SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 1, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JULY 1, 2022

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_____	122	CA 21 00408	SUERIA ASHKAR V ESTATE OF ROBERT NELSON
_____	135	KA 19 02227	PEOPLE V JOSE M. CASTRO
_____	163	CA 21 00961	PEARL STREET PARKING ASSOCIATES LLC V COUNTY OF ERIE
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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-01074

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

IN THE MATTER OF ELVERNA D. GIDNEY,
PETITIONER-APPELLANT,
ET AL., PETITIONER,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF BUFFALO,
PLANNING BOARD OF CITY OF BUFFALO, SYMPHONY
PROPERTY MANAGEMENT LLC AND MICHIGAN-REDEV LLC,
RESPONDENTS-RESPONDENTS.

LAW OFFICE OF ARTHUR J. GIACALONE, BUFFALO (ARTHUR J. GIACALONE OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JESSICA M. LAZARIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ZONING BOARD OF APPEALS OF CITY OF BUFFALO AND PLANNING BOARD OF CITY OF BUFFALO.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS SYMPHONY PROPERTY MANAGEMENT LLC AND MICHIGAN-REDEV LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered February 17, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Respondents Symphony Property Management LLC and Michigan-Redev LLC (collectively, developers) are the owners of several contiguous parcels of land, where they propose building a stacked unit residential building (project). The project site is split between mixed use zoning on the west and residential zoning on the east and, in order to complete the project as planned, the developers need to obtain certain area variances. In response to concerns raised at several public hearings on the developers' variance application before respondent Zoning Board of Appeals of the City of Buffalo (ZBA), the developers submitted a second amended site plan calling for a total of 133 units with design elements that would "mimic" some nearby existing structures. The ZBA granted the developers' application for the necessary variances for the project and, as lead agency for purposes of the State Environmental Quality

Review Act ([SEQRA] ECL art 8), the ZBA issued an amended negative declaration. Petitioners then commenced this CPLR article 78 proceeding seeking, inter alia, to annul those determinations. Elverna D. Gidney (petitioner) now appeals from a judgment that, inter alia, granted respondents' motions pursuant to CPLR 7804 (f) to dismiss the petition against them. We affirm.

We reject petitioner's contention that the determination to grant the developers' application for the use variances lacks a rational basis and is not supported by substantial evidence (*see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]). "[T]he ZBA is afforded 'broad discretion' in determining whether to grant the requested variances . . . , and judicial review is limited to whether the determination was illegal, arbitrary or an abuse of discretion" (*Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280 [4th Dept 2007]). "A reviewing court may not substitute its judgment for that of the ZBA, even if there is substantial evidence supporting a contrary determination" (*id.*). "Where there is substantial evidence in the record to support the rationality of the ZBA's determination, the determination should be affirmed upon judicial review" (*Matter of Buckley v Zoning Bd. of Appeals of City of Geneva*, 189 AD3d 2080, 2081 [4th Dept 2020]; *see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]). Here, upon our review of the record, we conclude that the determination of the ZBA is not illegal, arbitrary or an abuse of discretion inasmuch as the developers met their burden of establishing "that applicable zoning regulations and restrictions have caused unnecessary hardship," i.e., that they could not realize a reasonable return with respect to the property, that the hardship was unique, and that the variances would not alter the essential character of the neighborhood (General City Law § 81-b [3] [b]; *see Matter of Abrams v City of Buffalo Zoning Bd. of Appeals*, 61 AD3d 1387, 1387 [4th Dept 2009]). Contrary to petitioner's further contention, the ZBA did not intrude upon the authority of the City of Buffalo's Common Council by " 'destroy[ing] the general scheme' of the zoning law" (*Abrams*, 61 AD3d at 1387, quoting *Matter of Clark v Board of Zoning Appeals of Town of Hempstead*, 301 NY 86, 91 [1950], *rearg denied* 301 NY 681 [1950], *cert denied* 340 US 933 [1951]; *see Matter of Santora v Town of Poughkeepsie Zoning Bd. of Appeals*, 55 AD3d 741, 743 [2d Dept 2008]).

We further conclude that the ZBA complied with the requirements of SEQRA in issuing a negative declaration. The ZBA properly "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006] [internal quotation marks omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). "When the lead agency finds that there will be no adverse environmental impacts or that such impacts will be insignificant, it can issue a negative declaration . . . and it is not [the] court's role . . . to second-guess the [ZBA's] determination" (*Buckley*, 189 AD3d at 2082 [internal quotation marks omitted]; *see Matter of Brunner v Town of Schodack Planning Bd.*, 178 AD3d 1181, 1182-1183 [3d Dept

2019]).

We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00408

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

SUERIA ASHKAR, PLAINTIFF-APPELLANT,

V ORDER

ESTATE OF ROBERT NELSON, DECEASED,
ET AL., DEFENDANTS,
AND 700 N. SALINA STREET, LLC, DOING
BUSINESS AS ATTILIOS RISTORANTE,
DEFENDANT-RESPONDENT.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered March 1, 2021. The order granted the motion of defendant 700 N. Salina Street, LLC, doing business as Attilios Ristorante for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 21, 2022,

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

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-02227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE M. CASTRO, DEFENDANT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered November 14, 2019. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree (two counts) and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [2]), and two counts each of robbery in the second degree (§ 160.10 [1], [2] [a]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

We reject the contention of defendant that he was denied his statutory right to testify before the grand jury. Defendant failed to serve the requisite written notice upon the District Attorney that he intended to testify before the grand jury (*see* CPL 190.50 [5] [a]; *People v Hernandez*, 192 AD3d 1528, 1529 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]). We similarly reject defendant's contention that he was denied effective assistance of counsel by defense counsel's failure to move to dismiss the indictment pursuant to CPL 190.50 (5) (c). As noted, defendant did not serve the requisite written notice upon the District Attorney that he intended to testify before the grand jury (*see* CPL 190.50 [5] [a]), and it is well settled that "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]).

To the extent that defendant further contends that he was denied

effective assistance of counsel on the ground that his former attorney failed to effectuate his intent to testify before the grand jury, that contention concerns matters outside the record and thus is not reviewable on direct appeal and must be raised in a motion pursuant to CPL article 440 (*see People v Slater*, 61 AD3d 1328, 1329 [4th Dept 2009], *lv denied* 13 NY3d 749 [2009]; *People v Vann*, 288 AD2d 876, 877 [4th Dept 2001], *lv denied* 97 NY2d 709 [2002]; *see also People v Maffei*, 35 NY3d 264, 269 [2020]).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[T]he element of identity was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was one of the perpetrators" (*People v Brown*, 92 AD3d 1216, 1217 [4th Dept 2012], *lv denied* 18 NY3d 992 [2012]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that testimony from a police officer who identified defendant from a surveillance video was improperly admitted in evidence. Contrary to defendant's assertion, the means by which the police officer initially identified defendant were not unduly suggestive (*see People v Collins*, 60 NY2d 214, 220 [1983]; *cf. People v Burton*, 191 AD3d 1311, 1313 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]; *People v Gambale*, 150 AD3d 1667, 1668-1669 [4th Dept 2017]) and County Court did not abuse its discretion in permitting the testimony of that officer at trial (*see People v Russell*, 165 AD2d 327, 336 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]). " 'A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury' " (*People v Graham*, 174 AD3d 1486, 1487-1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *see Russell*, 165 AD2d at 336). Here, the court did not abuse its discretion in allowing the testimony because the People presented evidence establishing that the officer was familiar with defendant based on numerous prior interactions (*see People v Mosley*, 200 AD3d 1658, 1659 [4th Dept 2021]; *cf. Graham*, 174 AD3d at 1487-1488) and defendant's appearance had changed since the date of the incident (*see Russell*, 79 NY2d at 1025; *People v Sampson*, 289 AD2d 1022, 1022-1023 [4th Dept 2001], *lv denied* 97 NY2d 733 [2002]). Further, "the trial court issued appropriate limiting instructions to the jury" (*People v Sanchez*, 21 NY3d 216, 225 [2013]; *see Mosley*, 200 AD3d at 1659).

Defendant failed to preserve for our review his contentions that the indictment was multiplicitous and duplicitous (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Box*, 145 AD3d 1510, 1512-1513 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017]; *People v Fulton*, 133 AD3d 1194, 1194-1195 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]) and otherwise defective

(*see generally People v Iannone*, 45 NY2d 589, 600 [1978]) and that the verdict was inconsistent (*see People v Dinant*, 175 AD3d 1833, 1834 [4th Dept 2019], *lv denied* 34 NY3d 1077 [2019]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-00961

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

PEARL STREET PARKING ASSOCIATES LLC, AND VIOLET REALTY, INC., DOING BUSINESS AS MAIN PLACE LIBERTY GROUP, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, MARK C. POLONCARZ, WILLIAM GEARY, DEFENDANTS-APPELLANTS-RESPONDENTS, AND CITY OF BUFFALO, DEFENDANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT EDWARD KNOER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 3, 2021. The order, among other things, granted in part plaintiff's motion for partial summary judgment and denied the cross motion of defendants County of Erie, Mark C. Poloncarz and William Geary for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and vacating subparagraph (e) of the first ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: This litigation concerns an urban renewal project that began in 1965 in defendant City of Buffalo (City). At that time, the City had entered into an agreement with certain nonparties involving redevelopment of a portion of downtown Buffalo. As relevant here, the project included construction of a tunnel that extended from a street, went under the Rath Erie County Office Building, and connected to a parking garage, using an easement created as part of the project. Plaintiffs contend that they now own the rights to that easement and the tunnel, and the parties agree that plaintiffs own the fee title to the parking garage and the right to operate it. The parties also agree that, in 2016, officials of defendant County of Erie (County) blocked all public access to the tunnel.

Plaintiffs thereafter commenced this action asserting causes of action pursuant to RPAPL article 15 and for declaratory judgment, breach of contract and trespass and sought, among other relief, a

declaration of the rights of the parties to the easement. After joinder of issue, plaintiffs moved for, in effect, partial summary judgment on liability on the trespass and breach of contract causes of action and for summary judgment on the remainder of the complaint, and the County and defendants Mark C. Poloncarz and William Geary (collectively, defendants) cross-moved for summary judgment dismissing the complaint. Supreme Court granted the motion in part by awarding "judgment" on all four causes of action to the extent of finding that the County was in violation of the easement, that defendants did not have the right to block plaintiffs' access to the tunnel, that the County breached its contractual obligations arising from a 1968 deed, and that the County trespassed upon plaintiffs' property. The court also determined that defendants' actions constituted a taking and denied defendants' cross motion. Defendants appeal from the ensuing order, and plaintiffs cross-appeal from that part of the order finding that defendants' actions constituted a taking.

Addressing first the issues raised on the appeal, we note that defendants did not contend on their cross motion that this action should be treated as a CPLR article 78 proceeding and that it must therefore be dismissed based on the four-month statute of limitations applicable to such proceedings. Thus, they failed to preserve for our review their contention that the action is time-barred for that reason (*see Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d 782, 783-784 [3d Dept 2000], *lv denied* 96 NY2d 708 [2001]; *see generally Michael M. v Cummiskey*, 178 AD3d 1457, 1458 [4th Dept 2019]; *Nichols v Diocese of Rochester* [appeal No. 2], 42 AD3d 903, 905 [4th Dept 2007]).

We agree with defendants that plaintiffs failed to meet their burden with respect to the RPAPL article 15 cause of action, which sought, inter alia, a declaratory judgment quieting title by finding that the County is in violation of the easement and directing that the interference cease and desist. Pursuant to well-settled law, "[h]aving moved for summary judgment in this action to determine the ownership of . . . land pursuant to RPAPL article 15, plaintiffs had the initial burden to submit evidence sufficient to demonstrate the absence of all material issues of fact" (*Village of Warsaw v Gott*, 233 AD2d 864, 864 [4th Dept 1996]). Here, although plaintiffs met their initial burden of demonstrating that they were the titled owners of the easement, they failed to "eliminate[] all triable issues of fact regarding . . . the . . . enforceability of the . . . access easement" in light of the security issues raised by defendants (*Headin' E. Bub, LLC v Talmage*, 190 AD3d 957, 959 [2d Dept 2021]). Consequently, we conclude that the court erred in granting the motion with respect to that cause of action in part. For the same reasons, we conclude that plaintiffs failed to meet their burden on the motion with respect to the declaratory judgment cause of action (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), and thus the court further erred in granting the motion to that extent.

We also agree with defendants that the court erred in granting the motion with respect to the breach of contract cause of action, alleging that defendants breached a provision contained in a deed.

The elements of a cause of action for breach of contract are " 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). As the parties seeking summary judgment on that cause of action, plaintiffs bore the initial burden of establishing the existence of all of those elements (*see Wm. Schutt & Assoc. Eng'g & Land Surveying P.C. v St. Bonaventure Univ.*, 151 AD3d 1634, 1635 [4th Dept 2017], *amended on rearg* 153 AD3d 1676 [4th Dept 2017]; *Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455 [4th Dept 2014]). Plaintiffs failed to meet their burden with respect to that cause of action (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and thus denial of the motion to that extent "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez*, 68 NY2d at 324; *see Winegrad*, 64 NY2d at 853).

Similarly, in support of their motion with respect to the trespass cause of action, plaintiffs bore the initial burden of establishing the elements of that cause of action, i.e., that there was an " 'intentional entry onto the land of another without justification or permission' " (*Matter of Double M Dev., LLC v Khrom*, 189 AD3d 1227, 1228 [2d Dept 2020]; *see generally City of Albany v Normanskill Cr., LLC*, 165 AD3d 1437, 1439 [3d Dept 2018]; *Augeri v Roman Catholic Diocese of Brooklyn*, 225 AD2d 1105, 1106 [4th Dept 1996]). Here, plaintiffs' submissions on the motion failed to establish that defendants' entry upon the easement was not justified. Therefore, plaintiffs failed to make a prima facie showing of entitlement to judgment as a matter of law on the trespass cause of action, and the court should have denied the motion to that extent without regard to the sufficiency of the opposition papers (*see generally Winegrad*, 64 NY2d at 853). In light of the foregoing, we modify the order by denying the motion in its entirety.

Contrary to defendants' further contention with respect to all of the causes of action, however, they failed to submit sufficient evidence in admissible form to establish that they had the right to close the tunnel for security purposes (*cf. Island Park, LLC v State of New York*, 93 AD3d 1064, 1065-1067 [3d Dept 2012], *affd* 21 NY3d 981 [2013]). Therefore, the court properly denied their cross motion for summary judgment dismissing the complaint against them.

On both the appeal and the cross appeal, the parties contend that the court erred in concluding that defendants' blocking of the easement constituted a taking of property. We agree. Neither the motion nor the cross motion sought a determination that a taking had occurred or relief with respect to a taking. Thus, we further modify the order by vacating the court's finding that a taking occurred because it was not " 'the subject of the motions before the court' " (*Sullivan v Troser Mgt., Inc.*, 15 AD3d 1011, 1012 [4th Dept 2005], quoting *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430 [1996]; *see also*

Johnson v Pixley Dev. Corp., 169 AD3d 1516, 1517 [4th Dept 2019]; *Delaine v Finger Lakes Fire & Cas. Co.*, 23 AD3d 1143, 1144 [4th Dept 2005]).

Finally, plaintiffs' contention on the cross appeal that the court erred in denying that part of the motion seeking a permanent injunction is not properly before us. In their notice of cross appeal, plaintiffs indicate that they are cross-appealing from the order "to the extent that the [c]ourt reached a determination as set forth in paragraph 'e' finding that the actions taken by . . . [d]efendants . . . constitute a taking." It is well settled that, where a party files a notice of cross appeal indicating that it is appealing from a specific part of an order, that party "is limited by its notice of cross appeal to arguing only with respect to the" part of the order listed in the notice (*Millard v City of Ogdensburg*, 274 AD2d 953, 954 [4th Dept 2000]; *see* CPLR 5515 [1]; *W. Park Assoc., Inc. v Everest Natl. Ins. Co.*, 113 AD3d 38, 43 [2d Dept 2013]; *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00485

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

THE REGIONAL MUNICIPALITY OF YORK,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. LEBLANC, DEFENDANT-APPELLANT.
ET AL., DEFENDANTS.

HARRIS BEACH PLLC, PITTSFORD (ANNA MAE PATTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered December 18, 2020. The judgment granted the motion of plaintiff for summary judgment in lieu of complaint.

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

Memorandum: In this action to recognize a foreign judgment entered in a Canadian court, i.e., the Ontario Superior Court of Justice, Jeffrey J. LeBlanc (defendant) appeals from a judgment of Supreme Court that granted plaintiff's motion for summary judgment in lieu of complaint and awarded plaintiff a money judgment against defendants.

Defendant contends that, pursuant to CPLR former 5304 (a), the court erred in granting plaintiff's motion because the Canadian court did not acquire personal jurisdiction over defendant and the Canadian court's exercise of personal jurisdiction over him failed to comport with New York's due process requirements. We reject that contention. "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003], *cert denied* 540 US 948 [2003]). CPLR former article 53 applied to any foreign country judgment that was "final, conclusive and enforceable" where rendered (CPLR former 5302), and "a foreign country judgment is considered 'conclusive between the parties to the extent that it grants or denies recovery of a sum of money' " (*CIBC Mellon Trust Co.*, 100 NY2d at 221, quoting CPLR former 5303). "CPLR [former] 5304 (a), however, makes clear that a foreign judgment is 'not conclusive,' and

thus not entitled to recognition, where the foreign country fails to provide impartial tribunals or due process or where the tribunal lacked personal jurisdiction over the defendant" (*Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 NY3d 243, 248 [2008]).

Contrary to defendant's contention, "[t]he Ontario Superior Court of Justice is part of a judicial system that provides impartial tribunals and procedures compatible with due process of law" (*Gemstar Can., Inc. v George A. Fuller Co., Inc.*, 127 AD3d 689, 690 [2d Dept 2015]). Moreover, CPLR former 5305 (a) (2) provides, in relevant part, that a foreign country judgment may "not be refused recognition for lack of personal jurisdiction if . . . the defendant voluntarily appeared in the [foreign court] proceeding[], other than for the purpose of protecting property seized or threatened with seizure in the proceeding[] or of contesting the jurisdiction of the court" over him or her. Here, the foreign judgment may not be refused recognition for lack of personal jurisdiction inasmuch as defendant does not contend that he was protecting property seized or threatened with seizure, and plaintiff established that defendant "voluntarily appeared" in the Canadian action (CPLR former 5305 [a] [2]) and "did more than [he] had to do to preserve a jurisdictional objection" (*CIBC Mellon Trust Co.*, 100 NY2d at 225; *see* Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5305:1).

Defendant further contends that the discretionary grounds for nonrecognition of a foreign country judgment in CPLR former 5304 (b) weigh in his favor. Again, we reject that contention. As relevant here, CPLR former 5304 (b) (4) and (7) provided that "[a] foreign country judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state; [or] . . . in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." "[F]oreign judgments generally should be upheld unless enforcement would result in the recognition of 'a transaction which is inherently vicious, wicked or immoral, and shocking to the *prevailing* moral sense' " (*Greschler v Greschler*, 51 NY2d 368, 377 [1980], quoting *Intercontinental Hotels Corp. [Puerto Rico] v Golden*, 15 NY2d 9, 13 [1964]; *see Flisfeder v Jardine*, 300 AD2d 1132, 1132 [4th Dept 2002]). A defendant opposing the recognition of a foreign judgment "bear[s] the burden of proving these discretionary grounds for nonrecognition" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 101 [1st Dept 2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]).

Here, there is nothing "inherently vicious, wicked or immoral, [or] shocking to the *prevailing* moral sense" (*Greschler*, 51 NY2d at 377) about plaintiff's foreign action against defendant (*see generally Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 85 [2006]; *Loucks v Standard Oil Co. of N.Y.*, 224 NY 99, 110-111 [1918]). To the extent that defendant seeks to challenge the merits of the Canadian court's determination, we note that, "[h]aving defaulted [in the foreign action,] defendant may not now challenge the merits of plaintiff[']s claims collaterally" (*Porisini v Petricca*, 90 AD2d 949, 949 [4th Dept

1982]; *see Constandinou v Constandinou* [appeal No. 1], 265 AD2d 890, 890 [4th Dept 1999]).

Additionally, Supreme Court did not abuse its discretion in determining that defendant failed to establish that the Canadian court was "a seriously inconvenient forum for the trial of the action" (CPLR former 5304 [b] [7]; *see Wimmer Can. v Abele Tractor & Equip. Co.*, 299 AD2d 47, 51 [3d Dept 2002], *lv denied* 99 NY2d 507 [2003]). As noted above, the record establishes that jurisdiction over defendant was obtained based not "only on personal service" (CPLR former 5304 [b] [7]), but also through defendant's voluntary appearance (*see generally CIBC Mellon Trust Co.*, 296 AD2d at 101). Further, "a discretionary basis for nonrecognition of a foreign court judgment . . . should generally not be invoked 'unless New York in an analogous situation would have dismissed the case under its own forum non conveniens doctrine' " (*Wimmer Can.*, 299 AD2d at 52; *see* Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5304:3; *see generally* CPLR 327) and, in view of the substantial nexus to Ontario of plaintiff's allegations in the foreign action that defendant is liable for, inter alia, breach of contract and fraud, "defendant's opposition to recognizing the foreign judgment on this ground was properly rejected" (*Wimmer Can.*, 299 AD2d at 52).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-00551

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

ALAN DENTICO AND LEANNE DENTICO, HIS WIFE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TURNER CONSTRUCTION COMPANY AND SBRA, INC.,
FORMERLY KNOWN AS SHEPLEY BULFINCH, INC.,
DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, SYRACUSE (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT TURNER CONSTRUCTION COMPANY.

BYRNE & O'NEILL LLP, NEW YORK CITY (MICHAEL J. BYRNE OF COUNSEL), FOR DEFENDANT-RESPONDENT SBRA, INC., FORMERLY KNOWN AS SHEPLEY BULFINCH, INC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 16, 2021. The order, among other things, granted defendants' motions seeking leave to reargue and, upon reargument, granted in their entirety defendants' motions for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion for summary judgment of defendant SBRA, Inc., formerly known as Shepley Bulfinch, Inc., insofar as it sought dismissal of the first and fifth causes of action against it and reinstating those causes of action against that defendant, and as modified the order is affirmed 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. Defendant Turner Construction Company (Turner) was the construction manager for the construction of the hospital. SBRA and Turner separately moved for summary judgment dismissing the amended complaint against them. Supreme Court (Glownia, J.) granted their

motions in part, dismissed the second through fourth causes of action against those defendants, and denied the motions with respect to the first and fifth causes of action, for negligence and loss of consortium. Plaintiffs appeal from an order of Supreme Court (Walker, A.J.) that, inter alia, granted the motions of Turner and SBRA for leave to reargue their motions for summary judgment with respect to the first and fifth causes of action and, upon reargument, granted defendants' motions for summary judgment insofar as they sought dismissal of those causes of action against them.

Initially, we conclude that the court properly granted the motions for leave to reargue on the ground that the court (Glownia, J.) misapprehended the facts and law in determining defendants' motions for summary judgment (*see Smith v City of Buffalo*, 122 AD3d 1419, 1420 [4th Dept 2014]; *see generally* CPLR 2221 [d] [2]).

We agree with plaintiff, however, that upon reargument the court (Walker, A.J.) erred in granting SBRA's motion for summary judgment insofar as it sought dismissal of the first and fifth causes of action against SBRA, and we therefore modify the order accordingly. With respect to those causes of action, on its motion for summary judgment SBRA had the initial burden of establishing that it "used the degree of care in design that a reasonably prudent architect would use to avoid an unreasonable risk of harm to anyone likely to be exposed to the danger" (*Richards v Passarelli*, 77 AD3d 905, 909 [2d Dept 2010]; *see generally Schilling v Warwick Constr.*, 193 AD2d 594, 595 [2d Dept 1993]). Initially, we conclude that the court erred in determining that plaintiff was not an intended user of the area where the incident occurred and thus that SBRA had no duty to plaintiff with respect to the design of that area. The evidence established that plaintiff was an employee of the hospital who was using the door in its ordinary manner, i.e., to reach the location on the other side of the door while he was showing that location to a coworker. Moreover, the coworker's deposition testimony was submitted by SBRA in support of its motion and established that there was a three-foot differential to the floor upon exiting the door and there were no warning signs, no locks on the door, and no railings. Thus, we conclude that SBRA failed to establish as a matter of law that it had no duty to plaintiff (*see generally Basso v Miller*, 40 NY2d 233, 240-241 [1976]) or that it was not negligent in the design of the relevant portion of the building (*cf. Richards*, 77 AD3d at 909).

Contrary to plaintiff's contention, however, the court properly granted Turner's motion for summary judgment with respect to the first and fifth causes of action against it. A "builder or contractor is justified in relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (*Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 [1924], *rearg denied* 239 NY 604 [1924]). Turner submitted evidence establishing that the doorway through which plaintiff fell was in a remote area of the hospital that was not easily accessible except to employees that worked in that area of the hospital. Thus, we conclude Turner was "justified in relying

upon [SBRA's] plans and specifications" for that area of the hospital (*id.*), and plaintiff "failed to submit any evidence that the plans and specifications were blatantly defective and that [Turner] was, therefore, unjustified in relying upon them" (*Pioli v Town of Kirkwood*, 117 AD2d 954, 955 [3d Dept 1986], *lv denied* 68 NY2d 601 [1986]; *see Peluso v ERM*, 63 AD3d 1025, 1026 [2d Dept 2009]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00512

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

ROGER DUTTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

YOUNG MEN'S CHRISTIAN ASSOCIATION OF BUFFALO NIAGARA, DEFENDANT-RESPONDENT.

JANET, JANET & SUGGS, LLC, BALTIMORE, MARYLAND (BRENDA A. HARKAVY OF COUNSEL), AND THE ABBATOY LAW FIRM, PLLC, ROCHESTER, FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (RYAN A. LEMA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 30, 2021. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that, as a child in the 1950s, he was subjected to repeated sexual abuse by an employee of Young Men's Christian Association of Niagara Falls, Inc. (YMCA Niagara Falls). Plaintiff further alleged that defendant, Young Men's Christian Association of Buffalo Niagara (YMCA Buffalo), is liable for the actions and omissions of YMCA Niagara Falls as a successor entity pursuant to either a de jure or de facto merger between the entities. More particularly, plaintiff alleged that the current iteration of YMCA Buffalo developed as a result of its merger with YMCA Niagara Falls, pursuant to which YMCA Buffalo took over the operation of YMCA Niagara Falls' facilities and branches, absorbed existing YMCA Niagara Falls staff, and effected a continuity of management, personnel, physical location, assets, and general business operations of the YMCA Niagara Falls facilities.

YMCA Buffalo moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). YMCA Buffalo contended that it was not liable as a successor to YMCA Niagara Falls because documentary evidence conclusively established that the entities did not merge. Rather, YMCA Niagara Falls was judicially dissolved by order pursuant to Not-For-Profit Corporation Law § 1404 (d), the National Council of

Young Men's Christian Associations of the United States of America (Y-USA) then assumed control of YMCA Niagara Falls' property, and Y-USA later agreed to transfer the property to YMCA Buffalo pursuant to a transfer agreement. YMCA Buffalo also contended that the de facto merger doctrine did not apply as a matter of law because that doctrine involves the purchase of assets of one corporation by another and requires a transaction between the two purportedly merged entities, but here YMCA Buffalo did not purchase assets or otherwise transact with YMCA Niagara Falls because that entity was dissolved, its assets were transferred to the intermediary Y-USA, and only subsequently did Y-USA transfer the assets to YMCA Buffalo.

Supreme Court agreed with YMCA Buffalo that the documentary evidence conclusively established that the de facto merger doctrine was inapplicable as a matter of law, and the court thus granted that part of the motion pursuant to CPLR 3211 (a) (1). The court did not rule on that part of the motion pursuant to CPLR 3211 (a) (7). Plaintiff appeals, and we now reverse.

"On a motion to dismiss a complaint pursuant to CPLR 3211, we must liberally construe the pleading and 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whe[re], as here, a defendant moves for dismissal of . . . cause[s] of action under CPLR 3211 (a) (1), the[ ] documentary evidence must 'utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law' " (*id.*, quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

With respect to the substantive law at issue, as a general rule, "a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). There are exceptions, however, and thus "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*id.* at 245). Plaintiff relies exclusively on the second exception, which implicates the de facto merger doctrine (*see Sweatland v Park Corp.*, 181 AD2d 243, 245 [4th Dept 1992]). The de facto merger doctrine is "based on the concept that a successor that effectively takes over a [corporation] in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased," which "is consistent with the desire to ensure that a source remains to pay for the victim's injuries" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296-297 [1984]; *see Simpson v Ithaca Gun Co. LLC*, 50 AD3d 1475, 1476 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]).

"Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation" (*Sweatland*, 181 AD2d at 245-246). Nonetheless, " '[n]ot all of these factors are needed to demonstrate a merger; rather, these factors are only indicators that tend to show a de facto merger' " (*id.* at 246). Indeed, "[p]ublic policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger" (*id.*; *see Lippens v Winkler Backereitechnik GmbH* [appeal No. 2], 138 AD3d 1507, 1510 [4th Dept 2016]). The factors are therefore "analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor" (*Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752 [2d Dept 2005]; *see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 176 [1st Dept 2013]). In sum, when evaluating the applicability of the de facto merger doctrine, "the court should analyze each situation on a case-by-case basis" (*Lippens*, 138 AD3d at 1510; *see Sweatland*, 181 AD2d at 246).

Here, the primary dispute between the parties does not relate to the evaluation of the de facto merger factors, but instead concerns the threshold issue of whether the court properly determined that the de factor merger doctrine is inapplicable as a matter of law under the circumstances of this case. We agree with plaintiff that the court erred in that regard.

Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference, we conclude on this record that YMCA Niagara Falls, having experienced a decline in revenue and being unable to pay its debts, filed a petition for dissolution pursuant to Not-For-Profit Corporation Law § 1404 (d) for the purpose of allowing YMCA Buffalo to acquire its assets and continue its operations and programming. In 2005, Supreme Court (Kloch Sr., A.J.) granted the petition, but did so with conditions that were consistent with the purpose of the dissolution. In particular, the court ordered dissolution of YMCA Niagara Falls "with the proviso and understanding that [Y-USA] will transfer the property of [YMCA Niagara Falls] to [YMCA Buffalo]." The dissolution order also imposed the conditions that YMCA Niagara Falls' facility could not be relocated without further court order, that YMCA Buffalo use its best efforts to make physical changes to the facility and continue programming, and that certain numbers of board and trustee members of YMCA Niagara Falls be elected to the respective boards of YMCA Buffalo. On the whole, the dissolution specifically contemplated, and was conditioned upon, the transfer of YMCA Niagara Falls' assets and operations to YMCA Buffalo.

Here, however, YMCA Buffalo nonetheless asserts, and Supreme

Court (Chimes, J.) agreed, that the next step in the transaction—the temporary transfer of YMCA Niagara Falls' assets to Y-USA pursuant to Not-For-Profit Corporation Law § 1404 (d)—renders the de facto merger doctrine inapplicable as a matter of law. We reject that conclusion for several interrelated reasons.

First, the formalistic position of the court and YMCA Buffalo ignores the principle that the applicability of the de facto merger doctrine must be "analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor" (*AT&S Transp., LLC*, 22 AD3d at 752; *see Tap Holdings, LLC*, 109 AD3d at 176). The record, viewed in the appropriate light, indicates that YMCA Buffalo intended to absorb and continue operation of YMCA Niagara Falls. The temporary transfer of YMCA Niagara Falls' property to the intermediary Y-USA pursuant to the statute was not an open-ended commitment providing Y-USA with discretion to manage or sell the assets (*cf.* N-PCL 1404 [d]); to the contrary, Y-USA had no choice in the matter inasmuch as the dissolution order was conditioned on the property being transferred to YMCA Buffalo so that it could continue YMCA Niagara Falls' operation.

Second, to the extent that YMCA Buffalo suggests, and the court agreed, that the mere presence of an intermediary in the transfer necessarily obviates application of the de facto merger doctrine, that conclusion lacks merit (*see generally Lippens*, 138 AD3d at 1509-1510; *Sweatland*, 181 AD2d at 244-246).

Third, we agree with plaintiff that, contrary to YMCA Buffalo's suggestion, a not-for-profit corporation may continue to transfer assets and wind up business affairs even after dissolution, which is precisely what YMCA Niagara Falls did here (*see* N-PCL 1006 [a] [1]; 1115 [a]). The dissolution order was granted subject to the condition that Y-USA transfer the property of YMCA Niagara Falls to YMCA Buffalo. Subsequently, YMCA Niagara Falls, along with YMCA Buffalo and Y-USA, entered into the transfer agreement, which recognized that YMCA Niagara Falls had "managed the [p]roperty in a wind down period" up until the time of the transfer agreement (*accord* N-PCL 1006 [a] [1]) and that Y-USA had, subject to Not-For-Profit Corporation Law § 1404 (d) and the dissolution order, taken possession of the property and agreed to immediately transfer the property to YMCA Buffalo on the date of the transfer agreement. In other words, the transfer agreement—to which YMCA Niagara Falls, although dissolved, was a party—specifically contemplated that YMCA Niagara Falls' assets were to be immediately transferred, albeit through a statutory and court-ordered intermediary, to YMCA Buffalo (*see generally Lippens*, 138 AD3d at 1510). The transaction, although perhaps not formally one, was "*structured as* a purchase of assets[, which] may be deemed to fall within the exception to nonliability as a de facto merger" (*Menche v CDx Diagnostics, Inc.*, 199 AD3d 678, 680 [2d Dept 2021] [emphasis added]; *see AT&S Transp., LLC*, 22 AD3d at 752; *Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]).

Still, YMCA Buffalo insists that the de facto merger doctrine cannot apply because the disposition of YMCA Niagara Falls' assets was dictated by the Not-For-Profit Corporation Law, and neither the statute nor the transfer agreement transferred YMCA Niagara Falls' tort liabilities to YMCA Buffalo. We agree with plaintiff, however, that YMCA Buffalo's assertion lacks merit. While neither the Not-For-Profit Corporation Law nor the transfer agreement provided for YMCA Buffalo's assumption of YMCA Niagara Falls' then-unknown tort liabilities (*cf.* former N-PCL 1005), that fact is immaterial here because plaintiff's theory of liability is not based on an express or implied assumption of YMCA Niagara Falls' tort liability through statute or contract, i.e., the first exception to the general rule of successor nonliability (*see Sweatland*, 181 AD2d at 244-245). Instead, plaintiff is relying upon the common-law doctrine of de facto merger under the second exception, which is an equitable remedy—consistent with the desire to ensure that a source remains to pay for injuries caused by the predecessor's torts—premised on the concept that a successor that effectively takes over a corporation in its entirety should carry the predecessor's liabilities as a concomitant to the benefits derived from acquiring the goodwill of the predecessor (*see Grant-Howard Assoc.*, 63 NY2d at 296).

YMCA Buffalo's related assertion that plaintiff's recourse is against YMCA Niagara Falls only is similarly without merit. As plaintiff contends, even if he had a viable claim against YMCA Niagara Falls, that would not prevent him from pursuing his de facto merger theory of successor liability against YMCA Buffalo because, if there are circumstances warranting imposition of liability on a successor corporation, "the injured party can elect to proceed against the defunct corporation, the successor corporation, or both" (*id.* at 297; *see* 1A NY PJI3d 2:120 at 797 [2022]).

Inasmuch as imposition of successor liability on the theory of de facto merger is not foreclosed as a matter of law under the circumstances of this case, the question becomes whether the documentary evidence submitted by YMCA Buffalo in support of its motion to dismiss conclusively establishes that the de facto merger exception to the general rule of successor nonliability does not apply here (*see* CPLR 3211 [a] [1]). Upon our evaluation of the factors, we agree with plaintiff that the documentary evidence does not conclusively establish the inapplicability of the de facto merger doctrine (*see Shea v Salvation Army*, 169 AD3d 1081, 1083 [2d Dept 2019]).

First, with respect to the continuity of ownership factor, "[s]ince, unlike for-profit corporations, nonprofits do not have owners, . . . continuity of ownership is not a sine qua non of de facto merger of nonprofits" (*Ring v Elizabeth Found. for the Arts*, 136 AD3d 525, 527 [1st Dept 2016]). Nonetheless, that factor is not entirely inapplicable to not-for-profit corporations (*see id.*). Instead, "[o]ne approach to determining continuity of ownership in the nonprofit situation is to look at the boards of the nonprofits" (*id.*). Here, the documentary evidence does not refute a continuity of "ownership" inasmuch as the dissolution order and transfer agreement

required that two board members and one trustee member of YMCA Niagara Falls be elected to serve on the respective boards of YMCA Buffalo (*cf. id.*).

Second, the documentary evidence tends to show "a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible" (*Sweatland*, 181 AD2d at 245-246). Here, YMCA Niagara Falls was dissolved by court order on November 7, 2005, with the proviso that its property be transferred from Y-USA to YMCA Buffalo, and YMCA Niagara Falls thereafter continued to manage the property while winding up its affairs until December 1, 2005, at which time its property was transferred to YMCA Buffalo.

Third, the documentary evidence also tends to show that YMCA Buffalo assumed "the liabilities ordinarily necessary for the uninterrupted continuation" of the operations of YMCA Niagara Falls (*id.* at 246). In addition to assuming all known and liquidated liabilities of YMCA Niagara Falls, YMCA Buffalo also became responsible for a host of liabilities to ensure continued operation, including obligations to undertake a concerted effort to increase programming and membership at the YMCA Niagara Falls facility; to clean, refurbish, upgrade, and repair the facility; and to implement appropriate staffing and training at the facility.

Fourth, the documentary evidence tends to show "a continuity of management, personnel, physical location, assets, and general business operation" of YMCA Niagara Falls (*id.*). Following the transaction, YMCA Buffalo continued operations and programming at YMCA Niagara Falls' physical location, which became a branch of YMCA Buffalo. In addition, under the transfer agreement, YMCA Buffalo agreed to give current personnel of YMCA Niagara Falls preference in maintaining their jobs and for training, incorporate YMCA Niagara Falls' mission, and allow the specified board and trustee members of YMCA Niagara Falls to serve in managerial roles on the respective boards of YMCA Buffalo. Moreover, the transfer agreement provided that YMCA Buffalo also received all tangible and intangible assets of YMCA Niagara Falls, including furniture, fixtures, computers, supplies, "know-how . . . and other operational information," use of trade names, membership lists, goodwill, records, cash and deposits, accounts receivable, real property, vehicles, and telephone numbers (*see e.g. Energy Coop. of Am., Inc. v Luigi's Family Bakery, Inc.*, 170 AD3d 1629, 1630 [4th Dept 2019]; *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]; *Sweatland*, 181 AD2d at 244-245).

Finally, YMCA Buffalo contends, as an alternative ground for affirmance, that the complaint should be dismissed pursuant to CPLR 3211 (a) (7) on the basis that plaintiff failed to state a cause of action. Here, the court did not address that part of YMCA Buffalo's motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, thereby implicitly denying that part of the motion (*see Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526 [4th Dept 2016]; *Augeri v Roman Catholic Diocese of Brooklyn*, 225 AD2d 1105, 1106 [4th Dept 1996]; *Brown v U.S. Vanadium Corp.*, 198 AD2d

863, 864 [4th Dept 1993]). Although YMCA Buffalo was not aggrieved by the order and thus could not have cross-appealed (*see Cleary*, 145 AD3d at 1526; *Matter of Tehan [Tehan's Catalog Showrooms, Inc.]* [appeal No. 2], 144 AD3d 1530, 1531 [4th Dept 2016]), YMCA Buffalo nonetheless properly raises its contention as an alternative ground for affirmance of the order granting its motion (*see Cleary*, 145 AD3d at 1526; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]). YMCA Buffalo's contention, however, lacks merit. Upon liberally construing the complaint, accepting the facts as alleged therein as true, and according plaintiff the benefit of every possible favorable inference (*see Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP*, 37 NY3d at 175), we conclude that the complaint states causes of action based on successor liability under a theory of de facto merger (*see State Farm Fire & Cas. Co. v Main Bros. Oil Co.*, 101 AD3d 1575, 1579 [3d Dept 2012]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00943

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

ROY HARRIGER, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 126681.)

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

SIVIN, MILLER & ROCHE LLP, NEW YORK CITY (EDWARD SIVIN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered December 18, 2020. The judgment awarded claimant money damages.

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

Memorandum: On appeal from a judgment in favor of claimant on his claims for assault and unwarranted use of excessive force, defendant contends that it cannot be held liable under the doctrine of respondeat superior for the acts of the unidentified correction officer who assaulted claimant because the correction officer acted outside the scope of his employment. Defendant correctly concedes that its contention is not preserved for our review because defendant did not raise it in the Court of Claims (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). Defendant argues, however, that in light of claimant's testimony that he was the victim of an unprovoked assault, the issue whether the correction officer acted outside the scope of his employment falls squarely within the exception to the preservation rule because it involves a question of law appearing on the face of the record that could not have been avoided by the opposing party if brought to that party's attention in a timely manner (*see Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). Even assuming, arguendo, that defendant did not waive that contention by expressly declining to argue that any correction officer was acting outside the scope of his or her employment (*see generally Matter of Antoinette C. v County of Erie*, 202 AD3d 1464, 1467-1468 [4th Dept 2022]), we reject it. An issue may not be raised for the first time on appeal where "it could have been obviated or cured by factual showings or legal countersteps in the trial court" (*Solvay Bank v Feher Rubbish Removal, Inc.*, 187 AD3d 1596, 1596 [4th Dept

2020] [internal quotation marks omitted]). "Whether an employee acted within the scope of employment is a fact-based inquiry" (*Rivera v State of New York*, 34 NY3d 383, 390 [2019]). Contrary to defendant's contention, although the court credited claimant's testimony that an assault took place, it explicitly refrained from making a determination as to the reason behind the assault of claimant. As the Court of Appeals has stated, "correction officers at times use excessive force. Such conduct will not fall outside the scope of employment merely because it violates department rules or policies or crosses the line of sanctioned conduct" (*id.* at 391). Because defendant's contention "could have been obviated or cured by factual showings or legal countersteps in the trial court" (*Oram*, 206 AD2d at 840 [internal quotation marks omitted]), preservation of the contention was required. We have considered defendant's alternative argument regarding preservation and conclude that it is without merit.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

289

CA 21-01448

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

AMANDA WELDON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANA N. MCMAHON, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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

STANLEY LAW OFFICES, SYRACUSE (JAMIE M. RICHARDS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 14, 2021. The order denied the motion of defendant Dana N. McMahon for leave to file an amended answer.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her vehicle was struck by a vehicle owned by Dana N. McMahon (defendant) and operated by Alison L. Argy. Defendant appeals from an order that denied his motion for leave to amend his answer.

We agree with defendant that Supreme Court abused its discretion in denying his motion. "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Palaszynski v Mattice*, 78 AD3d 1528, 1528 [4th Dept 2010] [internal quotation marks omitted]; *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). " 'Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment' " (*Burke, Albright, Harter & Rzepka LLP v Sills*, 187 AD3d 1507, 1509 [4th Dept 2020], quoting *Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998]). The nonmoving party bears the burden of establishing prejudice (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161

AD3d 1560, 1561 [4th Dept 2018]).

Here, plaintiff failed to identify any prejudice arising from the proposed amendment (*see Greco v Grande*, 160 AD3d 1345, 1346 [4th Dept 2018]; *Williams v New York Cent. Mut. Fire Ins. Co.* [appeal No. 2], 108 AD3d 1112, 1114 [4th Dept 2013]; *Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]), and the evidence submitted by defendant in support of his motion established that the proposed amendment is not patently without merit (*see Bryndle*, 66 AD3d at 1396; *see also Great Lakes Motor Corp. v Johnson*, 156 AD3d 1369, 1371 [4th Dept 2017]; *Holst v Liberatore*, 105 AD3d 1374, 1374-1375 [4th Dept 2013]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

331

KA 18-00208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH STEFANOVICH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered January 27, 2017. The judgment convicted defendant, after a nonjury trial, of rape in the first degree.

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

Memorandum: Defendant was initially convicted following a jury trial of rape in the first degree (Penal Law § 130.35 [1]). Although the victim was unable to identify defendant at trial, his DNA linked him to the crime, and he acknowledged during his testimony that he had sexual intercourse with the victim on the date in question but claimed that it was consensual. We reversed the judgment on appeal and ordered a new trial, concluding that defendant was deprived of effective assistance of counsel because his trial attorney repeatedly informed the jury, for no legitimate strategic reason, that defendant was a registered sex offender (*People v Stefanovich*, 136 AD3d 1375 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]). We rejected defendant's contentions that the evidence was legally insufficient and that the verdict was against the evidence. Upon remittal, defendant waived his right to a jury trial and, following a nonjury trial, he was convicted of the same crime based on essentially the same evidence that was admitted at the first trial.

Defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to preclude the People from using his testimony from the first trial against him at the retrial. Because the People did not ultimately seek to admit defendant's testimony from the first trial at the retrial, defendant was not prejudiced by the court's ruling, even assuming, arguendo, that it was improper. We note that defendant took the stand and offered testimony consistent with his testimony at the first trial. Under the circumstances, there

is no basis for reversal arising from the denial of defendant's preclusion motion.

Considering that the evidence at the retrial was largely the same as the evidence at the first trial, we reject defendant's contention that the evidence is legally insufficient to establish his guilt. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the [factfinder] based on the evidence at trial, i.e., that defendant had sexual intercourse with the victim by forcible compulsion" (*Stefanovich*, 136 AD3d at 1379; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Further, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). There is no dispute that, as the DNA evidence established, defendant had sexual intercourse with the victim; the only question at trial was whether it was by forcible compulsion, as the victim testified, or whether it was consensual, as defendant testified. The court evidently believed the victim and not defendant, and there is no basis in the record for us to disturb the court's credibility determinations, which are entitled to great deference (*see People v Pabon*, 126 AD3d 1447, 1448 [4th Dept 2015], *affd* 28 NY3d 147 [2016]; *People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]), especially considering that defendant, when questioned by the police, denied having sex with the victim.

Defendant further contends that the court erred in refusing to dismiss the indictment on the ground that he was deprived of due process by unreasonable preindictment delay (*see People v Vernace*, 96 NY2d 886, 887 [2001]). In determining whether defendant was deprived of due process, we must consider the factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), which are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*id*. at 445; *see People v Lewis*, 199 AD3d 1441, 1441 [4th Dept 2021], *lv denied* — NY3d — [2022]).

"[N]o one factor [is] dispositive of a violation, and [there are] no formalistic precepts by which a deprivation of the right can be assessed" (*People v Romeo*, 12 NY3d 51, 55 [2009], *cert denied* 558 US 817 [2009]). "Generally when there has been a protracted delay, certainly over a period of years, the burden is on the prosecution to establish good cause" (*People v Singer*, 44 NY2d 241, 254 [1978]). We note, however, that "[t]he People necessarily have wider discretion to *delay commencement of prosecution* for good faith, legitimate reasons than they do to delay a defendant's trial after charges have been filed, even for legitimate reasons and without acting in bad faith"

(*People v Wiggins*, 31 NY3d 1, 13 [2018] [additional emphasis added]), and "it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal" (*People v McFadden*, 148 AD3d 1769, 1771 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]; *see People v Decker*, 13 NY3d 12, 15 [2009]).

Here, as the People correctly concede, the first *Taranovich* factor weighs in defendant's favor inasmuch as the period of preindictment delay was extensive, exceeding six years. On the other hand, as defendant correctly concedes, the third and fourth factors militate against dismissal of the indictment inasmuch as rape in the first degree is a serious charge for which there is no statute of limitations, and defendant was not incarcerated prior to indictment.

With respect to the fifth factor, defendant contends that the extensive delay affected his ability to locate potential alibi witnesses, thus impairing his defense. But defendant did not pursue an alibi defense at trial. As noted, defendant testified that he had consensual sexual intercourse with the victim at the time and place she claimed the rape took place. There were thus no potential alibi witnesses to be found. Moreover, considering that by defendant's own account the sexual intercourse took place in the woods with no one else around, there were no witnesses defendant could have found to corroborate his testimony that the encounter was consensual. Under the circumstances, we cannot conceive of what defendant could or would have done differently had he been charged in a more timely manner.

In sum, we conclude that defendant's "conclusory assertions of prejudice are insufficient" to demonstrate that his "defense was impaired by reason of the delay" (*People v Johnson*, 134 AD3d 1388, 1390 [4th Dept 2015], *affd* 28 NY3d 1048 [2016]), and the complete absence of prejudice in this case weighs most heavily against him (*see generally People v Denis*, 276 AD2d 237, 249 [3d Dept 2000], *lv denied* 96 NY2d 782 [2001], *reconsideration denied* 96 NY2d 861 [2001]).

The remaining factor is the second, which concerns the reasons for the delay. There is no indication that the "delay was caused by any bad faith on the part of the People" (*People v Perez*, 85 AD3d 1538, 1539 [4th Dept 2011]). Instead, the delay was largely caused by the efforts of the People and law enforcement "to acquire substantial corroborating evidence in order to prove defendant's guilt beyond a reasonable doubt" (*People v Nazario*, 85 AD3d 577, 577 [1st Dept 2011], *lv denied* 17 NY3d 904 [2011]). Nevertheless, it is true, as defendant points out, that extensive periods of delay may fairly be attributed to neglect by the People and law enforcement in the investigation. But even assuming, arguendo, that the second factor weighs in defendant's favor, three of the five factors favor the People, and we thus conclude that the court did not err in denying that part of defendant's omnibus motion seeking to dismiss the indictment on due process grounds.

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

All concur except NEMOYER, J., who dissents and votes to reverse in accordance with the following memorandum: I dissent because, in my view, defendant was deprived of due process by unreasonable preindictment delay. As the majority explains, that issue requires us to consider the five factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), i.e., "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*id.* at 445).

As the majority agrees and the People correctly concede, the first factor weighs heavily in defendant's favor inasmuch as there was a protracted delay of over six years. Based on that delay, "the burden [was] on the prosecution to establish good cause" (*People v Singer*, 44 NY2d 241, 254 [1978]). The People, however, failed to present a valid reason for the delay under the second factor. As of September 2006, when the prosecution was made aware of DNA evidence linking defendant to the crime, the prosecutor possessed all information necessary to charge defendant, and the record reveals no reason, plan, or deliberate decision to delay defendant's arrest until it was eventually made in January 2013. Instead, the record reflects that the explanation for the over six-year delay was simply inadvertence, which is an insufficient reason as a matter of law (*see People v Wheeler*, 289 AD2d 959, 960 [4th Dept 2001]). Although the majority suggests that the second factor may not favor defendant because there was no indication of bad faith on the part of the People, the second factor looks for a "reason for the delay," not merely a lack of bad faith (*Taranovich*, 37 NY2d at 445). Indeed, the Court of Appeals in *Taranovich* held that the second factor "may be in the appellant's favor" despite the fact that there was no claim of bad faith in that case (*id.* at 446). Thus, although a lack of bad faith may mean that the second factor "in and of itself" will not warrant dismissal of the indictment (*id.*), a lack of bad faith does not change the fact that, in this case, the second factor favors defendant.

With respect to the third factor, although the majority seems to limit its analysis to whether defendant was charged with a "serious" crime, that factor more specifically considers the seriousness of the offense in the context of the complexity of the case, i.e., whether the nature of the case explains the delay (*see id.*; *Wheeler*, 289 AD2d at 960). Indeed, *Taranovich* analyzed the seriousness of the offenses charged simply as a means to explain why a prosecution may have taken an extended period of time, explaining that, "[u]pon such a serious charge, the District Attorney may be expected to proceed with far more caution and deliberation than he would expend on a relatively minor offense," and thus the delay could be explained by a prosecutor's attempt to "be more thorough and precise in his [or her] preparation for the trial" of a serious matter (*Taranovich*, 37 NY2d at 446). In this way, the third factor does not require us to simply examine whether an offense was serious in a vacuum, but rather whether the seriousness of the offense might explain the delay. That makes sense because this issue involves due process concerns, and a defendant does not lose the right to due process merely by virtue of being charged

with a serious crime. This case, however, was not a complex matter. The People had obtained a DNA match to defendant as of September 2006 but, rather than proceeding with "caution and deliberation" (*id.*), the record reflects that the prosecution allowed the matter to sit for over six years largely due to inattention, without any indication of the exercise of prosecutorial discretion or further investigative efforts. Thus, I conclude that the third factor favors defendant.

I agree with the majority that the fourth factor does not favor defendant. With respect to the fifth factor, however, the record reflects that the over six-year delay may have impaired defendant's ability to present testimony that could have supported his version of the incident, or helped establish that he was not the person who the victim alleged had attacked her at a specific time. In any event, the sheer length of the delay in prosecution, in my view, made it more difficult for defendant to support his version of events regarding the incident, which occurred in July 2005, even if he could not establish a precise way in which such impairment was manifested (*see generally People v Wiggins*, 31 NY3d 1, 13 [2018]). At worst for defendant, I conclude that the fifth factor was neutral or slightly favored him.

Based on the above, where up to four out of the five factors weigh in defendant's favor, I agree with defendant that the over six-year delay deprived him of his right to due process, and I would therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to dismiss the indictment on due process grounds, dismiss the indictment, and remit the matter to Supreme Court for further proceedings pursuant to CPL 470.45.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

339

CA 21-01011

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

PATRICIA A. ULRICH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN J. ULRICH, DEFENDANT-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, BUFFALO (KENNETH A. OLENA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Amy C. Martoche, J.), entered February 1, 2021 in a divorce action. The judgment, among other things, dissolved the marriage between the parties.

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

Memorandum: Defendant appeals from a judgment of divorce that, inter alia, dissolved the parties' marriage and, as set forth in the report of the Matrimonial Referee (Referee), awarded plaintiff her share of defendant's pension benefit "without reduction for the 'pop up' selection." We affirm.

The parties were married in August 2004. By that time, defendant had been working as a state correction officer for 16½ years. In 2015, while the parties were still married, defendant retired, having accrued 27½ years of pension credit. At that time, defendant chose a "pop up" pension payment option that provided that either he or plaintiff would continue to receive a pension upon the other's death but that, should plaintiff die first, defendant's pension payment would at that time change to the single life allowance amount.

Plaintiff commenced the underlying divorce action in November 2019. The parties informally resolved most of the issues raised in the action through a property settlement and separation agreement. The few remaining unresolved issues included, as relevant on appeal, the equitable distribution of defendant's pension allowance, which was addressed at a hearing.

Contrary to defendant's contention, Supreme Court did not abuse its discretion with respect to the equitable distribution of defendant's pension benefit (*see generally Rivera v Rivera*, 126 AD3d

1355, 1356 [4th Dept 2015]; *Schiffmacher v Schiffmacher*, 21 AD3d 1386, 1386-1387 [4th Dept 2005]; *McCanna v McCanna*, 274 AD2d 949, 949 [4th Dept 2000]). There is no dispute that "the concept of pension benefits as marital property is consistent with the concept of equitable distribution which rests largely on the view that marriage is, among other things, an economic partnership to which each party has made a contribution" (*Kraus v Kraus*, 131 AD3d 94, 99 [2d Dept 2015] [internal quotation marks omitted]; *see generally Olivo v Olivo*, 82 NY2d 202, 207-208 [1993]). Inasmuch as a court has the authority in a divorce action to require a pensioned spouse to elect a pension option providing a pension benefit for the other party that survives the pensioned spouse's death (*see Antinora v Antinora*, 125 AD3d 1336, 1340 [4th Dept 2015]), the court also has the power to direct equitable distribution of the irrevocable choice of a survivor pension benefit made during the marriage (*see generally Olivo*, 82 NY2d at 207-208; *Antinora*, 125 AD3d at 1340).

Here, the record establishes that the court confirmed the report of the Referee, who properly set forth the relevant statutory factors that she considered and the reasons for her decision with respect to the pension benefit (*see McCanna*, 274 AD2d at 949). Specifically, the record reflects that plaintiff made significant contributions to the parties' marriage to the extent that she cared for their shared home and both of their children from prior marriages. Thus, we perceive no reason, on this record, to disturb the court's determination (*see Rivera*, 126 AD3d at 1356).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

364

KA 20-00070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. PIASTA, JR., ALSO KNOWN AS MICHAEL JEROME PIASTA, JR., ALSO KNOWN AS MICHAEL PIASTA, ALSO KNOWN AS MICHAEL JEROME PIASTA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH NANCY FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered July 12, 2019. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree, grand larceny in the third degree and criminal possession of a weapon in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the second degree (Penal Law § 160.10 [2] [b]), grand larceny in the third degree (§ 155.35 [1]), and criminal possession of a weapon in the third degree (§ 265.02 [1]), arising from a gunpoint robbery of a fast food restaurant. In appeal No. 2, defendant appeals from an order that, inter alia, set the amount of restitution following a separate restitution hearing.

Defendant contends in appeal No. 1 that defense counsel was ineffective for failing either to preserve for appellate review the issue of the denial of his for-cause challenge to a prospective juror or to exercise a peremptory challenge to remove that prospective juror. We reject that contention.

"[J]ury selection involves the 'quintessentially tactical decision' of whether defendant's interests would be assisted or harmed by a particular juror" (*People v Molano*, 70 AD3d 1172, 1176 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]; *see People v Anderson*, 113 AD3d

1102, 1103 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]; *People v Cordova-Diaz*, 55 AD3d 360, 361 [1st Dept 2008], *lv denied* 12 NY3d 782 [2009]). "To prevail on an ineffective assistance claim, a defendant must 'demonstrate the absence of strategic or other legitimate explanations'—i.e., those that would be consistent with the decisions of a 'reasonably competent attorney'—for the alleged deficiencies of counsel" (*People v Maffei*, 35 NY3d 264, 269 [2020]). "[A]lthough there may be some cases in which the trial record is sufficient to permit a defendant to bring an ineffective assistance of counsel claim on direct appeal . . . , 'in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10' " (*id.* at 269-270). "That is especially true as to ineffective assistance of counsel claims based on the defense's acceptance of a prospective juror. Counsel's decisions during jury selection may be based on a myriad of factors, including not only the prospective jurors' statements or actions reflected in the record, but also matters dehors the record on the direct appeal" (*id.* at 270). Additionally, where, as here, the claim is based on one alleged misstep during jury selection, "defendant can prevail on his ineffective assistance claim only by showing that this is one of those very rare cases in which a single error by otherwise competent counsel was so serious that it deprived defendant of his constitutional right" (*People v Thompson*, 21 NY3d 555, 559 [2013]).

Here, defense counsel was not ineffective for failing to preserve for appellate review the issue of the for-cause challenge to the prospective juror, who had been a victim of an unsolved home burglary 30 years earlier (*see id.* at 560-561). Upon questioning by the prosecutor and defense counsel during voir dire, the prospective juror twice confirmed that he thought he would be able to set aside his past experience with the burglary of his home and be fair and impartial in this case. Contrary to defendant's suggestion, " '[t]hink' . . . is not a talismanic word that automatically makes a statement equivocal" (*People v Chambers*, 97 NY2d 417, 419 [2002]). The record here shows that the prospective juror's statements, "taken in context and as a whole, were unequivocal" (*id.*). That includes the prospective juror's final comment to defense counsel that being the victim of a crime "leaves a bad taste in your mouth." Read in the context of defense counsel's questioning, that comment merely provided further explanation for why the prospective juror initially acknowledged that his experience "could" affect his impartiality—i.e., because such an experience stays with one—but later clarified that he thought he would, indeed, be able to set that experience aside and be impartial. County Court thus properly denied defense counsel's for-cause challenge to the prospective juror, and it cannot be said that defense counsel was ineffective for failing to preserve that issue for appellate review inasmuch as it would have had little or no chance of success on appeal (*see People v Griffin*, 203 AD3d 1608, 1610 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). In any event, even assuming, arguendo, that the court's decision to deny the for-cause challenge may have been

erroneous, "[t]he issue of the for-cause challenge was not . . . 'clear-cut and completely dispositive,' " and thus "[defense] counsel's mistake, if it was one, was not the sort of 'egregious and prejudicial' error that amounts to a deprivation of the constitutional right to counsel" (*Thompson*, 21 NY3d at 561).

Defendant has also " 'failed to establish that defense counsel lacked a legitimate strategy in choosing not to [peremptorily] challenge th[e] prospective juror[]' " (*People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]; *see Maffei*, 35 NY3d at 265-274; *People v Barboni*, 21 NY3d 393, 406-407 [2013]; *People v Barksdale*, 191 AD3d 1370, 1371 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]). The record shows that, after using two peremptory challenges to strike members of the first panel, defense counsel asked the court if he "could just have a moment" because "[w]e are still thinking something over" and thereafter informed the court that, "at this time," the defense would be using just the two peremptory challenges. Inasmuch as the record is silent as to what was discussed between defense counsel and defendant during the requested brief pause, or how any such conversation may have affected defense counsel's decision to abstain from exercising a peremptory challenge to remove the prospective juror, the record on direct appeal cannot establish defendant's ineffective assistance claim in that regard (*see Maffei*, 35 NY3d at 272). Not only is this record silent concerning what, if anything, defendant conveyed to defense counsel regarding the prospective juror, but the voir dire record as a whole is also "inadequate to support anything more than second-guessing the reasonableness of [defense] counsel's decision" to abstain from using a peremptory challenge on the prospective juror (*id.* at 273). Indeed, the prospective juror was only the fifth seated juror from the first panel and, therefore, despite his unsuccessful for-cause challenge, defense counsel "could reasonably have made the strategic decision to conserve limited remaining peremptory challenges for prospective jurors whose impartiality was less certain" (*People v Horton*, 181 AD3d 986, 998 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]). Thus, the record here does not establish defendant's claim of ineffective assistance and, to the extent that defendant's contention depends on matters outside the record on direct appeal, "the appropriate procedure for the litigation of defendant's challenge to [defense] counsel's performance is a CPL 440.10 motion" (*Maffei*, 35 NY3d at 266; *see Barksdale*, 191 AD3d at 1371; *Carpenter*, 187 AD3d at 1557).

Defendant next contends in appeal No. 1 that the evidence is legally insufficient to establish his identity as the perpetrator of the offenses. We reject that contention. "Legal sufficiency review requires that we view the evidence in the light most favorable to the prosecution, and, when deciding whether a jury could logically conclude that the prosecution sustained its burden of proof, [w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Allen*, 36 NY3d 1033, 1034 [2021] [internal quotation marks omitted]; *see People v Hampton*, 21 NY3d 277, 287-288 [2013]; *People v Delamota*, 18 NY3d 107, 113 [2011]). Viewed in that light, we conclude that the direct and circumstantial evidence is

legally sufficient to establish defendant's identity as the perpetrator of the offenses (*see People v Brown*, 204 AD3d 1390, 1392 [4th Dept 2022]; *People v Howe*, 267 AD2d 601, 601-602 [3d Dept 1999], *lv denied* 94 NY2d 921 [2000]; *see also People v Cascio*, 79 AD3d 1809, 1810 [4th Dept 2010], *lv denied* 16 NY3d 893 [2011]).

Defendant also contends in appeal No. 1 that the evidence is legally insufficient to support the grand larceny conviction on the ground that the People failed to prove that the amount of money taken exceeded $3,000. Defendant failed to preserve that contention for our review, however, because his motion for a trial order of dismissal was not specifically directed at that alleged insufficiency (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Slack*, 137 AD3d 1568, 1569 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]). In any event, defendant's contention lacks merit. While "[a] conclusory statement" or "a 'rough estimate' without evidence of its basis" is insufficient (*People v Gonzalez*, 221 AD2d 203, 204 [1st Dept 1995]), "[i]n determining the value of stolen property, the jury need only have a reasonable, rather than speculative, basis for inferring that the value exceeded the statutory requirement" (*People v Butcher*, 192 AD3d 1196, 1198 [3d Dept 2021], *lv denied* 36 NY3d 1118 [2021] [internal quotation marks omitted]; *see People v Geroyianis*, 96 AD3d 1641, 1644-1645 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012], *reconsideration denied* 19 NY3d 1102 [2012]). In that regard, "a victim must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404 [1992]; *see Slack*, 137 AD3d at 1569). Here, contrary to defendant's assertion, the restaurant manager who testified at trial did not provide "only [a] 'rough estimate[] of value'. . . without setting forth any basis for his estimate[]" (*Geroyianis*, 96 AD3d at 1645; *cf. Gonzalez*, 221 AD2d at 204-205). Rather, the testimony of the restaurant manager "properly included his 'basis for knowledge of value . . . [so] that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' " (*People v Pepson*, 61 AD3d 1399, 1400 [4th Dept 2009], *lv denied* 12 NY3d 919 [2009]; *see People v Booker*, 33 AD3d 371, 371-372 [1st Dept 2006], *lv denied* 8 NY3d 844 [2007]).

Contrary to defendant's further contention in appeal No. 1, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention in appeal No. 1 that the incarceration component of his sentence is unduly harsh and severe.

We nonetheless agree with defendant's contention in appeal No. 2 that the People failed to meet their burden at the hearing of establishing the amount of restitution. "Whenever the court requires restitution or reparation to be made, the court must make a finding as

to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense" and, "[i]f the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue in accordance with" CPL 400.30 (Penal Law § 60.27 [2]). "At a restitution hearing, the People bear the burden of proving the victim's out-of-pocket loss—the amount necessary to make the victim whole—by a preponderance of the evidence" (*People v Tzitzikalakis*, 8 NY3d 217, 221 [2007]; *see* CPL 400.30 [4]). "The People's burden of proof encompasses both the burden of producing evidence sufficient to establish a prima facie case of the proper restitution amount . . . as well as the burden of persuasion—that is, the ultimate burden of convincing the hearing court, after all the evidence is submitted, that its restitution figure is, more likely than not, correct" (*Tzitzikalakis*, 8 NY3d at 221 n 2).

Here, the prosecutor requested at the hearing an amount of restitution based on the restaurant manager's testimony, which the court admitted in evidence over defendant's objection that the amount was speculative and approximate. With no other evidence or argument offered, the People and defendant each rested. The court, however, interjected to inquire whether the prosecutor was assuming that the court would consider materials submitted during the presentence investigation process. The prosecutor—apparently unfamiliar with the presentence investigation materials in the court's possession—then reviewed a letter submitted to the local police department from Erie Insurance Company (Erie), which was later included in the presentence investigation materials. The letter stated that, under the terms of the policy with its insured, i.e., F&P Enterprises of Amherst (presumably, but without an evidentiary basis, the restaurant's franchisee), Erie had "settled with them for the above loss" and, therefore, had "an interest in any recovery and/or prosecution related to this incident." The letter then listed the "Amount of Loss" as $6,004.09—an amount that materially differed from the amount claimed by the restaurant manager—with no further information about that figure. After his review, the prosecutor informed the court that he "d[id]n't know if there was any deductible" and "d[id]n't know how [Erie] determined that amount," but that he had no objection to the court considering that document. The court later issued a written decision and order in which it recited the submissions and burden of proof and then found, in conclusory fashion, that restitution had been established in the amount of $6,004.09. The court did not specify any recipient of the restitution.

We conclude that the People failed to establish the victim's actual out-of-pocket loss by a preponderance of the evidence. The restitution amount ordered by the court deviated from the loss claimed by the restaurant manager in his testimony, and the sole evidence supporting the actual amount of out-of-pocket loss calculated by the court was an undetailed, vague letter ostensibly from the restaurant franchisee's insurer listing an amount of loss—the calculation and accuracy of which was, by their own representation at the hearing, unknown to the People (*cf. People v Wilson*, 108 AD3d 1011, 1013 [4th

Dept 2013]; *People v LaVilla*, 87 AD3d 1369, 1369-1370 [4th Dept 2011]).

Defendant also challenges in appeal No. 2 the court's failure to direct restitution to an appropriate person or entity (*see* Penal Law § 60.27 [4] [b]). Even assuming, arguendo, that defendant's contention required preservation under the circumstances of this case (*see People v Meyers*, 182 AD3d 1037, 1042 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]; *People v Graves*, 163 AD3d 16, 25 [4th Dept 2018], *lv denied* 35 NY3d 970 [2020]), we exercise our power to reach that unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Meyers*, 182 AD3d at 1042). As defendant correctly contends, although the intended recipient appears to be Erie, the court failed to so specify and the record therefore does not establish the recipient of the restitution (*see Meyers*, 182 AD3d at 1042).

Based on the foregoing, we reverse the order in appeal No. 2 and remit the matter to County Court for a new hearing to determine restitution and its recipient in compliance with Penal Law § 60.27 (*see People v Wilson*, 59 AD3d 807, 808-809 [3d Dept 2009]; *People v Mela*, 172 AD2d 630, 630-631 [2d Dept 1991]; *see generally Meyers*, 182 AD3d at 1042).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

365

KA 20-00071

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. PIASTA, JR., ALSO KNOWN AS MICHAEL JEROME PIASTA, JR., ALSO KNOWN AS MICHAEL PIASTA, ALSO KNOWN AS MICHAEL JEROME PIASTA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH NANCY FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated September 17, 2019. The order, among other things, determined the amount of restitution owed by defendant.

It is hereby ORDERED that the order so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and the matter is remitted to Genesee County Court for further proceedings in accordance with the same memorandum as in *People v Piasta* ([appeal No. 1] — AD3d — [July 1, 2022] [4th Dept 2022]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

368

KA 20-00916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL STEVENS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Stephen T. Miller, A.J.), entered June 1, 2020. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in refusing to grant him a downward departure from his presumptive risk level. We affirm.

Contrary to defendant's contention, the mere absence of aggravating factors does not warrant a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 853, 861 [2014]). Rather, a defendant seeking a downward departure bears the burden of establishing by a preponderance of the evidence the existence of an appropriate mitigating factor—i.e., "a factor which tends to establish a lower likelihood of reoffense or danger to the community" (*People v Jackson*, 114 AD3d 739, 739 [2d Dept 2014], *lv denied* 23 NY3d 903 [2014]; *see People v Johnson*, 120 AD3d 1542, 1542 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014])—that is of a kind or to a degree not adequately taken into account by the risk assessment guidelines (*see Gillotti*, 23 NY3d at 853; *People v Uerkvitz*, 171 AD3d 1491, 1492 [4th Dept 2019], *lv denied* 33 NY3d 912 [2019]; *People v Wooten*, 136 AD3d 1305, 1306 [4th Dept 2016]). Here, even assuming, arguendo, that defendant is correct in asserting that no aggravating factors were present, we conclude that defendant failed to identify or prove the existence of an appropriate mitigating factor in support of his request for a downward departure at the SORA hearing (*see People v*

Kemp, 163 AD3d 1339, 1341-1342 [3d Dept 2018], *lv denied* 32 NY3d 919 [2019]). The court thus lacked the discretion to order a downward departure (*see People v Braxdton*, 166 AD3d 665, 666 [2d Dept 2018], *lv denied* 32 NY3d 917 [2019]; *People v Johnson*, 120 AD3d 1542, 1542 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014]; *see also People v Mann*, 177 AD3d 1319, 1320 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]).

Moreover, even if defendant met his burden on the first two steps of the analysis (*see generally Gillotti*, 23 NY3d at 861), we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level does not represent an overassessment of his dangerousness and risk of sexual recidivism (*see People v Taylor*, 198 AD3d 1369, 1370 [4th Dept 2021], *lv denied* 38 NY3d 905 [2022]; *People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]; *see generally Gillotti*, 23 NY3d at 861).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

372

KA 21-00364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH HENRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 29, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and resisting arrest (§ 205.30). We affirm.

Initially, as defendant contends and the People correctly concede, defendant's purported waiver of the right to appeal is invalid. During the plea colloquy, County Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *see People v Mothersell*, 167 AD3d 1580, 1581 [4th Dept 2018]) and, therefore, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). In addition, the court's explanation that the waiver would foreclose any review by a higher court "utterly 'mischaracterized the nature of the right [that] defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]).

We reject defendant's contention that the court erred in refusing to suppress evidence recovered by the police officers. As defendant

correctly concedes, the officers' initial approach was justified by their observation that defendant was committing a parking violation by blocking pedestrian use of the sidewalk with his car (*see People v Valerio*, 274 AD2d 950, 951 [4th Dept 2000], *affd* 95 NY2d 924 [2000], *cert denied* 532 US 981 [2001]; *People v Amos*, 140 AD3d 1683, 1684 [4th Dept 2016], *lv denied* 28 NY3d 925 [2016]), which constituted "an articulable, credible reason . . . , not necessarily indicative of criminality," entitling the officers to approach defendant and request information (*People v Witt*, 129 AD3d 1449, 1450 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]; *see People v Ocasio*, 85 NY2d 982, 985 [1995]). During the ensuing inquiry, the officers determined that defendant was not lawfully present on the property on which his vehicle was partially parked, which gave them probable cause to place him under arrest for trespass (*see People v Davis*, 199 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]; *People v Caba*, 78 AD3d 857, 858 [2d Dept 2010], *lv denied* 20 NY3d 1096 [2013]; *see generally* CPL 1.20 [39]; 140.10 [2]; Penal Law § 140.05). Because the officers' arrest of defendant was justified, defendant's subsequent deliberate abandonment of contraband while forcibly resisting the arrest "was not precipitated by any illegal police conduct, and the court properly refused to suppress [that] evidence" (*Davis*, 199 AD3d at 1332 [internal quotation marks omitted]; *see People v Martinez*, 80 NY2d 444, 448-449 [1992]).

Defendant's contentions that he was unlawfully seized at the start of the police encounter because the officers blocked him in a driveway without establishing reasonable suspicion that he had committed a crime and that he was unlawfully seized when one of the officers took his identification to perform a warrant check are unpreserved for our review "[b]ecause defendant failed to raise th[ose] specific contention[s] at the suppression hearing" (*People v Simpson*, 173 AD3d 1617, 1619 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]; *see generally People v Turriago*, 90 NY2d 77, 84 [1997], *rearg denied* 90 NY2d 936 [1997]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see generally* CPL 470.15 [3] [c]).

Defendant further contends that he received ineffective assistance of counsel because defense counsel failed at the suppression hearing to cross-examine the testifying officers regarding statements they made in the police reports purportedly establishing that the police encounter was unlawful from its inception inasmuch as the officers blocked defendant's vehicle with their patrol vehicle before they had reasonable suspicion that defendant had committed a crime (*see generally People v Jennings*, 45 NY2d 998, 999 [1978]; *People v Suttles*, 171 AD3d 1454, 1455 [4th Dept 2019]; *People v Layou*, 71 AD3d 1382, 1383 [4th Dept 2010]). Although defendant's contention survives his guilty plea (*see generally People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]), it is without merit. "[E]ven a single error or failure to make an argument may amount to ineffective assistance of counsel, despite otherwise competent representation, where that error is sufficiently egregious or prejudicial" (*People v Allen*, 184 AD3d 1076, 1079 [4th Dept 2020];

see generally People v McGee, 20 NY3d 513, 518 [2013]; *People v Turner*, 5 NY3d 476, 480 [2005]). "To rise to that level, the omission must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*McGee*, 20 NY3d at 518; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). However, defense counsel's efforts should not be second-guessed with the clarity of hindsight simply to determine how the defense might have been more effective (*see People v Murray*, 194 AD3d 1360, 1362 [4th Dept 2021]).

Here, we conclude that defendant's contention is based on mere "[s]peculation that a more vigorous cross-examination might have" undermined the credibility of the police officers (*People v Parson*, 122 AD3d 1441, 1443 [4th Dept 2014], *affd* 27 NY3d 1107 [2016] [internal quotation marks omitted]; *see People v Williams*, 110 AD3d 1458, 1459-1460 [4th Dept 2013], *lv denied* 22 NY3d 1160 [2014]). The statements in the police reports do not present a clear-cut inconsistency with the officers' hearing testimony, and therefore any error failing to cross-examine the officers on the subject is not so egregious or prejudicial that defendant was deprived of meaningful representation (*see McGee*, 20 NY3d at 518; *People v Lovette*, 188 AD3d 1726, 1727-1728 [4th Dept 2020], *lv denied* 36 NY3d 1051 [2021]). In addition, defendant failed to demonstrate that there was no strategic or other legitimate explanation for defense counsel's failure to cross-examine the officers on the purported inconsistency between their testimony and the police reports (*see Lovette*, 188 AD3d at 1728; *see generally People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Foster*, 101 AD3d 1668, 1669-1670 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

373

CA 21-01577

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

IN THE MATTER OF GEORGE D. MAZIARZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WESTERN REGIONAL OFF-TRACK BETTING CORPORATION,
RESPONDENT-RESPONDENT.

MICHAEL KUZMA, BUFFALO, FOR PETITIONER-APPELLANT.

CONNORS LLP, BUFFALO (REBECCA F. IZZO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered March 25, 2021. The order, among other things, denied petitioner's request for attorney's fees and litigation costs.

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

Memorandum: In this CPLR article 78 proceeding to compel respondent to produce records requested by petitioner under the Freedom of Information Law ([FOIL] Public Officers Law art 6), petitioner appeals from an order that, inter alia, denied his request for attorney's fees and litigation costs. We affirm.

As relevant here, a court may assess reasonable attorney's fees and other litigation costs against an agency in a FOIL proceeding where the petitioner "has substantially prevailed, and . . . the agency failed to respond to a request or appeal within the statutory time" (Public Officers Law § 89 [4] [c] [i]; *see Matter of Purcell v Jefferson County Dist. Attorney*, 77 AD3d 1328, 1329 [4th Dept 2010]). Even if the party meets those requirements, the award of attorney's fees and litigation costs remains discretionary with the court (*see Matter of LTTR Home Care, LLC v City of Mount Vernon*, 179 AD3d 798, 800 [2d Dept 2020]). We agree with petitioner that respondent failed to respond to petitioner's FOIL appeal within the statutory time and that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) did not toll respondent's statutory time within which to respond (*see* Public Officers Law § 89 [4] [a]; *Matter of Oustatcher v Clark*, 198 AD3d 420, 421-422 [1st Dept 2021]). Nevertheless, even assuming, arguendo, that it could be said that petitioner substantially prevailed in this proceeding, we conclude that Supreme Court did not abuse its

discretion in denying petitioner's request for attorneys' fees and litigation costs inasmuch as respondent's delay was caused by the ongoing COVID-19 pandemic (*cf. Matter of Edmond v Suffolk County*, 197 AD3d 1297, 1299-1300 [2d Dept 2021]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

394

KA 17-01118

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY T. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 24, 2017. The judgment convicted defendant upon a plea of guilty of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). We agree with defendant that County Court incorrectly characterized the waiver of the right to appeal as an absolute bar to the taking of an appeal, and we therefore conclude that the colloquy was insufficient to ensure that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Nevertheless, we reject defendant's further contention that the court erred in summarily denying that part of his omnibus motion seeking to suppress, as the products of an unlawful search and seizure, a silver handgun and a backpack that defendant and a codefendant discarded while fleeing from the police. It is well settled that a motion to suppress evidence on such a ground may be summarily denied if defendant does not allege a proper legal basis for suppression or if the "sworn allegations of fact do not as a matter of law support the ground alleged" (CPL 710.60 [3] [b]; *see People v Mendoza*, 82 NY2d 415, 421 [1993]). "Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, . . . factual sufficiency [is to] be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*Mendoza*, 82 NY2d at 422; *see People v Jones*, 95 NY2d 721, 725 [2001]).

Here, the allegations in defendant's moving papers are insufficient to warrant a hearing. The information that the People provided to the defense established that a police officer, who was already present at a location due to an unrelated earlier incident, observed defendant and another man jumping over a fence while running toward the officer. When defendant saw the officer, he jumped back over the fence and ran the other way. Immediately thereafter, the officer heard a radio report of a robbery that had just occurred at the location from which defendant was first seen running. It is well settled that "a 'defendant's flight may be considered in conjunction with other attendant circumstances' in determining whether reasonable suspicion justifying a seizure exists" (*People v Pines*, 99 NY2d 525, 527 [2002], quoting *People v Martinez*, 80 NY2d 444, 448 [1992]). Consequently, the officer's observations and the radio report provided "reasonable suspicion that defendant may have been engaged in criminal activity justifying police pursuit" (*People v Cruz*, 14 AD3d 730, 732 [3d Dept 2005], *lv denied* 4 NY3d 852 [2005]). Defendant's abandonment of a weapon during that pursuit provided the police with probable cause to arrest him (*see People v Wilson*, 5 AD3d 408, 409 [2d Dept 2004], *lv denied* 2 NY3d 809 [2004]). In his moving papers, however, defendant merely alleged that he was of a different race than the description of one of the perpetrators that the victim provided in the initial robbery report. The racial characteristics of the perpetrators were not relied upon by the officers who pursued and stopped defendant, thus defendant's allegations did not contravene any of the information possessed by the officers. Therefore, in his moving papers, defendant failed to "raise a factual dispute on a material point which must be resolved before the court [could] decide the legal issue" (*People v White*, 192 AD3d 1539, 1539 [4th Dept 2021] [internal quotation marks omitted]; *see Mendoza*, 82 NY2d at 422; *People v Davis*, 142 AD3d 1387, 1387 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

420

CA 21-01591

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

ROBERT STERN, PLAINTIFF-APPELLANT,

V ORDER

GOLUB CORPORATION, PRICE CHOPPER OPERATING CO., INC., GOLUB CORP., DOING BUSINESS AS PRICE CHOPPER (STORE #172) AND JOHN L. BETSEY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

ROBERT STERN, PLAINTIFF-APPELLANT PRO SE.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GOLUB CORPORATION, PRICE CHOPPER OPERATING CO., INC., AND GOLUB CORP., DOING BUSINESS AS PRICE CHOPPER (STORE #172).

JOHN L. BETSEY, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 12, 2021. The order denied in part the motion of plaintiff seeking, inter alia, to compel disclosure of certain documents.

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

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

421

CA 21-01598

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

ROBERT STERN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOLUB CORPORATION, PRICE CHOPPER OPERATING CO., INC., GOLUB CORP., DOING BUSINESS AS PRICE CHOPPER (STORE #172) AND JOHN L. BETSEY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

ROBERT STERN, PLAINTIFF-APPELLANT PRO SE.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GOLUB CORPORATION, PRICE CHOPPER OPERATING CO., INC., AND GOLUB CORP., DOING BUSINESS AS PRICE CHOPPER (STORE #172).

JOHN L. BETSEY, DEFENDANT-RESPONDENT PRO SE.

Appeal from an amended order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 13, 2021. The amended order, among other things, denied in part the motion of plaintiff seeking, inter alia, to compel disclosure of certain documents.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries allegedly arising from an incident in which he was struck by a motorized shopping cart operated by defendant John L. Betsey while inside a Price Chopper supermarket owned and operated by one or more of the other defendants (Price Chopper defendants). Thereafter, plaintiff, pro se, moved for an order, inter alia, compelling the production by defendants of expanded bills of particulars and certain discovery materials. Plaintiff, pro se, now appeals from an amended order that, inter alia, denied most of his requests concerning the production of expanded bills of particulars and discovery materials. We affirm.

Initially, we note that plaintiff’s contentions concerning other motions, in which he apparently sought summary judgment and sanctions for spoliation of evidence, which Supreme Court specifically stated in the amended order were not being resolved therein, are not properly before us. Even assuming, arguendo, that the court should have

addressed the other motions in the amended order on appeal, we conclude "that the appropriate procedural vehicle to address such a failure would have been a CPLR article 78 proceeding to compel the court to render a decision on [those] motions" (*Miller v Lanzisera*, 273 AD2d 866, 867 [4th Dept 2000], *appeal dismissed* 95 NY2d 887 [2000], *reconsideration denied* 96 NY2d 731 [2001]; *see Matter of State of New York v Boutelle*, 85 AD3d 1607, 1608 [4th Dept 2011]).

Contrary to plaintiff's contention, the court properly denied his present motion insofar as it sought an order directing defendants to supply more detailed responses to his demands for bills of particulars. It is well settled that "[t]he purpose of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial; it is not an evidence-gathering device" (*Mayer v Hoang*, 83 AD3d 1516, 1517 [4th Dept 2011] [internal quotation marks omitted]; *see Khoury v Chouchani*, 27 AD3d 1071, 1072 [4th Dept 2006]).

Contrary to plaintiff's further contention, the court properly denied the motion insofar as it sought to compel the Price Chopper defendants to provide additional discovery. "Although CPLR 3101 (a) provides for 'full disclosure of all matter material and necessary in the prosecution or defense of an action,' it is well settled that a party need not respond to discovery demands that are overbroad" (*Kregg v Maldonado*, 98 AD3d 1289, 1290 [4th Dept 2012]; *see Battease v State of New York*, 129 AD3d 1579, 1580 [4th Dept 2015]). We conclude that plaintiff's demands for reports of every motorized shopping cart accident in every Price Chopper store for the 10 years preceding the accident and for the Price Chopper defendants' entire claim file were properly denied as overbroad (*see generally Matter of Greenfield v Board of Assessment Review for Town of Babylon*, 106 AD3d 908, 909 [2d Dept 2013]; *Kregg*, 98 AD3d at 1290).

Finally, we reject plaintiff's contention that the court abused its discretion in denying his motion insofar as it sought to compel production of Betsey's medical records. Plaintiff failed to meet his burden of establishing that Betsey's medical condition is "in controversy" (CPLR 3121 [a]; *see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *Robinson v State of New York*, 103 AD3d 1247, 1248 [4th Dept 2013]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

424

CA 21-01025

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

STEPHEN A. PANARO, PH.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ATHENEX, INC., SUCCESSOR IN INTEREST TO KINEX PHARMACEUTICALS, INC., FORMERLY KNOWN AS QUADPHARMA, LLC, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (TRISTAN D. HUJER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered July 9, 2021. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment dismissing the fifth cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendant, his former employer, and sought monetary damages and declaratory and injunctive relief arising from his termination and related events. Defendant appeals from an order denying in part its motion seeking, inter alia, summary judgment dismissing the amended complaint and summary judgment on certain counterclaims that were asserted in its answer to the amended complaint. We agree with defendant that the fifth cause of action is moot, and that Supreme Court therefore erred in denying the motion insofar as it sought summary judgment dismissing that cause of action (*see generally Hughes v Gates*, 217 AD2d 966, 967 [4th Dept 1995]). We thus modify the order accordingly. Defendant's assertion that the court should have granted judgment in its favor on the third counterclaim is unpreserved for our review inasmuch as defendant never sought such relief in its motion papers. We have considered and rejected defendant's remaining contentions.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

432

KA 18-01850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONYELL J. MCKENZIE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONYELL J. MCKENZIE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered August 24, 2017. The judgment convicted defendant upon a nonjury 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 after a nonjury trial of murder in the second degree (Penal Law § 125.25 [1]). In the first of defendant's two prior appeals arising from this incident, we affirmed a judgment convicting him upon a jury verdict of that crime (*People v McKenzie*, 81 AD3d 1375, 1375 [4th Dept 2011], *revd* 19 NY3d 463 [2012]). In reversing this Court's order, the Court of Appeals ordered a new trial based on its conclusion that defendant was entitled to a jury instruction on the affirmative defense of extreme emotional disturbance (EED) (*McKenzie*, 19 NY3d at 469). In defendant's second prior appeal, from his conviction of the same crime after the retrial, this Court concluded that defendant had been deprived of his right to counsel because defense counsel permitted defendant to decide whether to exercise a peremptory challenge against a prospective juror, and we therefore reversed the judgment and granted defendant another new trial (*People v McKenzie*, 142 AD3d 1279, 1280 [4th Dept 2016]). That retrial resulted in the conviction from which defendant now appeals.

To the extent that defendant contends in his main and pro se supplemental briefs that the evidence is legally insufficient to support the conviction because the People did not disprove the defense of justification beyond a reasonable doubt and because he established the EED affirmative defense by a preponderance of the evidence, those

contentions are unpreserved for our review inasmuch as defendant failed to move for a trial order of dismissal on those grounds (*see People v Fafone*, 129 AD3d 1667, 1668 [4th Dept 2015], *lv denied* 26 NY3d 1039 [2015]; *People v Ashline*, 124 AD3d 1258, 1260 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]; *see generally People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that those contentions lack merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crime, the defense of justification and the EED affirmative defense in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contentions in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends in his main brief that, because he was not present during an exchange of emails between his attorney, the prosecutor and County Court, he was deprived of the right to be present at all material stages of the trial. We reject that contention. The exchange of emails at issue, which occurred during a break in the charge conference at which defendant was present, "concerned questions of law . . . , and thus there was no 'potential for meaningful input by' defendant during those proceedings" (*People v Russo*, 4 AD3d 777, 778 [4th Dept 2004], *lv denied* 2 NY3d 806 [2004], quoting *People v Roman*, 88 NY2d 18, 27 [1996], *rearg denied* 88 NY2d 920 [1996]; *see generally People v Fabricio*, 3 NY3d 402, 406 [2004]).

Contrary to defendant's additional contention in his main brief, the sentence is not unduly harsh or severe.

Defendant's contention in his pro se supplemental brief concerning the People's purported failure to present certain evidence to the grand jury involves matters that are outside the record on appeal and thus must be raised, if at all, by way of a CPL article 440 motion (*see People v Highsmith*, 124 AD3d 1363, 1365 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]). We have considered defendant's further contention in his pro se supplemental brief that he was deprived of effective assistance of counsel by several purported failures on the part of defense counsel and, after 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 generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

452

CAF 21-01187

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

IN THE MATTER OF MELINDA BYLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KENNETH BYLER AND MARY BYLER,
RESPONDENTS-RESPONDENTS.

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

AVERY S. OLSON, JAMESTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered August 5, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded respondent Mary Byler sole custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, determined following a hearing that respondent Mary Byler (aunt), the subject children's paternal aunt, established extraordinary circumstances, ordered that it was in the best interests of the children to remain in the care of the aunt, awarded the aunt sole custody and physical placement of the children, and awarded the mother visitation in the form of weekly video/electronic communication with the children. We affirm.

" '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]). That rule " 'applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist' " (*Matter of Wolfford v Stephens*, 145 AD3d 1569, 1570 [4th Dept 2016]; *see Byler*, 185 AD3d at

1404; *Orlowski*, 147 AD3d at 1446). " 'Examples of extraordinary circumstances found by courts include prolonged separation, disruption of custody for a prolonged period of time and attachment of the child to the custodian . . . , sibling separation . . . , psychological bonding of the child to the custodian and potential harm to the child . . . , the biological parent's abdication of parental rights and responsibilities . . . and the child's poor relationship with the biological parent' " (*Matter of Hilkert v Parsons-O'Dell*, 187 AD3d 1675, 1676 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]).

The mother contends that Family Court erred in determining that extraordinary circumstances existed, thereby warranting an inquiry into the best interests of the children, because the evidence at the hearing was insufficient to meet the aunt's burden. We reject that contention. Preliminarily, contrary to the mother's assertion, the court's "determination to credit the [aunt's] testimony over the mother's in determining the existence of extraordinary circumstances is entitled to great deference" and, here, we see no reason to disturb that credibility determination (*Matter of Johnson v Wellington*, 185 AD3d 1549, 1549-1550 [4th Dept 2020]; *see Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]). As a further preliminary matter, we reject the mother's challenge to the admission at the hearing of threatening text messages and website posts made by her inasmuch as she waived that challenge by stipulating to the admission of that evidence (*see Matter of DeViteri v Saldana*, 95 AD3d 1221, 1222 [2d Dept 2012]). Additionally, the court did not err in according that evidence appropriate weight after crediting the hearing proof that the mother was the sender of the text messages and the author of the website posts (*see generally People v Tucker*, 200 AD3d 1584, 1586 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]; *Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]; *Matter of Colby II. [Sheba II.]*, 145 AD3d 1271, 1273 [3d Dept 2016]).

With respect to the substance of the court's extraordinary circumstances determination, we reject the mother's assertion that the court improperly relied upon the approximately five-year separation between the mother and the children. It is well established that " 'the child may be so long in the custody of the nonparent' that separation from the natural parent amounts to an extraordinary circumstance, especially when 'the psychological trauma of removal is grave enough to threaten destruction of the child' " (*Matter of Male Infant L.*, 61 NY2d 420, 428 [1984], quoting *Bennett*, 40 NY2d at 550). Conversely, however, when "the separation between the natural parent and child is not in any way attributable to a lack of interest or concern for the parental role, that separation does not amount to an extraordinary circumstance and, indeed, deserves little significance" (*id.* at 429; *see Matter of Dickson v Lascaris*, 53 NY2d 204, 209-210 [1981]; *Matter of Cote v Brown*, 299 AD2d 876, 877-878 [4th Dept 2002]). Here, while the mother characterizes her filing of more than 85 petitions as legitimate attempts to regain custody of the children during the approximately five years that they were living with the aunt, that characterization is refuted by the record. The court found that the mother's numerous petitions, only a few of which raised issues that fell within the jurisdiction of Family Court, constituted

abusive and harassing litigation that unfairly burdened the aunt by requiring her to appear to avoid default, thereby justifying its imposition of judicial screening for any future petitions. The mother does not challenge that finding on appeal. The mother's numerous petitions are therefore appropriately viewed as abusive and vexatious litigation rather than "serious attempts to regain custody or resume a parental role in the child[ren's] li[ves]" (*Orlowski*, 147 AD3d at 1447; *cf. Dickson*, 53 NY2d at 209-210; *Cote*, 299 AD2d at 877-878).

In any event, even if the prolonged separation alone is entitled to little significance here, the combination of that factor along with others present on this record sufficiently establish the existence of extraordinary circumstances. Although the mother would have us review the factors as though each was the only one present, we note that "[t]he extraordinary circumstances analysis must consider 'the cumulative effect' of all issues present in a given case and not view each factor in isolation" (*Matter of Pettaway v Savage*, 87 AD3d 796, 797 [3d Dept 2011], *lv denied* 18 NY3d 801 [2011]). We conclude that the aunt met her burden of establishing that extraordinary circumstances existed based upon the cumulative effect of, among other things, the mother's voluntary relinquishment of physical custody of the children, the subsequent protracted separation between the mother and the children, the psychological bonding of the children to the aunt and potential harm to the children if removed from the aunt's custody, the mother's failure to adequately address her ongoing mental health issues and, importantly, the series of incidents in which the mother engaged in erratic, unstable, threatening, and psychologically abusive behavior and communication directed at the children that justifiably rendered the children fearful of the mother (*see Hilkert*, 187 AD3d at 1676; *Matter of Cheryl YY. v Cynthia YY.*, 152 AD3d 829, 833 [3d Dept 2017]; *Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568 [4th Dept 2016], *lv denied* 28 NY3d 916 [2017]; *Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101 [4th Dept 2006], *lv denied* 7 NY3d 711 [2006]).

With respect to the court's custody and visitation determination, the mother does not dispute that it is in the best interests of the children to remain in the custody of the aunt. Instead, the mother challenges only the court's determination to replace the provision of the prior order providing for in-person supervised visitation twice per week with supervised video or electronic communication once per week, which would continue even after the mother's release from jail, where she had been placed following her arrest during the pendency of this proceeding (*see Matter of Magana v Santos*, 70 AD3d 1208, 1209-1210 [3d Dept 2010]). We conclude that the mother's challenge lacks merit. Even assuming, arguendo, that the court did not set forth sufficient findings with respect to the best interests of the children on the issue of the mother's visitation, we conclude that reversal is not thereby warranted inasmuch as the record is adequate for us to make a best interests determination, and the record supports the result reached by the court (*see Matter of Unczur v Welch*, 159 AD3d 1405, 1406 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Montalbano v Babcock*, 155 AD3d 1636, 1638 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]). In particular, the credible evidence that

the mother's prior in-person supervised visitation was already discontinued, coupled with the mother's erratic and threatening behaviors, including repeatedly appearing uninvited at the aunt's house while approaching or communicating with the children in a manner that caused them genuine fear, provides a sound and substantial basis supporting the court's determination to limit the mother's visitation to weekly supervised video or electronic communication only (*see Matter of Erica S. [Nancy R.E.—Michael A.S.]*, 135 AD3d 864, 865-866 [2d Dept 2016]).

Finally, the mother also seeks to challenge the court's determination that the aunt met her burden on her separate petition pursuant to Family Court Act article 8 of establishing that the mother committed family offenses. Despite the fact that the order of protection issued on the aunt's family offense petition, which constitutes the order of disposition in the article 8 proceeding (*see* Family Ct Act § 841 [d]; *see also* § 1112 [a]), clearly advised the mother of her obligation to timely appeal from that order (*see* § 1113), the mother failed to file a notice of appeal from the order of protection and, thus, her challenge to the court's determination that she committed family offenses is not properly before us (*see Matter of Gardner v Gardner*, 69 AD3d 1243, 1244 n 1 [3d Dept 2010]; *Matter of Houck v Garraway*, 293 AD2d 782, 783 n 2 [3d Dept 2002]). The mother's contention that the family offense determination is nonetheless properly raised under the circumstances of this appeal is without merit.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

483

TP 21-01831

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

IN THE MATTER OF DARRYL SHELTON, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered December 27, 2021) to review a determination of respondent. The determination found, after a tier III hearing, that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul that part of a determination, following a tier III disciplinary hearing, that he violated inmate rules 113.33 (7 NYCRR 270.2 [B] [14] [xxiii] [drug possession]), 113.34 (7 NYCRR 270.2 [B] [14] [xxiv] [conspiracy to introduce narcotics or marihuana into the facility]), 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]), and 180.11 (7 NYCRR 270.2 [B] [26] [ii] [facility correspondence violation]).

We conclude that, contrary to petitioner's contention, the misbehavior report, the testimony at the hearing, the evidence concerning tape recorded conversations, and the confidential testimony and information considered by the Hearing Officer together constitute substantial evidence that petitioner violated the subject inmate rules (*see Matter of Moore v Venettozzi*, 138 AD3d 1288, 1288 [3d Dept 2016]; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]). Petitioner's denial of guilt raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Foster*, 76 NY2d at 966).

We also reject petitioner's further contention that the misbehavior report was not "sufficiently specific to enable petitioner

to present a defense" (*Matter of Jones v Fischer*, 111 AD3d 1362, 1363 [4th Dept 2013]; *see Matter of Adams v New York State Dept. of Corr. & Community Supervision*, 151 AD3d 1770, 1772 [4th Dept 2017], *appeal dismissed* 30 NY3d 1007 [2017]). Given that petitioner's misconduct was a continuing violation, "it was not improper for the correction officer to use the date that his investigation was completed as the incident date on the misbehavior report" (*Moore*, 138 AD3d at 1289; *see also Matter of Jackson v Smith*, 13 AD3d 685, 685 [3d Dept 2004], *lv denied* 4 NY3d 707 [2005]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

486

KA 19-00667

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT JACKSON, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 15, 2018. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal because County Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of that waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). To the extent that defendant's contention is based on defense counsel's alleged failure to investigate or prepare a defense, it is unreviewable on direct appeal because it involves matters outside the record (*see People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]; *People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007]). To the extent that defendant's contention survives his plea and is reviewable on direct appeal, we conclude that it lacks merit

inasmuch as the record establishes that defendant received an advantageous plea agreement, and nothing in the record suggests that defense counsel's representation was anything less than meaningful (*see Boyde*, 71 AD3d at 1443). Indeed, the record establishes that defense counsel negotiated a favorable plea resulting in the instant determinate term of 25 years' imprisonment rather than the indeterminate term of 25 years to life that could have been imposed had defendant been convicted of murder in the second degree at trial (*see People v Mack*, 31 AD3d 1197, 1198 [4th Dept 2006], *lv denied* 7 NY3d 814 [2006]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

491

CAF 21-00435

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

IN THE MATTER OF CHAD WASHINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ELMORE DAVIS, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH OF COUNSEL), FOR PETITIONER-APPELLANT.

LAURIN R. HADDAD, SYRACUSE, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered October 7, 2020 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition and vacated a temporary order of protection.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, petitioner appeals from an order that, inter alia, dismissed his family offense petition. We affirm. We reject petitioner's contention that Family Court erred in dismissing the petition. "A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113 [4th Dept 2012] [internal quotation marks omitted]; *see* Family Ct Act § 832; *Matter of Chadwick F. v Hilda G.*, 77 AD3d 1093, 1093-1094 [3d Dept 2010], *lv denied* 16 NY3d 703 [2011]). "The determination of whether a family offense was committed is a factual issue to be resolved by the [court], and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record" (*Matter of Richardson v Richardson*, 80 AD3d 32, 43-44 [2d Dept 2010]; *see Matter of Scroger v Scroger*, 68 AD3d 1777, 1778 [4th Dept 2009], *lv denied* 14 NY3d 705 [2010]). As relevant here, a person commits disorderly conduct "when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," he or she "engages in fighting or in tumultuous or threatening behavior"; "makes unreasonable noise"; or "uses abusive or obscene language, or makes an obscene gesture" in a public place (Penal Law § 240.20; *see generally*

Matter of Tucker v Miller, 138 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Shiffman v Handler*, 115 AD3d 753, 753 [2d Dept 2014]). According due deference to the court's credibility determinations (*see Tucker*, 138 AD3d at 1384; *Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188, 1189 [4th Dept 2007]), we conclude that petitioner failed to establish by a preponderance of the evidence that respondent committed acts constituting disorderly conduct (*see generally Donna E. v Michael F.*, 185 AD3d 1179, 1183 [3d Dept 2020]; *Matter of Voorhees v Talerico*, 128 AD3d 1466, 1467 [4th Dept 2015], *lv denied* 25 NY3d 915 [2015]).

Petitioner's contention that the court erred in conducting a *Lincoln* hearing is not preserved for our review (*see Matter of Mya N. [Reginald N.]*, 185 AD3d 1522, 1526 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1146 [4th Dept 2016]; *see also Matter of Francisco A. v Amarilis V.*, 198 AD3d 405, 406 [1st Dept 2021]) and, in any event, any alleged error in having the child testify in camera was harmless (*see generally Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *Matter of Gracie C. v Nelson C.*, 118 AD3d 417, 417 [1st Dept 2014]; *Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1076-1077 [3d Dept 2012]). Petitioner's contention that the court improperly viewed a video during the hearing is not supported by the record.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

506

KA 20-01351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TORRENCE JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered August 12, 2020. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree (two counts), criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). We reject that contention.

Initially, we note that, as of January 1, 2020 (*see* L 2019, ch 59, § 1, part KKK, § 2), "[a]n order finally denying a motion to dismiss pursuant to [CPL 30.30 (1)] shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty" (CPL 30.30 [6]; *cf. People v O'Brien*, 56 NY2d 1009, 1010 [1982]; *People v Butler*, 170 AD3d 1496, 1496-1497 [4th Dept 2019]). Here, defendant's challenge to the denial of his statutory speedy trial motion is reviewable on appeal inasmuch as the judgment on appeal was rendered after the effective date of that statute (*cf. People v George*, 199 AD3d 831, 832 [2d Dept 2021], *lv denied* 38 NY3d 927 [2022]; *People v Lara-Medina*, 195 AD3d 542, 542 [1st Dept 2021], *lv denied* 37 NY3d 993 [2021]; *People v Duggins*, 192 AD3d 191, 194-195 [3d Dept 2021], *lv denied* 36 NY3d 1096 [2021]).

Nevertheless, we conclude that defendant's challenge to the denial of his motion lacks merit. "Where, as here, a felony is included in an indictment, the People must be ready for trial within six months, after subtracting excludable time" (*People v Barden*, 27 NY3d 550, 553 [2016]; *see* CPL 30.30 [1] [a]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018], quoting *People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]). " '[P]ostreadiness delay may be charged to the People when the delay is attributable to their inaction and directly implicates their ability to proceed to trial' " (*People v Fulmer*, 87 AD3d 1385, 1385 [4th Dept 2011], *lv denied* 18 NY3d 994 [2012], quoting *People v Carter*, 91 NY2d 795, 799 [1998]).

Here, the People announced their readiness for trial within one month of the commencement of the statutory period. Nevertheless, defendant contends that the postreadiness period from March 18, 2019, to December 9, 2019, is chargeable to the People because that delay was caused by adjournments necessitated by the People's inability to obtain certain new evidence, i.e., his fingerprints in a useable form, and thus the statement of readiness was illusory. We conclude, however, that "[a]lthough the People acquired new evidence . . . after they announced their readiness for trial, the People's statement of readiness was not illusory because the People could have proceeded to trial without the [new] evidence" (*People v Hewitt*, 144 AD3d 1607, 1607-1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *see People v Huddleston*, 196 AD3d 1098, 1100 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]; *People v Pratt*, 186 AD3d 1055, 1057 [4th Dept 2020], *lv denied* 36 NY3d 975 [2020]). In any event, all except two weeks of that time "is not chargeable to the People because it was the result of '. . . continuance[s] granted by the court at the request of . . . defendant or his counsel' " (*Hewitt*, 144 AD3d at 1608, quoting CPL 30.30 [4] [b]; *see People v Yampierre*, 300 AD2d 419, 419 [2d Dept 2002], *lv denied* 99 NY2d 634 [2003]; *cf. generally People v Liotta*, 79 NY2d 841, 843 [1992]).

The sentence is not unduly harsh or severe.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

507

KA 17-00124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN GO, DEFENDANT-APPELLANT.

MATTHEW K. BOROWSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Michael F. Pietruszka, J.), dated January 3, 2017. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 seeking to vacate a judgment convicting him, upon his plea of guilty, of attempted arson in the third degree (Penal Law §§ 110.00, 150.10 [1]). Defendant, who is not a United States citizen, contends that he was denied effective assistance of counsel under the Federal Constitution based on defense counsel's affirmative misadvice to him regarding the immigration consequences of his guilty plea. In support of the motion, defendant's attorney on the motion averred that defense counsel had given advice that was consistent with an assumption that the crime that defendant was pleading guilty to was a crime of moral turpitude within the meaning of the Immigration and Nationality Act (INA), for which an immigration judge could grant a cancellation of removal, when in actuality defendant was pleading guilty to an aggravated felony under the INA that would almost certainly result in deportation.

Where, as here, a defendant asserts that he or she was denied effective assistance of counsel under the Federal Constitution, he or she must meet the two-part standard set forth in *Strickland v Washington* (466 US 668, 687 [1984]). First, the defendant "must show that counsel's representation fell below an objective standard of reasonableness" (*id.* at 688). Second, the defendant must show prejudice, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different" (*id.* at 694). In the plea context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial" (*Hill v Lockhart*, 474 US 52, 59 [1985]; *see People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014]).

In *Padilla v Kentucky* (559 US 356, 363-371 [2010]), the United States Supreme Court applied the *Strickland* two-part test to a claim of ineffective assistance of counsel based on defense counsel's alleged inadequacy in advising the defendant of the immigration consequences of his guilty plea. The Court held that a defense counsel " 'must advise [his or] her client regarding the risk of deportation,' but the Court also cautioned that counsel's duty 'is more limited' where the 'deportation consequences of a particular plea are unclear or uncertain' " (*Hernandez*, 22 NY3d at 975, quoting *Padilla*, 559 US at 367, 369).

At the time defendant pleaded guilty, the Second Circuit had held "that a conviction under New York Penal Law §§ 110[.00] and 150.10 constitutes an aggravated felony . . . , rendering an alien ineligible for cancellation of removal" and, after defendant pleaded guilty, the Second Circuit's judgment was affirmed by the United States Supreme Court (*Torres v Holder*, 764 F3d 152, 159 [2d Cir 2014], *affd sub nom. Torres v Lynch*, 578 US 452 [2016]). The People assert that the deportation consequences of defendant's guilty plea were not easily determined by the terms of the applicable federal statute and that it was not until the Second Circuit's judgment was affirmed that it became clear that attempted arson in the third degree, as defined by New York's Penal Law, is an aggravated felony under the INA. When removal consequences are unclear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences" (*Padilla*, 559 US at 369; *see People v Castro*, 133 AD3d 986, 987 [3d Dept 2015]; *People v Dealmeida*, 124 AD3d 1405, 1406 [4th Dept 2015]). Here, however, defense counsel did not simply advise defendant that he may be deported but instead affirmatively misadvised defendant regarding the immigration consequences of his plea by telling defendant that his risk of deportation "diminish[ed]" because "the crime occurred beyond five years of him obtaining his green card." That was incorrect advice inasmuch as defendant was pleading guilty to a crime that was an aggravated felony under governing federal law (*see Torres*, 764 F3d at 159), and he was thus ineligible for cancellation of removal (*see* 8 USC § 1229b [a] [3]; *Torres*, 764 F3d at 155, 159). Where, as here, defense counsel gives incorrect advice regarding the immigration consequences of a guilty plea, that constitutes ineffective assistance under the first prong of *Strickland* (*see Padilla*, 559 US at 369; *People v McDonald*, 1 NY3d 109, 114-115 [2003]; *People v Bennett*, 139 AD3d 1350, 1351 [4th Dept 2016]), and we thus conclude that County Court erred in concluding otherwise.

With respect to the second prong under *Strickland*, the People assert, as an alternative ground for affirmance, that defendant failed

to make a prima facie showing of prejudice inasmuch as he did not submit an affidavit in support of the motion stating that, but for defense counsel's error, he would not have pleaded guilty (*see* CPL 440.30 [1] [a]; [4] [b]; *People v Dogan*, 37 NY3d 1007, 1007-1008 [2021]; *People v Delorbe*, 35 NY3d 112, 121 [2020]). The court, however, did not deny the motion on that ground, and we are thus precluded by *People v Concepcion* (17 NY3d 192, 194-196 [2011]) from affirming on the ground that defendant failed to sufficiently allege prejudice (*see People v Bailey* [appeal No. 2], 129 AD3d 1493, 1495-1496 [4th Dept 2015]; *People v Abuhamra*, 107 AD3d 1630, 1630-1631 [4th Dept 2013], *lv denied* 22 NY3d 1038 [2013]; *People v Santana*, 101 AD3d 1664, 1664 [4th Dept 2012], *lv denied* 20 NY3d 1103 [2013]).

We therefore reverse the order and remit the matter to County Court for a hearing with respect to prejudice, i.e., whether there is a reasonable probability that, but for counsel's misadvice regarding the immigration consequences of defendant's plea, he would not have pleaded guilty and would have insisted on going to trial.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

566

KA 21-00746

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS ST. DENIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered May 4, 2016. The judgment convicted defendant upon a plea of guilty of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We agree with defendant that his waiver of the right to appeal is invalid because Supreme Court's oral colloquy used overbroad language that mischaracterized the wavier as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v DeMarco*, 191 AD3d 1428, 1428 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]; *People v Shantz*, 186 AD3d 1076, 1077 [4th Dept 2020]). We nevertheless conclude that the sentence is not unduly harsh or severe. Finally, the certificate of conviction and the uniform sentence and commitment form incorrectly reflect that defendant was sentenced as a second felony offender and must be amended to reflect that he was sentenced as a second violent felony offender (*see People v Seymore*, 188 AD3d 1767, 1770 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

568

KA 19-01859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALEC M. SPANN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered June 27, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and criminally using drug paraphernalia in the second degree (two counts).

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

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

569

KA 18-00464

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILTON A. BROWN, JR., DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (HELEN SYME 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 January 19, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from a traffic stop of a vehicle in which he was a passenger and the subsequent search of the vehicle. Preliminarily, as defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Supreme Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Although defendant's purported appeal waiver is not enforceable, we nevertheless conclude that his contention concerning the scope of the search of the vehicle is not preserved for our review inasmuch as he failed to raise that contention in his motion papers or at the suppression hearing (*see People v Lanaux*, 156 AD3d 1459, 1460 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]). We decline to exercise our

power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

571

KA 21-00784

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS ST. DENIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered May 4, 2016. The judgment convicted defendant upon his plea of guilty of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [1]). We agree with defendant that his waiver of the right to appeal is invalid because Supreme Court's oral colloquy used overbroad language that mischaracterized the wavier as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v DeMarco*, 191 AD3d 1428, 1428 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]; *People v Shantz*, 186 AD3d 1076, 1077 [4th Dept 2020]). We nevertheless conclude that the sentence is not unduly harsh or severe. Finally, the certificate of conviction and the uniform sentence and commitment form incorrectly reflect that defendant was sentenced as a second felony offender and must be amended to reflect that he was sentenced as a second violent felony offender (*see People v Seymore*, 188 AD3d 1767, 1770 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

573

KA 20-00073

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BAEK, DEFENDANT-APPELLANT.

EMILY E. STOUFER-QUINN, NUNDA, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered October 17, 2019. The appeal was held by this Court by order entered July 16, 2021, decision was reserved and the matter was remitted to Allegany County Court for further proceedings (196 AD3d 1112 [4th Dept 2021]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the indictment is dismissed with leave to the People to re-present the charge to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of rape in the third degree (Penal Law § 130.25 [3]). Although we addressed the merits of most of defendant's contentions on a prior appeal, we held the case, reserved decision and remitted the matter to County Court for a ruling on that part of defendant's omnibus motion seeking dismissal of the indictment on the ground that "the indictment, as amplified by the bill of particulars, [was] facially duplicitous" (*People v Baek*, 196 AD3d 1112, 1112 [4th Dept 2021]).

We agree with defendant that the court, on remittal, erred in refusing to dismiss the indictment. Because the sole count of the indictment charged only one offense, as required by CPL 200.30 (1) (*see People v Bauman*, 12 NY3d 152, 154 [2009]), the indictment on its face was not duplicitous. It is well settled, however, that indictments charging one offense per count can be rendered duplicitous by, among other things, a bill of particulars alleging more than one offense per count (*see People v Beauchamp*, 74 NY2d 639, 640-641 [1989]; *People v Algarin*, 166 AD2d 287, 287-288 [1st Dept 1990]). Here, the bill of particulars alleged that defendant engaged in two separate and distinct acts of nonconsensual sexual intercourse with the victim. The second such act allegedly occurred more than three hours after the first act. Thus, while the indictment charged only one criminal act, the jury heard evidence at trial of two criminal acts, with no specification from the court or the prosecutor as to

which act they were to consider when rendering a verdict.

Even if the trial evidence narrowed the scope of defendant's allegedly illegal conduct, and here it did not, that "is irrelevant. Defendant was entitled to pretrial notice of the charges so that he would be able to adequately prepare a defense" (*Beauchamp*, 74 NY2d at 641 [emphasis omitted]; *see generally People v Keindl*, 68 NY2d 410, 417 [1986], *rearg denied* 69 NY2d 823 [1987]).

We thus reverse the judgment and dismiss the indictment with leave to the People to re-present the charge to another grand jury.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

576

KA 18-00697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTINARRA SEALEY, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 9, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of one felony count of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and two misdemeanor counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). We affirm.

Defendant challenges the voluntariness of the plea on the ground that, although County Court advised him of its aggregate sentencing promise—a specified determinate sentence of imprisonment and period of postrelease supervision by virtue of the felony count—it failed to inform him when the misdemeanor counts were made part of the offer during the plea proceeding that it would also impose concurrent definite sentences on those counts. We conclude that defendant was required to preserve that challenge for our review because "[t]he record demonstrates that, prior to the imposition of sentence, defendant had the actual and practical ability to object and preserve the claim he now makes—[i.e.,] that his guilty plea was involuntary because of a deficient plea allocution as to the sentence promise, a direct consequence of the plea" (*People v Bush*, 38 NY3d 66, 71 [2022]; *see People v Williams*, 27 NY3d 212, 219-223 [2016]; *People v Leverich*, 140 AD3d 901, 902 [2d Dept 2016], *lv denied* 28 NY3d 1029 [2016]). However, "[b]y failing to seize upon the[ ] opportunities to object or seek additional pertinent information," defendant failed to preserve

for our review his challenge to the voluntariness of the plea (*Williams*, 27 NY3d at 223). Indeed, defendant did not move to withdraw the plea or otherwise object to the court's purported failure to apprise him of the direct consequences of the guilty plea to the misdemeanor counts (*see Bush*, 38 NY3d at 70; *Williams*, 27 NY3d at 214, 222; *Leverich*, 140 AD3d at 902). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

577

KA 20-00787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD HILL, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.) rendered February 19, 2020. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree and assault on a police officer.

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 sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and assault on a police officer (§ 120.08), defendant contends that his waiver of the right to appeal is unenforceable. We agree. The waiver is "unenforceable because County Court mischaracterized it as an absolute bar to a direct appeal" (*People v Smith*, 203 AD3d 1566, 1566 [4th Dept 2022], *lv denied* 38 NY3d 1010 [2022]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Martin*, 202 AD3d 1445, 1445 [4th Dept 2022]). Because the court provided defendant with erroneous information about the scope of the waiver of the right to appeal and failed to identify that certain rights would survive the waiver, we conclude that the colloquy was insufficient to ensure that the waiver was knowingly and voluntarily made (*see People v Clark*, 191 AD3d 1471, 1472 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *People v Crogan*, 181 AD3d 1212, 1212-1213 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]; *see generally Thomas*, 34 NY3d at 564-567). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

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

578

KA 21-01008

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES TORRANCE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered July 6, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]), defendant contends that his waiver of the right to appeal is invalid and that the sentence imposed is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

580

KA 15-02163

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASPAR S. THOMAS, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Francis A. Affronti, J.), rendered February 10, 2015. The appeal was held by this Court by order entered February 1, 2019, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (169 AD3d 1451 [4th Dept 2019]). The proceedings were held and completed (Judith A. Sinclair, J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of five counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a], [b]). We previously held this case, reserved decision, and remitted the matter to Supreme Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (3) and, if so, whether defendant should be afforded youthful offender status (*People v Thomas*, 169 AD3d 1451, 1452 [4th Dept 2019]). Upon remittal, the court found that defendant was not an eligible youth upon his conviction of an armed felony offense inasmuch as there were no mitigating circumstances that bore directly on the manner in which the crime was committed and, although defendant was not the sole participant in the crime, his participation was not relatively minor (*see* CPL 720.10 [2] [a] [ii]; [3]). Contrary to defendant's contention, the court did not abuse its discretion in concluding that defendant was not an eligible youth and therefore denying defendant youthful offender treatment (*see People v Williams*, 197 AD3d 975, 976 [4th Dept 2021], *lv denied* 37 NY3d 1062 [2021]; *People v Gonzalez*, 185 AD3d 1436, 1436-1437 [4th Dept 2020], *lv denied* 35 NY3d 1094 [2020]).

Defendant's further contention that the sentence is unduly harsh and severe was not raised when this appeal was initially heard and may

not be raised for the first time following our remittal (*see People v Muridi M.*, 140 AD3d 1642, 1643 [4th Dept 2016], *lv denied* 28 NY3d 934 [2016]; *see also People v Reid*, 97 AD3d 1037, 1038-1039 [3d Dept 2012], *lv denied* 19 NY3d 1104 [2012]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

583

KA 19-01533

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ENNIS E. RUFFIN, SR., DEFENDANT-APPELLANT.

ENNIS E. RUFFIN, SR., DEFENDANT-APPELLANT PRO SE.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (IAN D. ARTIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered December 10, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree.

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

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

585

KA 21-00859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUSTUS HOLMES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 24, 2020. The judgment convicted defendant, upon a plea of guilty, of attempted murder in the second degree, assault in the first degree, assault in the second degree and criminal possession of a weapon in the second degree.

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

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court