] not . . . primarily motivated by an intent to arrest and seize evidence; and (3) there [is] some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched' " (*People v Turner*, 175 AD3d 1783, 1783 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019], quoting *People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). We conclude, however, that the first and third elements of the emergency exception were not present at the time the officer entered defendant's residence because defendant had been secured prior to that time and the officer who conducted the search

testified that he did not believe there was anyone else in the residence at that time (*see People v Hidalgo-Hernandez*, 200 AD3d 1681, 1683 [4th Dept 2021]; *People v Mormon*, 100 AD3d 782, 783 [2d Dept 2012], *lv denied* 20 NY3d 1102 [2013]).

We therefore modify the judgment by granting that part of defendant's omnibus motion seeking to suppress the switchblade knife and defendant's statements relating to the switchblade knife, reversing that part of the judgment convicting defendant of CPW in the third degree as it relates to the switchblade knife, and dismissing count 4 of the indictment (*see People v Lawrence*, 192 AD3d 1686, 1687-1688 [4th Dept 2021]). We reject defendant's contention that a new trial is warranted, inasmuch as "there is no reasonable possibility that the . . . evidence supporting the . . . tainted count[ ] in any meaningful way influenced the jury's decision to convict on the remaining counts" (*People v Doshi*, 93 NY2d 499, 503 [1999]).

We also reject defendant's contention that the court's *Sandoval* ruling constituted an abuse of discretion (*see generally People v Sandoval*, 34 NY2d 371, 374 [1974]). The convictions on which the court ruled that it would permit inquiry were probative of defendant's credibility because "such acts showed the 'willingness . . . [of defendant] to place the advancement of his individual self-interest ahead of principle or of the interests of society' " (*People v Thomas*, 213 AD3d 1359, 1360 [4th Dept 2023], *lv denied* 39 NY3d 1143 [2023]; *see People v Gethers*, 151 AD3d 1398, 1401 [3d Dept 2017], *lv denied* 30 NY3d 980 [2017]; *People v Johnson*, 307 AD2d 384, 384-385 [3d Dept 2003], *lv denied* 1 NY3d 574 [2003]; *People v Godin*, 50 AD2d 839, 839 [2d Dept 1975]). Additionally, defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of those convictions] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*Thomas*, 213 AD3d at 1360). Moreover, it was within the court's discretion to permit questions relating to a "similar[ ] . . . prior conviction" (*People v Downey*, 256 AD2d 810, 810 [3d Dept 1998], *lv denied* 93 NY2d 969 [1999]) and the sentences received (*see People v Carmichael*, 171 AD3d 1084, 1085 [2d Dept 2019], *lv denied* 34 NY3d 979 [2019]).

Defendant further contends that the court erred in allowing the People to bolster a witness's testimony through questioning of the witness and two other witnesses as to that witness's prior consistent statements. Defendant failed to preserve that contention for our review with respect to most of the testimony he now asserts was improper bolstering (*see People v Comerford*, 70 AD3d 1305, 1306 [4th Dept 2010]). Defendant's sole preserved contention with respect to bolstering lacks merit. While "it is generally improper to introduce testimony that [a] witness had previously made prior consistent statements, when there is no claim of either prompt outcry or recent fabrication," such testimony "may be admissible when it is offered not for its truth, but for some other relevant purpose, for example [as here,] to assist in 'explaining the investigative process and completing the narrative of events leading to the defendant's

arrest' " (*People v Gross*, 26 NY3d 689, 694-695 [2016]; *see People v Smith*, 22 NY3d 462, 465 [2013]).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to counts 2 and 5, for CPW in the third degree relating to the handgun and high-capacity magazine, respectively, is not against the weight of the evidence (*see People v Wright*, 188 AD3d 1687, 1688 [4th Dept 2020]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude that, contrary to defendant's contention, the verdict with respect to count 7, for endangering the welfare of a child with respect to the daughter, is not against the weight of the evidence.

We agree with defendant, however, that, as the People correctly concede, the verdict with respect to count 6, for menacing in the first degree, is against the weight of the evidence (*see* Penal Law §§ 120.13, 120.14 [1]). We also agree with defendant that, contrary to the People's contention, the verdict with respect to count 8, for endangering the welfare of a child with respect to the couple's son, is against the weight of the evidence inasmuch as the People failed to establish that defendant's actions were "likely to be injurious to the physical, mental, or moral welfare of [the] child" (§ 260.10 [1]; *cf. People v Meseck*, 52 AD3d 948, 949-950 [3d Dept 2008], *lv denied* 11 NY3d 739 [2008]). We therefore further modify the judgment by reversing those parts convicting defendant of menacing in the first degree and of endangering the welfare of a child as it relates to the son, and dismissing counts 6 and 8 of the indictment.

We further conclude that, as defendant contends and the People correctly concede, the part of the judgment convicting him of criminal possession of a firearm must be reversed and count 3 of the indictment dismissed because it is an inclusory concurrent count of CPW in the third degree. Here, the CPW in the third degree count relating to the handgun charged possession of a "handgun, a firearm" as one of its elements and, as charged in the indictment, the elements of CPW in the third degree are precisely those required for criminal possession of a firearm under Penal Law § 265.01-b (1) (*see generally People v Scott*, 61 AD3d 1348, 1350 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009]). Thus, it was impossible for defendant to commit CPW in the third degree without, by the same conduct, committing criminal possession of a firearm, thereby rendering criminal possession of a firearm an inclusory concurrent count of CPW in the third degree. We therefore further modify the judgment by reversing that part convicting defendant of criminal possession of a firearm and dismissing count 3 of the indictment.

Finally, contrary to defendant's contention, his sentence is not unduly harsh or severe.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1040

CA 23-00087

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

ROBYN GRAMMATICO AND LOUIS GRAMMATICO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES R. LAMAR, D.M.D., FRANK R. LAMAR, JR., D.D.S., ELMWOOD DENTAL GROUP-IMPLANT AND RESTORATION, P.C., AND ELMWOOD DENTAL GROUP-FAMILY, P.C.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered November 30, 2022. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first and third causes of action against defendants James R. Lamar, D.M.D., Elmwood Dental Group-Implant and Restoration, P.C., and Elmwood Dental Group-Family, P.C., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this dental malpractice action seeking damages for injuries allegedly sustained by Robyn Grammatico (plaintiff) as a result of defendants' negligence during treatment of plaintiff, including extraction of a tooth in March 2016. In appeal No. 1, plaintiffs appeal from an order that granted defendants' motion for summary judgment dismissing the complaint. In appeal No. 2, plaintiff appeals from an order that denied her motion to settle the record on appeal in appeal No. 1.

Preliminarily, in appeal No. 2, plaintiff contends that Supreme Court improperly excluded necessary and relevant documents from the record on appeal in appeal No. 1. We reject that contention. The reply affidavit of defendant Frank R. Lamar, Jr., D.D.S., was withdrawn at oral argument, and therefore it was not a document "upon which the . . . order [in appeal No. 1] was founded" (CPLR 5526; *see Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co.*, 175

AD3d 1100, 1101-1102 [4th Dept 2019]). Further, defendants' memorandum of law, which may be included in the record on appeal "only for the limited purpose of determining whether the contentions on appeal are preserved for our review" (*Town of West Seneca v Kideney Architects, P.C.*, 187 AD3d 1509, 1510 [4th Dept 2020]), is not necessary here, and the correspondence between the parties and the court is not relevant to any of the issues in appeal No. 1.

With respect to appeal No. 1, plaintiffs first contend that the court erred in dismissing the first cause of action, for negligence and medical malpractice. We agree in part. On that part of their motion for summary judgment dismissing the first cause of action, defendants "had the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause [plaintiff's] injuries" (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1469 [4th Dept 2020] [internal quotation marks omitted]). Defendants met that burden through the submission of the affidavits of defendants James R. Lamar, D.M.D., and Frank R. Lamar, Jr., D.D.S., which contained "opinion evidence . . . based on facts in the record or personally known to the witness[es]" (*Tirado v Koritz*, 156 AD3d 1342, 1344 [4th Dept 2017] [internal quotation marks omitted]) and were " 'detailed, specific and factual in nature' and addresse[d] [each of] plaintiff[s'] specific factual claim[s] of negligence" (*Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]; *see Czereszko v Procopio*, 149 AD3d 1531, 1532 [4th Dept 2017]).

The burden then shifted to plaintiffs to raise a triable issue of fact by submitting " 'evidentiary facts or materials to rebut the prima facie showing by the defendant[s]' beyond mere '[g]eneral allegations of medical malpractice' " (*Webb v Scanlon*, 133 AD3d 1385, 1386-1387 [4th Dept 2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Plaintiffs met that burden with respect to defendants James R. Lamar, Elmwood Dental Group-Implant and Restoration, P.C., and Elmwood Dental Group-Family, P.C., through the submission of an expert affidavit opining that defendant James R. Lamar deviated from the applicable standard of care while performing the March 2016 procedure on plaintiff, causing injuries to her. Where, as here, "a nonmovant's expert affidavit 'squarely opposes' the [affidavits] of the moving parties' expert[s], the result is 'a classic battle of the experts' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]), which should be determined by the trier of fact. This is not a case in which plaintiffs' expert "misstate[d] the facts in the record, nor is the affidavit vague, conclusory, [or] speculative" (*id.* [internal quotation marks omitted]).

Plaintiffs did not meet their burden with respect to defendant Frank R. Lamar, Jr., however, inasmuch as their expert affidavit did not provide an opinion that defendant Frank R. Lamar, Jr. deviated from the applicable standard of care (*see Emerson v Kaleida Health*, 217 AD3d 1540, 1541 [4th Dept 2023]).

We therefore modify the order in appeal No. 1 by denying defendants' motion in part and reinstating the first cause of action

and the third cause of action, for loss of consortium, against defendants James R. Lamar, Elmwood Dental Group-Implant and Restoration, P.C., and Elmwood Dental Group-Family, P.C.

Plaintiffs also contend that the court erred in dismissing the second cause of action, for lack of informed consent. We reject that contention. The complaint alleged that plaintiff underwent a procedure in March 2016, which included a tooth extraction, and that defendants "failed to provide proper informed consent for the procedure at issue." In support of their motion for summary judgment made following discovery, defendants, inter alia, submitted the written informed consent form for the March 2016 procedure, signed by plaintiff. Plaintiffs then opposed the part of defendants' motion that sought to dismiss the cause of action for lack of informed consent by arguing that there was no consent for a separate procedure that defendant James R. Lamar performed in September 2016, which also included a tooth extraction. That is a new theory of recovery, and thus could not be raised to defeat defendants' motion (*see generally DeMartino v Kronhaus*, 158 AD3d 1286, 1287 [4th Dept 2018]). We note that plaintiffs did not move to amend the complaint or bill of particulars to include allegations pertaining to the September 2016 procedure. We conclude that the court did not err in granting defendants' motion with respect to the second cause of action.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1041

CA 23-00466

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

ROBYN GRAMMATICO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES R. LAMAR, D.M.D., FRANK R. LAMAR, JR., D.D.S., ELMWOOD DENTAL GROUP-IMPLANT AND RESTORATION, P.C., AND ELMWOOD DENTAL GROUP-FAMILY, P.C., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered March 7, 2023. The order settled the record for an appeal from an order entered November 30, 2022.

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

Same memorandum as in *Grammatico v Lamar* ([appeal No. 1] — AD3d — [Feb. 9, 2024] [4th Dept 2024]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1046

CA 23-00953

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

JP OIL GROUP, INC., PLAINTIFF-RESPONDENT,

V ORDER

SADRUDDIN M. LAKHANI AND AMIR PERANI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SPECTOR GADON ROSEN VINCI P.C., NEW YORK CITY (DAVID B. PICKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered January 27, 2023. The order denied defendants' motion to compel certain depositions and denied plaintiff's motion for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-546 [1983]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1047

CA 23-00954

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

JP OIL GROUP, INC., PLAINTIFF-RESPONDENT,

V ORDER

SADRUDDIN M. LAKHANI AND AMIR PERANI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SPECTOR GADON ROSEN VINCI P.C., NEW YORK CITY (DAVID B. PICKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a decision of the Supreme Court, Oneida County (James P. McClusky, J.), entered April 4, 2023. The decision, among other things, granted plaintiff's motion for summary judgment as to defendants' liability.

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

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1048

CA 23-00955

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

JP OIL GROUP, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SADRUDDIN M. LAKHANI AND AMIR PERANI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SPECTOR GADON ROSEN VINCI P.C., NEW YORK CITY (DAVID B. PICKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (James P. McClusky, J.), entered May 3, 2023. The order and judgment, among other things, granted plaintiff's motion for summary judgment and awarded plaintiff the amount of $282,428.28 as against defendants.

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

Memorandum: In 2014, nonparty A-1 Easy Mart, Inc. (A-1), which is owned and operated by defendants, entered into a lease agreement with nonparty Rome Gas, Inc. (Rome Gas) to operate a gas station. Simultaneously, A-1 entered into an exclusive sales agreement with plaintiff, which is owned by the principals of Rome Gas. The sales agreement required A-1 to purchase a specified volume of petroleum products, including gasoline, from plaintiff each year over a 10-year period and provided for liquidated damages in the event of a default. Defendants personally guaranteed A-1's performance under the sales agreement. A-1, however, failed to meet its petroleum purchase obligations. In 2017, Rome Gas sold the gas station to an unrelated third-party, assigning the lease with A-1 to the new owner. In July 2019, the Department of Environmental Conservation (DEC) directed that two of the fuel tanks at the gas station be permanently closed and removed. Plaintiff's last fuel delivery to A-1 was in September 2019, and A-1 ceased operations shortly thereafter. Plaintiff subsequently commenced this action against defendants pursuant to the guarantee to recover damages under the sales agreement. Plaintiff thereafter moved for summary judgment on the complaint. Supreme Court granted the motion and directed that the claim for damages be terminated as of the date the DEC ordered the removal of fuel tanks. We affirm.

Contrary to defendants' contention, the court properly granted plaintiff's motion. Plaintiff submitted the sales agreement and guarantee, which unambiguously state that A-1's failure to comply with its purchase obligations would constitute a default and material breach and that, upon such a default, plaintiff had the right to, inter alia, seek liquidated damages and enforce the guarantee. Written agreements "that [are] complete, clear, and unambiguous on [their] face must be enforced according to the plain meaning of [their] terms" (*Medlock Crossing Shopping Ctr. Duluth, Ga. L.P. v TT Medlock Crossing, LLC*, 210 AD3d 1450, 1451 [4th Dept 2022], *lv dismissed in part & denied in part* 39 NY3d 1102 [2023]). By submitting undisputed proof that A-1 failed to meet its contractual purchase obligations, which were guaranteed by defendants, plaintiff met its initial burden on the motion (*see generally Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]).

The burden then shifted to defendants to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), which they failed to do. Specifically, defendants contend that there is a question of fact whether plaintiff modified the sales agreement by reducing the specified volume of petroleum products that defendants were obligated to purchase. We reject that contention inasmuch as the sales agreement contains a provision prohibiting oral modification (*see* General Obligations Law § 15-301 [1]; *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]), and defendants produced no written modification. Similarly, defendants did not raise a question of fact whether the parties' partial performance under the sales agreement resulted in a waiver of the provision prohibiting oral modification (*see Rose*, 42 NY2d at 343). Defendants failed to establish that the "partial performance was 'unequivocally referable to the [purported] oral modification' " (*Ford Motor Credit Co. v Sawdey*, 286 AD2d 972, 973 [4th Dept 2001]).

We also reject defendants' contention that there is a question of fact whether plaintiff failed to mitigate its damages when it delivered gasoline to defendants in September 2019.

The remaining issues defendants contend create triable questions of fact either misinterpret the plain language of the sales agreement or seek to have the court "interpret [the] agreement as impliedly stating something which the parties specifically did not include" (*Donohue v Cuomo*, 38 NY3d 1, 12 [2022] [internal quotation marks omitted]).

We further reject defendants' contention that the court erred in failing to equitably estop plaintiff from claiming that A-1 defaulted under the sales agreement due to an estoppel certificate executed by Rome Gas as part of its 2017 sale of the subject gas station that asserted A-1 was not in default of its obligations under the sales agreement. Initially, any claims defendants have against Rome Gas or plaintiff's principals are not properly before us inasmuch as those claims were previously dismissed in a separate final order that was not appealed (*see generally* CPLR 5501 [a] [1]; *Darien Lake Theme Park*

& Camping Resort, Inc. v Contour Erection & Siding Sys., Inc., 16 AD3d 1055, 1056 [4th Dept 2005]). Moreover, with respect to estoppel, defendants failed to establish that "the conduct upon which [they purportedly] relied to establish the estoppel was 'incompatible with the agreement as written, a requisite for applying equitable estoppel' " (*Ford Motor Credit Co.*, 286 AD2d at 973; *see General Motors Acceptance Corp. v Desbiens*, 213 AD2d 886, 887 [3d Dept 1995]) inasmuch as plaintiff was not a signatory to the 2017 estoppel certificate and the sales agreement had a provision that could extend the contract term to allow defendants additional time to meet their purchase obligations.

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

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1049

CA 23-01066

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

JP OIL GROUP, INC., PLAINTIFF-RESPONDENT,

V ORDER

SADRUDDIN M. LAKHANI AND AMIR PERANI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 4.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SPECTOR GADON ROSEN VINCI P.C., NEW YORK CITY (DAVID B. PICKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order and judgment (one paper) of the Supreme Court, Oneida County (James P. McClusky, J.), entered June 2, 2023. The amended order and judgment, among other things, awarded plaintiff the amount of $282,428.28.

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

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1050

CA 23-01067

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

JP OIL GROUP, INC., PLAINTIFF-RESPONDENT,

V ORDER

SADRUDDIN M. LAKHANI AND AMIR PERANI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 5.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SPECTOR GADON ROSEN VINCI P.C., NEW YORK CITY (DAVID B. PICKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order and judgment (one paper) of the Supreme Court, Oneida County (James P. McClusky, J.), entered June 2, 2023. The amended order and judgment, among other things, awarded plaintiff the amount of $282,428.28.

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

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1055

KA 20-00430

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE BERMUDEZ, ALSO KNOWN AS SWIZZLE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 28, 2020. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree, attempted murder in the second degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of one count of murder in the second degree (Penal Law § 125.25 [1]), two counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]), and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]).

We reject defendant's contention that his conviction is not supported by legally sufficient evidence. Viewing the facts "in a light most favorable to the People," we conclude that "there is a valid line of reasoning and permissible inferences from which a rational [factfinder] 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]). Contrary to defendant's further contention, we conclude that, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see id.*), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]).

We also reject defendant's contention that Supreme Court impermissibly allowed lay witnesses to testify regarding his cell phone data. Contrary to defendant's contention, the witnesses in

question testified to factual matters within their knowledge and did not impermissibly draw inferences or conclusions that would require expert testimony (*see People v Elmore*, 211 AD3d 1536, 1539-1540 [4th Dept 2022]).

Contrary to defendant's further contention, his sentence is not unduly harsh or severe.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1056

KA 22-00358

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEVON GAITER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN R. HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered January 19, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]), arising from a confrontation during which defendant caused a fatal slash wound to the victim's throat with a weapon with a sharp edge that one eyewitness described as having made a clicking sound as defendant removed it from his pocket prior to slashing the victim. We affirm.

Defendant contends that County Court erred in ruling, on his motion in limine, that limited use of his nickname, "Animal," would be permitted during trial. We reject that contention. Inasmuch as certain witnesses knew defendant only by his nickname, "it was permissible for the People to elicit testimony regarding [the] nickname[ ] at trial for identification purposes" (*People v Tolliver*, 93 AD3d 1150, 1150 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Vanalst* [appeal No. 2], 148 AD3d 1658, 1659 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]; *cf. People v Collier*, 114 AD3d 1136, 1137 [4th Dept 2014]). Relatedly, defendant contends that the prosecutor exceeded the scope of the court's ruling and deprived him of a fair trial by repeatedly referring to him by his nickname, and that the court erred in failing to provide limiting or curative instructions to the jury. Defendant failed to preserve those contentions for our review (*see* CPL 470.05 [2]; *People v Tuff*, 156 AD3d 1372, 1377 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]; *Vanalst*, 148 AD3d at 1659), and we decline to exercise our power to

review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that he was deprived of a fair trial due to other alleged instances of prosecutorial misconduct "is unpreserved for our review inasmuch as defendant did not object to any of [those] alleged instances of misconduct" (*People v Pendergraph*, 150 AD3d 1703, 1703 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *see* CPL 470.05 [2]), 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]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]).

Defendant also contends that the court, in its *Molineux* ruling, erred in refusing to redact from a videotaped police interview of defendant the references to an incident that occurred about a week before the confrontation during which the police, upon approaching defendant to address a noise complaint, discovered that he possessed a box cutter in his pocket. Even assuming, arguendo, that defendant's recent prior possession of a box cutter constitutes *Molineux* evidence (*see generally People v Ventimiglia*, 52 NY2d 350, 359 [1981]; *People v Molineux*, 168 NY 264, 293 [1901]), we conclude that the court properly admitted the references thereto because that evidence tended to undermine defendant's claims that the victim came at him with a knife and that defendant had no weapon at the crime scene, and the court did not abuse its discretion in determining that the probative value thereof outweighed the potential for prejudice (*see People v Camarena*, 289 AD2d 7, 8 [1st Dept 2001], *lv denied* 97 NY2d 752 [2002]; *see generally People v Alvino*, 71 NY2d 233, 242 [1987]). We have reviewed defendant's remaining contentions concerning alleged evidentiary errors and conclude that they are either unpreserved or lack merit.

Contrary to defendant's contention, the court properly denied his request for an intoxication charge. Viewing the evidence in the light most favorable to defendant (*see People v Beaty*, 22 NY3d 918, 921 [2013]; *People v Farnsworth*, 65 NY2d 734, 735 [1985]), we conclude that "the evidence was insufficient to allow a reasonable juror to harbor a doubt concerning the element of intent on the basis of intoxication" (*Beaty*, 22 NY3d at 921; *see People v Barill*, 120 AD3d 951, 953 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014], *reconsideration denied* 25 NY3d 949 [2015], *cert denied* 577 US 865 [2015]).

Contrary to defendant's further contentions, we conclude that, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1063

CA 23-00107

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

ALAN DENTICO AND LEANNE DENTICO,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TURNER CONSTRUCTION COMPANY, DEFENDANT,
AND SBRA, INC., FORMERLY KNOWN AS SHEPLEY
BULFINCH, INC., DEFENDANT-RESPONDENT-APPELLANT.

GROSS SHUMAN, P.C., BUFFALO (SCOTT M. PHILBIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

BYRNE & O'NEILL, LLP, NEW YORK CITY (MICHAEL J. BYRNE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 21, 2022. The order denied in part the motion of defendant SBRA, Inc., formerly known as Shepley Bulfinch, Inc. to preclude certain testimony and denied plaintiffs' cross-motion in limine.

It is hereby ORDERED that said appeal and cross-appeal are unanimously dismissed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Alan Dentico (plaintiff) when he fell while exiting a door at the hospital where he worked as a maintenance groundskeeper. There was a three-foot height differential from the floor from which plaintiff was exiting and the ground on the opposite side of the door. Defendant SBRA, Inc., formerly known as Shepley Bulfinch, Inc. (SBRA), was the architect who designed the hospital, including the three-foot elevation differential at the subject doorway. Plaintiffs appeal and SBRA cross-appeals from an order that denied in part the motion in limine of SBRA seeking to preclude plaintiffs' proposed expert from testifying at trial regarding alleged violations by SBRA of certain building codes, and that denied plaintiffs' cross-motion in limine seeking an order precluding SBRA from offering, or moving to preclude, certain evidence.

"Generally, an order [ruling on] a motion in limine, even when 'made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1285 [4th Dept 2015]; *see Harris v Rome Mem. Hosp.*, 219 AD3d 1129,

1131 [4th Dept 2023]). Here, no appeal lies as of right from the order inasmuch as it "merely adjudicates the admissibility of evidence and does not affect a substantial right" (*Of Does 3-6 v Kenmore-Town of Tonawanda Union Free Sch. Dist.*, 204 AD3d 1450, 1451 [4th Dept 2022] [internal quotation marks omitted]; *see* CPLR 5701 [a] [2] [v]). Consequently, the appeal and cross-appeal must be dismissed (*see Shahram v St. Elizabeth School*, 21 AD3d 1377, 1378 [4th Dept 2005]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1064

CA 23-00105

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

CLEARFUND SOLUTIONS LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANTON TOMASSETTI, DOING BUSINESS AS TONY'S TREE SERVICE AND ANTON TOMASSETTI, DEFENDANTS-APPELLANTS.

AMOS WEINBERG, GREAT NECK, FOR DEFENDANTS-APPELLANTS.

WELLS LAW P.C., LANCASTER (STEVEN W. WELLS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered March 9, 2022. The order denied the motion of defendants to, inter alia, vacate a default judgment.

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

Memorandum: Plaintiff commenced this action for breach of contract and unjust enrichment seeking to recover under a merchant cash advance agreement (agreement) between plaintiff and defendant Anton Tomassetti, doing business as Tony's Tree Service (Tony's). Defendant Anton Tomassetti personally guaranteed Tony's performance of the agreement. Defendants failed to appear or answer, and a default judgment was entered against them. Defendants thereafter moved to, inter alia, vacate the default judgment, and they now appeal from an order denying their motion. We affirm.

We conclude that Supreme Court did not abuse its discretion in denying defendants' motion. To establish an excusable default under CPLR 5015 (a) (1), defendants were required to establish a reasonable excuse for the default as well as a meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Fusion Funding v Loftti Inc.*, 216 AD3d 1416, 1416-1417 [4th Dept 2023]; *Peroni v Peroni*, 189 AD3d 2058, 2060 [4th Dept 2020]). "In determining whether to vacate an order entered on default, 'the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits' " (*Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128 [4th Dept 2013]; *see Matter of County of Livingston [Mort]*, 101 AD3d 1755, 1755 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]). "[T]he determination of whether . . . to

vacate a default . . . is generally left to the sound discretion of the court" (*Peroni*, 189 AD3d at 2060 [internal quotation marks omitted]; *see Stonewell Bodies & Mach., Inc. v All Area Fire & Rescue Apparatus Sales, LLC*, 213 AD3d 1237, 1238 [4th Dept 2023]).

Here, the only excuse defendants gave for their failure to answer the complaint was that they were not properly served with the papers—a contention they have abandoned on appeal—and thus they failed to establish a reasonable excuse for the default (*see Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 221 [2d Dept 2011]). Inasmuch as defendants failed to establish a reasonable excuse for the default, "we need not determine whether [they] had a potentially meritorious defense" to the action (*Peroni*, 189 AD3d at 2060; *see City of Utica v Mallette*, 200 AD3d 1614, 1617 [4th Dept 2021]; *Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1100 [4th Dept 2013]).

We reject defendants' contention that the motion should have been granted and the default vacated "for sufficient reason and in the interests of substantial justice" based on the defense of criminal usury (*Crystal Springs Capital, Inc. v Big Thicket Coin, LLC*, 220 AD3d 745, 746 [2d Dept 2023] [internal quotation marks omitted]; *see Slate Advance v Saygan Global Steel, Ltd.*, 206 AD3d 782, 783 [2d Dept 2022]; *see also Piatt v Horsley*, 108 AD3d 1188, 1189 [4th Dept 2013]). Defendants' remaining contentions are raised for the first time on appeal and are not properly before us (*see O'Hara v City of Buffalo*, 211 AD3d 1509, 1511 [4th Dept 2022]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

1070

CA 23-00627

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

CURRY MCMAHON-DECARLO AND FREDERICK DECARLO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ANDREW WICKLINE, M.D., DEFENDANT-RESPONDENT.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (JONATHAN P. PILAT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 17, 2022. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: In this medical malpractice action seeking damages for injuries Curry McMahon-DeCarlo (plaintiff) allegedly sustained after undergoing hip replacement surgery performed by defendant, plaintiffs appeal from an order that granted defendant's motion for summary judgment dismissing the complaint. We reverse.

Defendant had "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]). Supreme Court determined that defendant met his initial burden of establishing that he did not deviate or depart from the applicable standard of care, and plaintiffs do not challenge that determination on appeal. The court further determined that plaintiffs failed to raise triable issues of fact sufficient to defeat defendant's motion inasmuch as their expert failed to establish the qualifications to opine on the applicable standard of care and inasmuch as the expert's opinions with respect to defendant's alleged deviations from the standard of care were conclusory and speculative. We agree with plaintiffs that the court erred in its determination.

Contrary to the court's determination, we conclude that

plaintiffs' expert laid an adequate foundation for their qualifications in orthopedic medicine. "[A] plaintiff's expert need not have practiced in the same specialty as the defendant[]" (*Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629 [4th Dept 2012]), and "any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020] [internal quotation marks omitted]; *see* PJI 1:90). Here, plaintiffs' expert is board certified as a medical examiner, an orthopedic surgeon and an arthroscopic laser surgeon. The expert completed a residency in general and orthopedic surgery. The expert is now a clinical instructor of orthopedic surgery and a clinical assistant professor of orthopedic surgery. The expert is affiliated with four hospitals and previously served as the chair of the department of orthopedic surgery at one hospital. Thus, we conclude that plaintiffs' expert "had the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion[ ] . . . [is] reliable" (*Sanchez v Van Riper*, 217 AD3d 1358, 1359 [4th Dept 2023] [internal quotation marks omitted]; *see Leberman v Glick*, 207 AD3d 1203, 1205 [4th Dept 2022]).

We further agree with plaintiffs that the court erred in determining that the expert's opinion was conclusory and speculative. The expert's opinion was appropriately based in part on evidence in the record, i.e., plaintiff's medical records (*see Stradtman*, 179 AD3d at 1471; *see generally Admiral Ins. Co. v Joy Contrs., Inc.*, 19 NY3d 448, 457 [2012]). Based on that information, plaintiffs' expert opined that defendant's actions fell "below the reasonable standards of medical care" when defendant failed to order the necessary imaging of plaintiff and that, as a result, defendant was negligent when he performed the wrong surgery, causing a worsening of plaintiff's condition. We therefore conclude that plaintiffs raised triable issues of fact and that the court erred in granting the motion.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1071

CA 23-01061

PRESENT: SMITH, J.P., CURRAN, BANNISTER, AND NOWAK, JJ.

JOHN G. DELANEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE UNIVERSITY, DEFENDANT-RESPONDENT.

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

BARCLAY DAMON LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered June 7, 2023. The order granted the motion of defendant to dismiss the amended complaint and dismissed the amended 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 amended complaint is reinstated.

Memorandum: Plaintiff commenced this action to recover for injuries he allegedly sustained when he fell from his motorized bicycle while riding on a defective sidewalk on the campus of defendant, Syracuse University. At the time of the accident, plaintiff was traveling from his home off campus to a destination outside of the campus. In lieu of answering, defendant moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (7), asserting that General Obligations Law § 9-103, i.e., the recreational use statute, applied and that plaintiff failed to allege that defendant willfully or maliciously failed to guard against or warn of the dangerous condition, as required to state a cause of action against a landowner who is immune from liability for ordinary negligence under the recreational use statute. Supreme Court granted the motion. Plaintiff appeals, and we reverse.

As relevant here, General Obligations Law § 9-103 (1) (a) provides that "an owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for . . . bicycle riding . . . or to give warning of any hazardous condition . . . on such premises to persons entering for such purposes." The statute was enacted to "induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities" (*Ferres v City of New*

Rochelle, 68 NY2d 446, 451 [1986]). The rationale for the statute is that "outdoor recreation is good; New Yorkers need suitable places to engage in outdoor recreation; [and] more places will be made available if property owners do not have to worry about liability when recreationists come onto their land" (*Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 550 [1994]; *see Cummings v Manville*, 153 AD3d 58, 60 [4th Dept 2017], *appeal dismissed* 30 NY3d 959 [2017]). The statute applies when two conditions are met: (1) the plaintiff is engaged in one of the activities identified in section 9-103 and (2) the plaintiff is recreating on land suitable for that activity (*see Albright v Metz*, 88 NY2d 656, 662 [1996]).

Here, there is no dispute that plaintiff was engaged in the statutorily enumerated activity of bicycle riding (*see Sasso v WCA Hosp.*, 130 AD3d 1546, 1547 [4th Dept 2015]). We agree with plaintiff, however, that the court erred in concluding that the sidewalk was suitable for the recreational use of bike riding (*see Albright*, 88 NY2d at 662). In evaluating the suitability of a property for a particular activity, courts look to whether the premises is the "type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation" (*Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45 [1989]). Accepting the allegations in the amended complaint as true, as we must (*see Pottorff v Centra Fin. Group, Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]), we conclude that plaintiff sufficiently alleged that the sidewalk at issue was not appropriate for public use in pursuing the recreational activity of bike riding. Plaintiff alleged that the sidewalk area where he fell was not designated by defendant for bike riding and was situated along a busy campus roadway near the front entrance of an academic building containing classrooms and offices. Such a property is not appropriate for public use in pursuing bicycle riding as a recreational activity (*see Sasso*, 130 AD3d at 1547-1548; *see also F.M. v North Merrick Union Free Sch. Dist.*, 68 Misc 3d 1209[A], 2020 NY Slip Op 50895[U], *4 [Sup Ct, Nassau County 2020]; *Diaz v New York City Hous. Auth.*, 159 Misc 2d 72, 75 [Sup Ct, Kings County 1993]). Inasmuch as the recreational use statute does not apply here, the court erred in granting the motion.

Entered: February 9, 2024

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 23-00426

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMIAH ROWELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 17, 2023. The judgment convicted defendant upon his plea of guilty of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, the record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Sullivan*, 188 AD3d 1774, 1774-1775 [4th Dept 2020], *lv denied* 36 NY3d 1060 [2021]; *People v Jenkins*, 184 AD3d 1150, 1150 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]). The valid waiver forecloses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *Sullivan*, 188 AD3d at 1774-1775).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

20

KA 22-00015

PRESENT: SMITH, J.P., BANNISTER, NOWAK, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEVYS BALL, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 16, 2021. The judgment convicted defendant, upon a guilty plea, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]), defendant contends that the 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 is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

25

CAF 22-01405

PRESENT: SMITH, J.P., BANNISTER, NOWAK, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF ZACKERY S. AND DANYAL S.

YATES COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

CHRISTA P., RESPONDENT-APPELLANT.

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

RUTH A. CHAFFEE, PENN YAN, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Yates County (Joseph G. Nesser, A.J.), entered July 12, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, revoked a suspended judgment entered upon her admission that she had permanently neglected the subject children and terminated her parental rights. We affirm.

It is well settled that, "[w]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with ***any of the terms*** of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015] [internal quotation marks omitted & emphasis added]; *see* Family Ct Act § 633 [f]; *Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). Contrary to the mother's contention, the record establishes that she violated the terms of the suspended judgment by failing to arrange for the children's transportation to the New Year's Day home visit in 2022, failing to confirm every scheduled visit 24 hours in advance when required to do so, and missing scheduled appointments or home visits with the caseworker.

Finally, a preponderance of the evidence supports that it was in the children's best interests to terminate the mother's parental

rights (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]). "Although [the mother's] breach of the express conditions of the suspended judgment does not compel termination of [her] parental rights, [it] is strong evidence that termination is, in fact, in the best interests of the child[ren]" (*Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023] [internal quotation marks omitted]). Here, we conclude that "any progress that [the mother] made was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status" (*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

28

CA 22-01992

PRESENT: SMITH, J.P., BANNISTER, NOWAK, DELCONTE, AND KEANE, JJ.

MARGERY STANTON, AS EXECUTOR OF THE ESTATE
OF SALLY KELLER, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WATERFRONT CENTER FOR REHABILITATION
AND HEALTHCARE, ELLICOTT CENTER FOR
REHABILITATION AND NURSING, WATERFRONT
OPERATIONS ASSOCIATES, LLC, CENTERS HEALTH
CARE, CENTERS FOR SPECIALTY CARE GROUP LLC,
CENTERS FOR SPECIALTY CARE GROUP IPA, LLC,
KENNETH ROZENBERG AND JEFFREY SICKLICK,
DEFENDANTS-APPELLANTS.

CAITLIN ROBIN & ASSOCIATES PLLC, NEW YORK CITY (CAITLIN ROBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered November 22, 2022. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff, in her capacity as power of attorney for Sally Keller (decedent), commenced this action seeking to recover damages for injuries sustained by decedent, who was a resident at defendant Waterfront Center for Rehabilitation and Healthcare (Waterfront), after she developed an infection in her left eye following cataract surgery that became so severe that the eye required surgical removal. Decedent died during discovery, and plaintiff was substituted as the named plaintiff in her capacity as executor of decedent's estate. Defendants appeal, as limited by their brief, from an order insofar as it granted plaintiff's motion for partial summary judgment on the issue of liability regarding the first cause of action and the claim for violation of Public Health Law § 2801-d under the second cause of action. We affirm.

As a preliminary matter, we conclude that plaintiff's first cause

of action sounds in medical malpractice inasmuch as her "allegation that the lack of [appropriate] medical treatment resulted in [decedent's] need for surgery [to remove her left eye] is an allegation concerning the medical consequences of the lack of [appropriate] treatment and is an allegation that is not 'within the ordinary experience and knowledge of laypersons' " (*McDonald v State of New York*, 13 AD3d 1199, 1200 [4th Dept 2004]). In particular, plaintiff claims that the nursing staff at Waterfront failed to administer the anti-inflammatory steroid eye drops directed by decedent's ophthalmologist following decedent's cataract surgery on her left eye and later opted to treat decedent with antibiotic eye drops after she began exhibiting signs of a post-operative infection rather than immediately transferring her to the ophthalmologist's office or the emergency department. Those claims concern acts or omissions that "constitute medical treatment or bear a substantial relationship to the rendition of medical treatment" (*Karasek v LaJoie*, 92 NY2d 171, 175 [1998]; *see Bleiler v Bodnar*, 65 NY2d 65, 66-67, 72 [1985]; *Holland v Cayuga Med. Ctr. at Ithaca, Inc.*, 195 AD3d 1292, 1293-1294 [3d Dept 2021]; *see generally Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788 [1996]).

On the merits, we conclude that Supreme Court properly granted the motion with respect to the first cause of action. Contrary to defendants' contention, plaintiff met her initial burden on the motion of establishing her entitlement to judgment as a matter of law on that cause of action (*see Cyrus v Rochester Regional Health & Unity Hosp. at Park Ridge*, 206 AD3d 1589, 1589-1590 [4th Dept 2022]; *Salter v Deaconess Family Medicine Ctr.* [appeal No. 2], 267 AD2d 976, 976-977 [4th Dept 1999]). Plaintiff's submissions included decedent's medical records and the written report of the New York State Department of Health (DOH) pertaining to its investigation of Waterfront, the latter of which constitutes "presumptive evidence of the facts so stated therein" (Public Health Law § 10 [2]; *see Maldonado v Cotter*, 256 AD2d 1073, 1074-1075 [4th Dept 1998]). Those submissions established that nursing staff at Waterfront failed to administer the anti-inflammatory steroid eye drops directed by decedent's ophthalmologist following decedent's cataract surgery on her left eye and subsequently opted to treat decedent with certain antibiotic eye drops over a weekend later in the month after she began exhibiting signs of a post-operative infection instead of immediately transferring her to the ophthalmologist's office or the emergency department for more intensive treatment. Plaintiff also submitted the affidavit of a medical expert who, upon setting forth his qualifications and the specific factors appearing in the report and medical records that led him to his conclusions, opined that defendants deviated from the standard of care and that such deviations proximately caused the loss of decedent's left eye. According to the medical expert, defendants' initial failure to administer the anti-inflammatory steroid eye drops caused decedent to develop endophthalmitis and defendants' later delay in sending decedent to her ophthalmologist or the emergency department on an urgent basis caused the infection to progress to an irrecoverably severe point and contributed to the need to surgically remove the eye (*see Cyrus*, 206 AD3d at 1590; *see also Jeannette S. v Williot*, 179 AD3d 1479, 1480-1481 [4th Dept 2020]).

We agree with defendants that they raised an issue of fact whether the post-operative failure to administer anti-inflammatory steroid eye drops was a proximate cause of the infection that resulted in the loss of decedent's left eye inasmuch as defendants submitted in opposition to the motion the affirmation of their medical expert and the deposition testimony of decedent's ophthalmologist contradicting the opinion of plaintiff's expert on that issue (*see Florio v Kosimar*, 79 AD3d 625, 626 [1st Dept 2010]).

We nonetheless further conclude that, contrary to defendants' contention, they failed to raise a triable issue of fact whether the decision to treat decedent with certain antibiotic eye drops over the weekend instead of immediately sending decedent to the ophthalmologist's office or the emergency department on an urgent basis was consistent with good and accepted medical practice. Although defendants' expert opined that Waterfront's treatment of decedent with the antibiotic eye drops was "an appropriate first step," defendants' expert did not adequately address the conclusion of plaintiff's expert that the standard of care for a person with decedent's presentation of endophthalmitis required examination at the ophthalmologist's office or the emergency department on an urgent basis, nor did defendants' expert address many of the undisputed facts concerning decedent's treatment including, critically, those contained in the report and medical records documenting decedent's worsening infection symptoms over the period that Waterfront chose to treat decedent with antibiotic eye drops that proved ineffective instead of seeking, as urged by the ophthalmologist's office upon consultation at the outset of decedent's symptoms, more intensive and specialized care to address the infection (*see Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]; *see also Cyrus*, 206 AD3d at 1590). Likewise, defendants' expert did not controvert the opinion of plaintiff's expert that Waterfront's delay in sending decedent to her ophthalmologist or the emergency department on an urgent basis caused the infection to progress to an irrecoverably severe point and contributed to the need to surgically remove the eye (*see Keller v Liberatore*, 134 AD3d 1495, 1496 [4th Dept 2015]).

We further conclude that the court properly granted that part of plaintiff's motion with respect to the claim for violation of Public Health Law § 2801-d under the second cause of action. On her motion, plaintiff "bore the initial burden of establishing . . . prima facie entitlement to judgment as a matter of law and to 'show that there is no defense to [that] cause of action' " (*Masheh v JHF Mgt., LLC*, 200 AD3d 1621, 1621 [4th Dept 2021], quoting CPLR 3212 [b]; *see generally Rodriguez v City of New York*, 31 NY3d 312, 317, 320 [2018]). Plaintiff met her initial burden by establishing that decedent was injured as a result of a deprivation of a right or benefit established for the well-being of a patient of a residential health care facility by state regulation, including 10 NYCRR 415.3 (f) (1) (i), and that defendants did not "exercise[ ] all care reasonably necessary to prevent and limit the deprivation and injury" (§ 2801-d [1]; *see generally Cornell v County of Monroe*, 158 AD3d 1151, 1152 [4th Dept

2018]). Defendants failed to raise a triable issue of fact in opposition to the motion (*cf. Cornell*, 158 AD3d at 1153).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

29

CA 23-00013

PRESENT: SMITH, J.P., BANNISTER, NOWAK, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF UPSTATE UNIVERSITY HOSPITAL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered November 2, 2022. The order, inter alia, authorized the administration of medication to respondent.

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

Memorandum: In appeal No. 1, respondent appeals from an order granting petitioner's application for an order continuing a prior order authorizing petitioner to administer medication to respondent over his objection and transferring such authority from petitioner to the Onondaga County Justice Center. In appeal No. 2, respondent appeals from an order denying his motion seeking leave to renew, inter alia, his opposition to petitioner's application. Because the order has since expired, we dismiss as moot the appeals from the orders in appeal Nos. 1 and 2 (*see Matter of Russell v Tripp*, 144 AD3d 1593, 1594 [4th Dept 2016]; *see also Matter of Upstate Univ. Hosp. v Jason L.*, 219 AD3d 1147, 1150 [4th Dept 2023]; *see generally People ex rel. Luck v Squires*, 173 AD3d 1767, 1767 [4th Dept 2019]). Contrary to respondent's contention in both appeals, we conclude that the exception to the mootness doctrine does not apply (*see Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

30

CA 23-00014

PRESENT: SMITH, J.P., BANNISTER, NOWAK, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF UPSTATE UNIVERSITY HOSPITAL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered December 13, 2022. The order, inter alia, denied the motion of respondent seeking leave to renew.

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

Same memorandum as in *Matter of Upstate Univ. Hosp. v Bryant W.* ([appeal No. 1] — AD3d — [Feb. 9, 2024] [4th Dept 2024]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

37

KA 18-01922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BEUFORD T. RICHARDSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 9, 2018. The judgment convicted defendant upon a plea of guilty of course of sexual conduct against a child in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]), defendant contends that County Court erred in summarily denying his motion to withdraw his guilty plea based on his claims that he was innocent and that he was coerced into pleading guilty. Preliminarily, because that contention would survive even a valid waiver of the right to appeal, we need not consider defendant's challenge to the validity of the waiver (*see People v Burden*, 217 AD3d 1422, 1422-1423 [4th Dept 2023], *lv denied* 40 NY3d 950 [2023]; *People v Truitt*, 170 AD3d 1591, 1591-1592 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]; *People v Colon*, 122 AD3d 1309, 1309-1310 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]).

We reject defendant's contention that the court erred in summarily denying the motion. Defendant's motion was based on his conclusory and wholly unsubstantiated claims of coercion and innocence, which were belied by the plea colloquy in which defendant admitted his guilt and stated, inter alia, that he was fully advised of the consequences of the plea, that he was confident in his attorney's abilities, and that he was not coerced into entering the plea (*see People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *People v Alexander*, 203 AD3d 1569, 1570 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]; *People v Garcia*, 203 AD3d 1585, 1586 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]). Inasmuch as the

motion was "patently insufficient on its face," the court properly denied it without conducting a hearing (*People v Mitchell*, 21 NY3d 964, 967 [2013]; *see Burden*, 217 AD3d at 1423; *People v Harris*, 206 AD3d 1711, 1711-1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]).

Finally, we note that the certificate of conviction does not reflect defendant's status as a second felony offender, and it must be amended accordingly (*see People v Schlifke*, 210 AD3d 1518, 1519 [4th Dept 2022], *lv denied* 39 NY3d 1080 [2023]; *People v Southard*, 163 AD3d 1461, 1462 [4th Dept 2018]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

61

KA 22-01915

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK WATKINS, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Meredith A. Vacca, J.), rendered October 25, 2022. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with one another, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]) and criminal sexual act in the first degree (§ 130.50 [3]), defendant contends that County Court erred in denying his statutory speedy trial motion because the People's certificate of compliance was improper and thus the statement of readiness illusory. We reject that contention. CPL 30.30 (1) provides that a motion to dismiss the indictment must be granted "where the people are not ready for trial" within certain periods of time, which for felony charges is six months (*see* CPL 30.30 [1] [a]). A prosecutor's statement of readiness must be accompanied or preceded by a certificate of compliance (COC); if a court determines that the People were not actually ready to proceed, the statement of readiness shall not be valid (*see* CPL 30.30 [5]). The COC must "state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" (CPL 245.50 [1]). With an exception not relied on here, until the People file a "proper" COC, they "shall not be deemed ready for trial for purposes of section 30.30 of this chapter" (CPL 245.50 [3]). "A statement of readiness [made] at a time when the People are not actually ready is illusory and [is] insufficient to stop the

running of the speedy trial clock" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]). "Although CPL 245.50 (1) directs that '[n]o adverse consequence to the prosecution or the prosecutor shall result from the filing of a [COC] in good faith and reasonable under the circumstances,' it clarifies that a trial court may nonetheless grant discovery sanctions and remedies where provided in CPL 245.80" (*People v Bay*, — NY3d —, 2023 NY Slip Op 06407, *2 [2023]).

"[T]he key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*id.*). Whether "the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*id.*). Courts "should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*). On defendant's motion pursuant to CPL 30.30, the People had the burden of establishing "that they did, in fact, exercise due diligence and made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*Bay*, — NY3d at —, 2023 NY Slip Op 06407, *2).

Here, the People filed a COC indicating that there were no 911 calls associated with the case. That was based upon a review of the police reports, which showed that the victim's parents had taken the victim to a child advocacy center and, when the victim made certain disclosures, the child advocacy center contacted the police, which started their involvement in the case. In preparation for the trial, however, the prosecutor spoke with the victim's parents and became aware that the parents had contacted 911 but, when the police did not respond to the calls, they took the victim to the child advocacy center. The prosecutor obtained and turned over a copy of the 911 calls to the defense and filed a supplemental COC. Defendant moved to dismiss the indictment pursuant to CPL 30.30 the next day. The court determined that the People's COC was filed in good faith and that the People exercised due diligence inasmuch as there was "no information of a 911 call" in the "information that was provided to the People."

We agree with the court that the People met their burden of demonstrating that they exercised due diligence and made reasonable inquiries prior to the filing of the COC. In determining whether the People exercised due diligence, "[r]easonableness . . . is the touchstone" (*Bay*, — NY3d at —, 2023 NY Slip Op 06407, *2). Here, it was reasonable for the prosecutor to have concluded that no 911 calls existed at the time of the filing of the COC. Inasmuch as the People's COC was proper under CPL 245.50, we reject defendant's related contention that the statement of readiness was invalid, and that defendant's CPL 30.30 motion was improperly denied.

Defendant next contends that the court erred in allowing the victim to testify to two uncharged acts of defendant showing the victim pornographic videos and masturbating in front of her. We agree with the court that the prior bad acts, which were consistent with grooming behaviors, were relevant to show defendant's motive to commit the crimes, and were thus properly admitted for that purpose (*see People v Schinnerer*, 192 AD3d 1395, 1396 [3d Dept 2021], *lv denied* 37 NY3d 968 [2021]; *People v Rhodes*, 91 AD3d 1185, 1186 [3d Dept 2012], *lv denied* 19 NY3d 966 [2012]). The evidence was also relevant to complete the narrative or provide background information with respect to the nature of the relationship between defendant and the victim (*see Schinnerer*, 192 AD3d at 1396; *People v Maxey*, 129 AD3d 1664, 1665 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]; *Rhodes*, 91 AD3d at 1186; *see generally People v Leonard*, 29 NY3d 1, 7-8 [2017]). In addition, "the probative value of the *Molineux* evidence outweighed the prejudicial effect, which was minimized by the court's repeated limiting instructions to the jury" (*Maxey*, 129 AD3d at 1665).

We reject defendant's contention that the verdict is against the weight of the evidence. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor' " (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the imposition of consecutive sentences renders the sentence unduly harsh and severe under the circumstances of this case. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences imposed on both counts run concurrently (*see generally* CPL 470.15 [6] [b]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

63

KA 23-00288

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW S. FISHER, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, 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 (Patrick F. McAllister, A.J.), rendered December 5, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.09 [2]). Defendant contends that County Court erred in imposing an enhanced sentence without holding a hearing or otherwise making a sufficient inquiry regarding his alleged violation of the conditions of the plea agreement. That contention is not preserved for our review inasmuch as defendant " 'failed to request such a hearing and did not move to withdraw his plea on that ground' " (*People v Scott*, 200 AD3d 1729, 1730 [4th Dept 2021]). In any event, the contention lacks merit. Under the circumstances, the court was not required to conduct a hearing, and it provided "[b]oth defendant and his counsel . . . ample opportunity to refute the court's assertions that defendant had violated the plea terms" (*People v Albergotti*, 17 NY3d 748, 750 [2011]; *see generally People v Semple*, 23 AD3d 1058, 1059-1060 [4th Dept 2005], *lv denied* 6 NY3d 852 [2006]), specifically by his failure to appear at sentencing and failure to report to probation as directed by the court (*see People v Baker*, 204 AD3d 1471, 1472 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Winship*, 26 AD3d 768, 768-769 [4th Dept 2006], *lv denied* 6 NY3d 899 [2006]; *see also Albergotti*, 17 NY3d at 749-750).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

65

CAF 22-01329

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF ANDREW M. ALLEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARA L. COURTNEY, RESPONDENT-APPELLANT.

MATTHEW R. ST. MARTIN, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.
(APPEAL NO. 1.)

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT.

MATTHEW R. ST. MARTIN, NEWARK, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeals from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered April 12, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner permission to relocate to Wisconsin with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent-petitioner mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, granted petitioner-respondent father permission to relocate to Wisconsin with the subject child. In appeal No. 2, the mother appeals from an order that dismissed without prejudice her petition seeking to modify the parties' prior order of custody by granting her primary physical custody of the child. Preliminarily, inasmuch as the mother fails to challenge any aspect of the order in appeal No. 2, we dismiss the appeal from that order as abandoned (*see Matter of Jaime D. [Jacquelina D.]*, 170 AD3d 1584, 1585 [4th Dept 2019]).

The mother contends in appeal No. 1 that Family Court's determination that relocation is in the child's best interests lacks a sound and substantial basis in the record. The AFC has submitted new information to this Court indicating that the child has been living with the mother in New York since December 2023 with the father's consent. In addition, the mother has been awarded temporary custody of the child. This Court may "take notice of . . . new facts and allegations to the extent they indicate that the record before us is

no longer sufficient for determining," as relevant here, whether relocation is in the child's best interests (*Matter of Gunn v Gunn*, 129 AD3d 1533, 1534 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *see also Matter of Kennedy v Kennedy*, 107 AD3d 1625, 1626 [4th Dept 2013]). In light of this new information, we reverse the order in appeal No. 1, and we remit the matter to Family Court for an expedited hearing and, thereafter, a new determination of whether, considering the best interests of the child, the father should be permitted to relocate with the child (*see Matter of Tavares v Barrington*, 131 AD3d 619, 620 [2d Dept 2015]; *see generally Matter of Martin v Martin*, 221 AD3d 1557, 1558 [4th Dept 2023]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-01330

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF SARA L. COURTNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREW M. ALLEN, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

THOMAS L. PELYCH, HORNELL, FOR PETITIONER-APPELLANT.

MATTHEW R. ST. MARTIN, NEWARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered April 14, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Allen v Courtney* ([appeal No. 1] — AD3d — [Feb. 9, 2024] [4th Dept 2024]).

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-01716

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF TODD TICKNER, AS TRUSTEE OF THE DONALD R. TICKNER FAMILY WEALTH TRUST, PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF PERINTON, TOWN OF PERINTON ZONING BOARD OF APPEALS, MICHAEL DOSER, MPA, IN HIS CAPACITY AS TOWN OF PERINTON DIRECTOR OF PLANNING, LOCK 32 BREWING COMPANY, LLC, DOING BUSINESS AS SEVEN STORY BREWING, BOARDWALK DESIGN, INC., CANAL HOUSE PROPERTIES, LLC, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

JOSEPH H. LAFAY, TOWN ATTORNEY, FAIRPORT, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF PERINTON, TOWN OF PERINTON ZONING BOARD OF APPEALS, AND MICHAEL DOSER, MPA, IN HIS CAPACITY AS TOWN OF PERINTON DIRECTOR OF PLANNING.

REFERMAT & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS BOARDWALK DESIGN, INC., AND CANAL HOUSE PROPERTIES, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered September 22, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment dismissed the petition-complaint.

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

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioner-plaintiff (petitioner) appeals from a judgment dismissing his petition-complaint, which sought, inter alia, to annul the determination of respondent-defendant Michael Doser, MPA, in his capacity as Director of Planning for respondent-defendant Town of Perinton, that a brewery operating on the premises at issue did not violate the Zoning Law of the Town of Perinton (zoning code).

We dismiss the appeal as moot. It is well settled that “an

appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *see Matter of Brooks v Palmieri*, 187 AD3d 1680, 1681 [4th Dept 2020]). Here, it is undisputed that the brewery that petitioner alleges violated the zoning code is no longer in operation and has vacated the premises. Thus, adjudication of the merits will not "result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see generally Matter of Gilbert v Endres*, 34 AD3d 1218, 1218 [4th Dept 2006]; *Guziec v Woods*, 171 AD2d 1082, 1082 [4th Dept 1991]). Contrary to petitioner's contention, we conclude that the exception to the mootness doctrine does not apply in this case (*see Hearst Corp.*, 50 NY2d at 714-715; *see generally Matter of Gannett Co., Inc. v Doran*, 74 AD3d 1788, 1789 [4th Dept 2010]).

Entered: February 9, 2024

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 22-00847

PRESENT: SMITH, J.P., CURRAN, MONTOUR, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHANON JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered June 5, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), arising from defendant's involvement in a narcotics trafficking operation that was conducted out of a house. We affirm.

Contrary to defendant's contention, Supreme Court properly refused to suppress evidence recovered upon execution of the challenged search warrants. Upon our review of the record, we conclude that "the in camera testimony of the confidential informant at the *Darden* hearing established that the confidential informant existed and imparted to the police the information referred to in the search warrant application" (*People v Hernandez*, 143 AD3d 1280, 1281 [4th Dept 2016], *lv denied* 29 NY3d 1080 [2017]; *see People v Ross*, 185 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]). We further conclude that "the hearsay information supplied in the search warrant application satisfied the two prongs of the *Aguilar-Spinelli* test and that the search warrant[s] w[ere] issued upon probable cause" (*People v Mitchum*, 130 AD3d 1466, 1468 [4th Dept 2015]; *see People v Monroe*, 82 AD3d 1674, 1675 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]; *People v Flowers*, 59 AD3d 1141, 1142-1143 [4th Dept 2009]).

Defendant next raises several challenges to the court's evidentiary rulings. "Generally, 'all relevant evidence is admissible unless its admission violates some exclusionary rule' " (*People v Harris*, 26 NY3d 1, 5 [2015], quoting *People v Scarola*, 71 NY2d 769, 777 [1988]). "Evidence is relevant if it has any tendency in reason to prove the existence of any material fact" (*Scarola*, 71 NY2d at 777). However, "[e]ven where relevant evidence is admissible, it may still be excluded in the exercise of the trial court's discretion if its probative value is substantially outweighed by the potential for prejudice" (*People v Mateo*, 2 NY3d 383, 424-425 [2004], *cert denied* 542 US 946 [2004]; *see Harris*, 26 NY3d at 5; *Scarola*, 71 NY2d at 777).

Defendant contends that the court abused its discretion in admitting in evidence the search warrants and testimony that defendant was a target of the search warrants, the execution of which was considered high-risk and involved the use of SWAT techniques to enter the house. We reject that contention inasmuch as that evidence was relevant and, contrary to defendant's assertion, "it was not so inflammatory that its prejudicial effect exceeded its probative value" (*People v Spencer*, 181 AD3d 1257, 1262 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]).

As defendant correctly concedes, he failed to preserve for our review his contention that the People improperly elicited *Molineux* evidence through a detective's fleeting reference during his testimony to the involvement of defendant and other individuals in prior drug sales at the house, inasmuch as he failed to object to that testimony (*see People v Campbell*, 182 AD3d 1004, 1005-1006 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]; *People v Sumpter*, 199 AD2d 1042, 1042 [4th Dept 1993], *lv denied* 83 NY2d 859 [1994]). 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]; *Sumpter*, 199 AD2d at 1042).

Defendant further contends that he was prejudiced when the detective, in the course of identifying the other individuals implicated in the drug trafficking operation to whom defendant had referred by their nicknames in a recorded jail telephone call, testified in response to a question by the prosecutor that he was familiar with the individuals associated with those nicknames based, in relevant part, on his 10 years of experience as a police officer. According to defendant, that testimony was prejudicial to him because it implied that he was affiliated with individuals who were familiar to the police from prior contacts outside of the present investigation. We conclude, however, that the court sufficiently "alleviated any prejudice by striking the question and response and instructing the jury that they were not to be considered evidence" (*People v Hilton*, 185 AD3d 1147, 1149 [3d Dept 2020], *lv denied* 35 NY3d 1095 [2020]; *see People v Hernandez*, 227 AD2d 162, 162-163 [1st Dept 1996]; *see generally People v Young*, 48 NY2d 995, 996 [1980], *rearg dismissed* 60 NY2d 644 [1983]; *People v Resto*, 147 AD3d 1331, 1333 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]).

As defendant correctly acknowledges, the court properly "receive[d] opinion testimony of a police officer qualified as a narcotics expert on matters concerning drug transactions not within the common experience or knowledge of the average juror" (*People v Hartzog*, 15 AD3d 866, 866-867 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]; *see People v Hicks*, 2 NY3d 750, 751 [2004]). Defendant failed to preserve for our review his contention that the testimony of the narcotics expert exceeded permissible bounds in this case (*see* CPL 470.05 [2]; *People v Thompson*, 51 AD3d 500, 501 [1st Dept 2008], *lv denied* 11 NY3d 742 [2008]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Thompson*, 51 AD3d at 501).

To the extent that defendant contends that the court erred in denying his motion for a mistrial after it was revealed during trial that a hidden camera that the police had used for surveillance of the front exterior of the house had failed to record several weeks of data, including the day the police searched the house, we conclude that defendant's contention lacks merit. It is within the sound discretion of the trial court to determine the appropriate sanction for the loss of evidence (*see People v Kelly*, 62 NY2d 516, 521 [1984]), and " '[g]iven that the exculpatory value of the missing evidence is completely speculative . . . , the court did not abuse its discretion in imposing the lesser sanction' of a permissive adverse inference instruction" (*People v Grovner*, 206 AD3d 1638, 1641 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]; *see People v Rice*, 75 NY2d 929, 932-933 [1990]). To the extent that defendant contends that he was prejudiced by the testimony of a prosecution witness about the duration that the house had been under surveillance and by a comment made by the prosecutor on summation about the lost surveillance evidence, we conclude that defendant's contention is not preserved for our review because defendant raised no objection thereto (*see* CPL 470.05 [2]; *People v Wallace*, 149 AD3d 878, 878-879 [2d Dept 2017], *lv denied* 30 NY3d 1023 [2017]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was denied effective assistance of counsel. Defendant has not demonstrated the absence of a legitimate explanation for counsel's alleged error in failing to move to reopen the suppression hearing after the People disclosed that the police had not conducted on-site surveillance of the house but had instead conducted live video surveillance from a remote location and that the surveillance evidence had been lost (*see People v Gray*, 27 NY3d 78, 83-84 [2016]; *People v Person*, 153 AD3d 1561, 1564 [4th Dept 2017], *lv denied* 30 NY3d 1118 [2018]). We conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see People v Flagg*, 167 AD3d 165, 170 [4th Dept 2018]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we further conclude that there is a "valid line of reasoning and permissible inferences

[that] could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial" (*People v Williams*, 84 NY2d 925, 926 [1994]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, there is "no evidence that defendant actually possessed the [drugs and drug paraphernalia], the People must establish that defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007] [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573-574 [1992]; *Grovner*, 206 AD3d at 1640).

In this case, the People presented evidence that drugs found in the backyard were being processed and packaged inside the house, and that a collection of defendant's personal paperwork was located on a dresser in the first-floor rear bedroom, in which room the police also found, among other things, narcotics packaging materials inside a dresser drawer and narcotics packaging materials in plastic bags. The People also presented evidence that defendant was observed entering and exiting the house in the morning prior to execution of the residential search warrant; that defendant's fingerprint was found on a shoebox containing a glassine envelope that was located in the backyard in close proximity to a plastic bag filled with glassine envelopes containing heroin; and that defendant, in the recorded jail telephone call, stated that the police had "raided us," referred to the house as "our crib," agreed with the characterization of the house as "the little secret crib," and mentioned by their nicknames the other individuals involved in the drug trafficking operation (*see People v Parnell*, 221 AD3d 1554, 1556 [4th Dept 2023]; *People v Pointer*, 206 AD3d 1232, 1233 [3d Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *People v Barnes*, 197 AD3d 977, 978 [4th Dept 2021], *lv denied* 37 NY3d 1058 [2021]). We conclude that, taken together, the evidence "permits 'the reasonable inference that defendant had both knowledge and possession' of the drugs and paraphernalia" (*Grovner*, 206 AD3d at 1640).

Contrary to defendant's assertion that the evidence is legally insufficient to establish his guilt as an accessory, we conclude that "the jury rationally could have concluded both that defendant had acted with the mental state necessary for the crime[s] of criminal possession of a controlled substance in the [third and fourth] degree[s] and that defendant 'intentionally aid[ed] [the other individuals] to engage in . . . conduct' . . . constituting th[ose] offense[s]" (*People v Moreno*, 58 AD3d 516, 517 [1st Dept 2009], *lv denied* 12 NY3d 819 [2009]; *see People v Coleman*, 26 AD3d 773, 774-775 [4th Dept 2006], *lv denied* 7 NY3d 754 [2006]).

Contrary to defendant's contention, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Grovner*, 206 AD3d at 1640; *People v Patterson*, 13 AD3d 1138, 1139 [4th Dept 2004], *lv denied* 4

NY3d 801 [2005]; *see generally Bleakley*, 69 NY2d at 495).

Finally, we note that the certificate of conviction and the uniform sentence and commitment form incorrectly state that defendant was sentenced as a second felony offender and they must be amended to reflect that he was actually sentenced as a second felony drug offender (*see People v Cruz*, 182 AD3d 999, 1000 [4th Dept 2020]; *People v Johnson*, 161 AD3d 1529, 1529 [4th Dept 2018]). The certificate of conviction also incorrectly states that defendant was convicted upon a plea of guilty and it must be amended to reflect that he was actually convicted upon a jury verdict (*see People v Baldwin*, 173 AD3d 1748, 1749-1750 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]).

Entered: February 9, 2024

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 22-00907

PRESENT: SMITH, J.P., CURRAN, MONTOUR, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES J. GEER, III, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 12, 2022. The judgment convicted defendant upon a guilty plea of attempted 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 his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). We affirm.

Defendant contends that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). In particular, he contends that the People's failure to disclose grand jury witness testimony (*see* CPL 245.20 [1] [b]) rendered their certificate of compliance (COC) improper (*see* CPL 30.30 [5]; 245.50 [1]), thereby also rendering their statement of readiness (SOR) "illusory and insufficient to stop the running of the speedy trial clock" (*People v England*, 84 NY2d 1, 4 [1994]; *see generally People v Gaskin*, 214 AD3d 1353, 1354 [4th Dept 2023]).

As relevant here, CPL 245.20 (1) (b) requires that the People disclose to the defendant "[a]ll transcripts of the testimony of . . . person[s] who ha[ve] testified before a grand jury," with the caveat that the time period within which disclosure of this material is to occur under CPL 245.10 (1) "may be stayed by up to an additional [30] calendar days without need for a motion pursuant to" CPL 245.70 (2) if, "due to the limited availability of transcription resources, . . . transcript[s] [are] unavailable for disclosure within the [relevant] time period." Here, the COC indicated that the relevant grand jury transcripts were "unavailable at this time due to limited transcription services." At the time the COC was filed, the extended time period contained in CPL 245.20 (1) (b) had not expired. Thus, at

the time the People filed their COC and SOR, they had complied with their automatic discovery obligations under CPL article 245 to the extent possible. We therefore reject defendant's contention that the COC was improper, inasmuch as the People have met their burden of establishing that, prior to filing the COC, they "ha[d] 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*People v Bay*, — NY3d —, —, 2023 NY Slip Op 06407, *2 [2023]; *see* CPL 245.50 [1]). Consequently, the court did not err in denying defendant's motion to dismiss the indictment on statutory speedy trial grounds.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 21-00758

PRESENT: SMITH, J.P., CURRAN, MONTOUR, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE D. WILLIAMS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 5, 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 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]). We affirm.

Defendant contends that Penal Law § 265.03 (3) is unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge before Supreme Court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). Defendant's "challenge to the constitutionality of [the] statute must be preserved" *(People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, 2023 NY Slip Op 05968, *2-7 [2023]).

Similarly, because he did not move to withdraw his guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that he did not knowingly, voluntarily, and intelligently enter the plea (*see generally People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020]). Moreover, the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666

[1988]) does not apply here.

We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). However, contrary to defendant's contention, his sentence is not unduly harsh or severe.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-00170

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF MICHAEL PROVOST-LUTZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JACQUELINE SCHMID, RESPONDENT-RESPONDENT.

TULLY RINCKEY, PLLC, NEW YORK CITY (MICHAEL E. LIPTROT OF COUNSEL), FOR PETITIONER-APPELLANT.

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

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Salvatore A. Pavone, R.), entered December 14, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner virtual parenting time with the subject children on a weekly basis.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, inter alia, awarded him weekly virtual visitation with the subject children. The record establishes, however, that the father, through his guardian ad litem, stipulated on the record in open court to the terms of the order, and it is well settled that "no appeal lies from an order entered upon the parties' consent" (*Matter of Holiday v Holiday*, 214 AD3d 1456, 1457 [4th Dept 2023] [internal quotation marks omitted]). Although the father contends that his guardian ad litem did not have authority to enter into the stipulation of settlement on his behalf, we note that a party " 'cannot be relieved from a stipulation . . . upon an appeal from the order entered pursuant to the stipulation' . . . The proper remedy is a motion to vacate . . . the order or a motion to set aside the stipulation" (*Matter of Michelle F.*, 280 AD2d 969, 969 [4th Dept 2001]; *see also Holiday*, 214 AD3d at 1457).

The father’s remaining contentions are not properly before us.

Entered: February 9, 2024

Ann Dillon Flynn
Clerk of the Court