SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 17, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED NOVEMBER 17, 2023

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_____	622	KA 22 00806	PEOPLE V M. ROBERT NEULANDER
_____	624	KA 22 00623	PEOPLE V ERIC J. WOODS
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_____	856	KA 20 01033	PEOPLE V TIMOTHY C. KEANE
_____	857	KA 20 00480	PEOPLE V MARIO TURNER, SR.
_____	859	KA 20 00410	PEOPLE V DANIEL LITTLES
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_____	862	CAF 22 01595	Mtr of BARRY G., JR.
_____	867	CAF 19 02202	SANDRA A. VATALARO V CHANTAL BIEN AIME
_____	871	CA 22 01939	SAVE MONROE AVE, INC. V TOWN OF BRIGHTON
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_____	891	CA 22 01166	STATE OF NEW YORK V NATHAN E.
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_____	893	CA 22 01928	ALBERT J. V STATE OF NEW YORK

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

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KA 18-01613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA BURNS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered August 9, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's initial contention, County Court did not err in granting the People's request to dismiss for cause a prospective juror who stated during voir dire that she would be distracted from the proceedings due to her impending examination for board certification in a medical field (*see People v Frierson*, 214 AD3d 1083, 1084 [3d Dept 2023], *lv denied* 40 NY3d 928 [2023]; *People v Williams*, 44 AD3d 326, 326 [1st Dept 2007], *lv denied* 9 NY3d 1010 [2007]; *cf. People v Manning*, 180 AD3d 605, 606 [1st Dept 2020]; *see generally* CPL 270.20 [1] [b]; *People v DeFreitas*, 116 AD3d 1078, 1080-1081 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]). The prospective juror's comments gave rise to a legitimate concern that her attention could be diverted from the evidence and testimony should the trial take longer than anticipated to be completed, thus conflicting with her examination and desire to study. Under the circumstances, we cannot conclude that the court abused its discretion in granting the People's for cause challenge to the prospective juror in question and replacing her with another prospective juror.

Defendant further contends that the court erred in admitting in evidence at trial autopsy photographs and portions of a recorded telephone call between defendant and another person. We reject those contentions. The autopsy photographs were properly admitted because they were not offered for the sole purpose of arousing emotions (*see*

People v Wood, 79 NY2d 958, 960 [1992]; *People v Spencer*, 181 AD3d 1257, 1261 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]). Rather, the photographs were relevant to establish defendant's intent to kill inasmuch as they helped to establish that the victim was shot directly in the face and neck from close range (*see People v Brooks*, 214 AD3d 1425, 1426-1427 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]; *Spencer*, 181 AD3d at 1261).

With respect to the recorded telephone conversation, it is well settled "that all relevant evidence is admissible unless its admission violates some exclusionary rule" (*People v Scarola*, 71 NY2d 769, 777 [1988]). Nevertheless, even relevant evidence "may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*id.*; *see People v McCullough*, 117 AD3d 1415, 1416 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014]; *see generally People v Harris*, 26 NY3d 1, 5 [2015]). Here, defendant's statements that he "kn[e]w what [he] did and [he was] sorry" and that he would not talk any further because the call was being recorded, were relevant inasmuch as they evinced a consciousness of guilt (*see People v Moore*, 118 AD3d 916, 918 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]). Further, "[a]ny ambiguity as to the defendant's intended meaning of his statements affected only the weight to be given to the recordings, not their admissibility" (*People v Sales*, 189 AD3d 1617, 1618 [2d Dept 2020], *lv denied* 36 NY3d 1123 [2021]; *see People v McKenzie*, 161 AD3d 703, 704 [1st Dept 2018], *lv denied* 32 NY3d 1113 [2018]).

We also reject defendant's contention that the People's firearms expert was not qualified to provide expert testimony. "The qualification of a witness to testify as an expert rests in the discretion of the court, and its determination will not be disturbed in the absence of serious mistake, an error of law or an abuse of discretion" (*People v Johnson*, 153 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017] [internal quotation marks omitted]; *see People v Tisdale*, 270 AD2d 917, 917 [4th Dept 2000], *lv denied* 95 NY2d 839 [2000]).

A proposed "expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]; *see People v Wyant*, 98 AD3d 1277, 1278 [4th Dept 2012]). As we have noted, however, "[p]ractical experience may properly substitute for academic training in determining whether an individual has acquired the training necessary to be qualified as an expert" (*People v Owens*, 70 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010] [internal quotation marks omitted]; *see Wyant*, 98 AD3d at 1278). Here, the expert testified that he had a bachelor's degree in forensic science; had worked as a forensic firearms examiner for over 13 years; had been trained as a National Firearms Examiner using curriculum from the Bureau of Alcohol, Tobacco and Firearms; and had testified as a firearms expert in numerous prior cases, including cases that have

come before this Court. We therefore conclude that the court did not err in allowing that expert to testify regarding his analysis of ballistics evidence.

We further conclude that the court did not err in its response to a jury note. During deliberations, the jury sent a note requesting "[c]larification from the law." The jury note went on to ask whether, "[i]f you intend to shoot someone to cause harm but not death and that person dies would it constitute 2nd degree murder?" As a response to the note, the People requested that the court re-read the charge for murder in the second degree, but defense counsel requested that the court answer the exact question asked in the note, i.e., to respond "no" to the question. The court opted to re-read the entire instruction. Contrary to defendant's contention, the court's determination to re-read the instruction on murder in the second degree was appropriate and does not warrant reversal (*see People v Steinberg*, 79 NY2d 673, 684-685 [1992]; *People v Abdul-Jaleel*, 142 AD3d 1296, 1297-1298 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]; *People v Mobley*, 118 AD3d 1339, 1340 [4th Dept 2014], *lv denied* 24 NY3d 1121 [2015]).

We reject defendant's contention that the court erred in refusing to instruct the jury on the lesser included offense of manslaughter in the first degree. "A court 'may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed' the lesser but not the greater offense (CPL 300.50 [1]). It is undisputed that manslaughter in the first degree is a lesser included offense of second-degree murder within the meaning of CPL 1.20 (37), so 'the question simply is whether on *any* reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count and still find him guilty on the lesser one' " (*People v Hull*, 27 NY3d 1056, 1058 [2016]; *see People v Ott*, 200 AD3d 1642, 1643 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]). Given that the victim was shot in the face and neck with a shotgun fired from less than six feet away, we conclude that there is no reasonable view of the evidence that would support a finding that the shooter, be it defendant or the codefendant, intended to cause serious physical injury instead of death, which is the only distinction between murder in the second degree (Penal Law § 125.25 [1]) and manslaughter in the first degree (§ 125.20 [1]). Either the shooter intended to kill the victim, as posited by the prosecution, or it was a reckless accident, as posited by defense counsel at trial during summation (*cf. People v Joyce*, 150 AD3d 1632, 1633 [4th Dept 2017], *lv denied* 31 NY3d 1118 [2018]). Here, "[t]he element of homicidal intent c[an] be inferred from [the] act of aiming at the victim and firing a shot at very close range, striking him in the vicinity of the [face and] neck" (*People v Thompson*, 153 AD3d 433, 433 [1st Dept 2017], *lv denied* 30 NY3d 984 [2017]; *see People v Warner*, 194 AD3d 1098, 1104 [3d Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Lewis*, 93 AD3d 1264, 1267 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]).

Defendant further contends that the verdict, convicting him of murder in the second degree (Penal Law § 125.25 [1]) is against the weight of the evidence. We reject that contention. Even if the codefendant was the actual shooter, the evidence at trial established that defendant and the codefendant had "a shared intent, or community of purpose" (*People v Lora*, 192 AD3d 1488, 1488 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021] [internal quotation marks omitted]; *see* § 20.00; *People v Alcaraz-Ubiles*, 215 AD3d 1264, 1265-1266 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]). Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 22-00806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

M. ROBERT NEULANDER, DEFENDANT-APPELLANT.

SHAPIRO ARATO BACH LLP, NEW YORK CITY (ALEXANDRA A.E. SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

PAUL SKIP LAISURE, GARDEN CITY, FOR NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICUS CURIAE.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 2, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree and tampering with physical evidence.

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, following the reversal of his prior judgment of conviction and a retrial (*People v Neulander*, 162 AD3d 1763 [4th Dept 2018], *affd* 34 NY3d 110 [2019]), of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [2]). We affirm.

Defendant first contends that the evidence is legally insufficient and the verdict is against the weight of the evidence. We reject that contention. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001], quoting *People v Williams*, 84 NY2d 925, 926 [1994]).

Here, the evidence establishes that the victim, defendant's wife, died of a complex, comminuted skull fracture. The People introduced the testimony of several expert witnesses who opined that the victim's

head injury was caused by multiple blows consistent with a homicide, and that her injuries were inconsistent with a simple fall. The People also introduced evidence of blood splatter and tissue that had been found around the victim's bed, consistent with the People's theory that the victim had been killed in the bedroom and then moved to the bathroom. In addition, testimony from the housekeeper that the sheets on the victim's bed had been recently changed and that a bed pillow was missing, coupled with evidence that defendant moved the victim's body, supported the inference that defendant was acting to conceal evidence of the crime. Viewing that 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" from which the jury could find that defendant murdered his wife and then concealed evidence of that crime (*Williams*, 84 NY2d at 926).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, "[t]he jury was presented with conflicting expert testimony regarding the cause of death, and the record supports its decision to credit the People's expert testimony" (*People v Fields*, 16 AD3d 142, 142 [1st Dept 2005], *lv denied* 4 NY3d 886 [2005]).

Defendant next contends that County Court erred in granting the People's request for a missing witness instruction with respect to defendant's daughter inasmuch as she did not have direct knowledge regarding any of the issues on which defendant presented evidence. We reject that contention. A " 'missing witness' instruction allows a jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events" (*People v Savinon*, 100 NY2d 192, 196 [2003]). "[T]he instruction rests on the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause" (*id.* [internal quotation marks omitted]; *see People v Gonzalez*, 68 NY2d 424, 427 [1986]).

"The proponent [of a missing witness instruction] initially must demonstrate only three things via a prompt request for the charge: (1) 'that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) 'that such witness can be expected to testify favorably to the opposing party,' and (3) 'that such party has failed to call' the witness to testify" (*People v Smith*, 33 NY3d 454, 458-459 [2019], quoting *Gonzalez*, 68 NY2d at 427). Defendant did not call his daughter as a witness, and he concedes in his reply brief that his daughter "possessed material, non-cumulative knowledge regarding the case [and] that she was available and would be expected to testify favorably to him." We therefore conclude that the court did not abuse its discretion in giving the missing witness instruction (*see People v Macana*, 84 NY2d 173, 179-180 [1994]).

Contrary to defendant's contention, where, as here, a criminal defendant elects to either testify or "otherwise come forward with evidence at trial," a missing witness instruction may be given for any uncalled witness with knowledge of any material issue (*id.* at 177).

Defendant failed to preserve his contention that the missing witness instruction was impermissibly broad and should have been limited to a statement that the jury may infer that, if his daughter had been called as a witness, she would not have supported the defense testimony on the issue of which she possessed knowledge, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Davis*, 133 AD3d 911, 914 [3d Dept 2015]; *see generally* CPL 470.15 [6] [a]). To the extent defendant contends that the law governing the application of the missing witness instruction against criminal defendants should be changed, "it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals" (*Calcano v Rodriguez*, 91 AD3d 468, 469 [1st Dept 2012]).

Defendant further contends that the court erred by allowing the People to introduce expert testimony with respect to the victim's cause of death that was based, in part, on nonmedical evidence, including blood splatter evidence and other investigative information. We reject that contention. It is not error for a court to admit in evidence expert testimony on cause of death that is based, in part, on nonmedical evidence (*see generally People v Ramsaran*, 154 AD3d 1051, 1055 [3d Dept 2017], *lv denied* 30 NY3d 1063 [2017]; *People v Forsha*, 151 AD2d 875, 876 [3d Dept 1989], *lv denied* 74 NY2d 809 [1989]), so long as the opinion is also based, in part, "on professional or medical knowledge" (*People v Eberle*, 265 AD2d 881, 881 [4th Dept 1999]).

Defendant also contends that he was denied a fair trial through numerous acts of prosecutorial misconduct, including improper cross-examination and editorializing to the jury. Contrary to defendant's contention, the prosecutor had "some reasonable basis for believing the truth of things he was asking about" in his cross-examination of defendant's expert witness (*People v Alamo*, 23 NY2d 630, 633 [1969], *cert denied* 396 US 879 [1969]; *see People v Rouse*, 34 NY3d 269, 277 [2019]). Moreover, although the prosecutor made a number of extraneous comments during the trial, "the court sustained defendant's objection[s] and gave curative instructions [where necessary], thereby alleviating any possible prejudice" (*People v Marzug*, 280 AD2d 974, 975 [4th Dept 2001], *lv denied* 96 NY2d 904 [2001]; *see People v Chizor*, 190 AD3d 763, 763 [2d Dept 2021], *lv denied* 37 NY3d 954 [2021]). Further, the evidence against defendant was overwhelming and "without the [challenged] conduct[,] the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419 [4th Dept 1983]), and we therefore conclude that the alleged improprieties "[did] not substantially prejudice[ ] . . . defendant's trial" (*People v Galloway*, 54 NY2d 396, 401 [1981]).

Finally, contrary to defendant's contention, we conclude that the

sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

624

KA 22-00623

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC J. WOODS, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered April 4, 2022. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree (three counts), sexual abuse in the second degree (two counts), criminal sexual act in the second degree (18 counts), criminal sexual act in the third degree (17 counts) and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of sexual abuse in the first degree (Penal Law § 130.65 [4]), two counts of sexual abuse in the second degree (§ 130.60 [2]), 18 counts of criminal sexual act in the second degree (§ 130.45 [1]), 17 counts of criminal sexual act in the third degree (§ 130.40 [2]), and one count of rape in the third degree (§ 130.25 [2]), in connection with allegations that, over a period of five years, he repeatedly committed numerous sex offenses against the victim.

Defendant contends that County Court and defense counsel failed to ensure his presence in the courtroom when defense counsel waived defendant's right to a scheduled *Huntley* hearing, and that, in any event, he did not knowingly, intelligently, and voluntarily waive his entitlement to that hearing. Because those contentions rely on matters outside the record, however, we conclude that they must be raised by way of a CPL article 440 motion (*see People v Fricke*, 216 AD3d 1446, 1448 [4th Dept 2023], *lv denied* 40 NY3d 928 [2023]; *see generally People v Mahoney*, 175 AD3d 1034, 1036 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]).

Defendant's contention that the victim's testimony rendered

duplicitous several counts in the indictment is unpreserved for our review (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Riley*, 182 AD3d 1017, 1017 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020]) and, despite the People's concession with respect to count 50 of the indictment, 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 [6] [a]). By strictly adhering to the preservation requirement for issues of non-facial duplicity we simply aim to "prevent unnecessary surprise after the conduct of a complete trial," and we note that "[a]ny uncertainty [with respect to duplicity] could have easily been remedied with an objection during . . . the witness testimony, or to the jury charge" (*Allen*, 24 NY3d at 449).

Defendant contends that the evidence is legally insufficient to support his conviction of sexual abuse in the first degree under counts 11-13 of the indictment, sexual abuse in the second degree under counts 14-15 of the indictment, criminal sexual act in the second degree under counts 16-33 of the indictment, and criminal sexual act in the third degree under counts 34-48 of the indictment on the ground that the victim's testimony lacked the requisite specificity with respect to the time frame for each of those counts. Initially, contrary to the People's assertion, we conclude that the contention is preserved for our review because defendant's motion for a trial order of dismissal made the same specific argument that he now makes on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]). Inasmuch as defendant rested without presenting any evidence, he was not required to renew his motion to preserve his sufficiency contention (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction. With respect to the counts of sexual abuse in the first and second degrees, the victim's testimony established that defendant would, once a season during the relevant time frame, touch her on the breasts under the guise of giving her a massage, an account which was corroborated by defendant's statement to the police. In a similar vein, with respect to the counts of criminal sexual act in the second and third degrees, the victim's testimony amply established that defendant would, once a month during the relevant time frame for those counts, enter her bedroom and, also under the guise of giving her a massage, would engage her in oral sexual conduct, and the victim's testimony in that regard also was corroborated by defendant's statement to police (*see People v Feliciano*, 196 AD3d 1030, 1033 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]; *People v Carlson*, 184 AD3d 1139, 1140-1141 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]; *People v Lawrence*, 81 AD3d 1326, 1327 [4th Dept 2011], *lv denied* 17 NY3d 797 [2011]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to the aforementioned counts

is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even if we assume, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Kilgore*, 203 AD3d 1634, 1634-1635 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]; *see generally Bleakley*, 69 NY2d at 495). Ultimately, the jury was in the best position to assess the victim's credibility (*see People v Hunt*, 172 AD3d 1888, 1889 [4th Dept 2019], *lv denied* 34 NY3d 933 [2019]; *see generally People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]), and we perceive no reason to reject the jury's credibility determination.

Defendant's contention that the court erred in failing to provide an immediate limiting instruction with respect to certain testimony admitted in evidence under *People v Molineux* (168 NY 264 [1901]), is unpreserved for our review (*see* CPL 470.05 [2]; *People v McKoy*, 217 AD3d 1396, 1399 [4th Dept 2023]; *People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]), and 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 [6] [a]; *McKoy*, 217 AD3d at 1399).

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

628

CAF 22-00564

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

IN THE MATTER OF JAYLIN B.

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

MEMORANDUM AND ORDER

MARIAH S., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 1, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent mother appeals from an order that determined that she neglected the subject child, an infant, by, inter alia, exposing him to dangerous and unsanitary conditions in a hotel room where they had stayed for an extended period of time. When the mother was evicted from the room for failing to pay the bill, the hotel manager observed, among other things, more than 30 dirty diapers in the room, feces on the wall, sharp knives within the reach of a child and what looked like cocaine residue on a coffee table. The mother does not dispute that the conditions in the hotel room posed an imminent risk of harm to an infant, nor does she dispute that her infant son was in the room with her at some point during her month-long stay at the hotel. The mother contends, however, that the child went to visit his grandmother in Ohio approximately one week before the hotel manager entered the room and observed the dangerous conditions, and, as a result, petitioner failed to establish that the room was in a dangerous condition while the child was in the room with the mother. We reject that contention.

We note at the outset that the mother did not testify at the hearing, and Family Court thus properly drew the strongest possible

negative inference against her (*see Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1313 [4th Dept 2022]; *Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644 [4th Dept 2019]). Nor did the mother present the testimony of the grandmother who the child had allegedly visited in Ohio, or any other witnesses. The only evidence introduced at the hearing that would support the conclusion that the child visited the grandmother arose from hearsay statements in the caseworker's notes, which the mother contends should not have been admitted in evidence at the hearing. Those notes indicate that the mother refused to provide the grandmother's address to the authorities and that the grandmother, when reached by phone, refused to disclose her address as well. Such evidence raised questions of credibility concerning whether the child ever actually went to Ohio, as the mother alleged.

Additionally, the hotel manager testified that she observed the child at the hotel with the mother on several occasions, and there were many toys in the room when the mother was evicted, as well as soiled children's clothing and dirty baby bottles, suggesting that the child had recently been in the room. That evidence, together with the negative inference drawn against the mother based on her refusal to testify at the hearing, supports the court's finding that petitioner established by a preponderance of the evidence that the mother neglected the child by exposing him to the undisputedly dangerous conditions in the hotel room (*see Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463-1464 [4th Dept 2023]; *Matter of Danaryee B. [Erica T.]*, 145 AD3d 1568, 1568 [4th Dept 2016]). The mother has raised no challenge to the court's other grounds for determining that the child was a neglected child, so we deem any challenge related to those grounds abandoned (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [1994]). Thus, even if we were to agree with the mother that petitioner failed to establish that the child was in the hotel room while the room presented a danger, we would nevertheless affirm the court's neglect finding.

Contrary to the mother's further contention, she was not denied her right to due process when the court proceeded with the fact-finding hearing in her absence. "While due process of law applies in Family [Court] Act article 10 proceedings and includes the right of a parent to be present at every stage of the proceedings, that right is not absolute . . . The court is authorized to proceed despite a parent's absence, but must vacate any resulting order and permit a rehearing on motion of that parent, supported by affidavit, unless the court finds that the parent 'willfully refused to appear at the hearing' " (*Matter of Elizabeth T. [Leonard T.]*, 3 AD3d 751, 753 [3d Dept 2004], quoting Family Ct Act § 1042; *see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446-1447 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]). Inasmuch as the mother made a belated request for an in-person hearing and refused to attend the hearing virtually from the jail where she was incarcerated, we conclude that the mother willfully refused to appear at the fact-finding hearing and thus waived her right to be present (*see Malachi S.*, 195 AD3d at 1446-1447; *Matter of Ceirra L.*, 50 AD3d 1520, 1521 [4th Dept 2008]). We note that the court double-checked with a corrections officer at the jail to make sure that the mother refused to participate in the hearing.

We also reject the mother's contention that the court abused its discretion in denying her two requests for an adjournment of the hearing. The first request for an adjournment was for the incarcerated mother to meet with her attorney, and the second request for an adjournment was for the mother to present two witnesses. " '[T]he determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Logan P.G. [William G.]*, 208 AD3d 1643, 1643 [4th Dept 2022], *lv denied* 39 NY3d 909 [2023]; *see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]).

Here, although the mother was incarcerated at the time of the hearing, that hearing was held over one year after the neglect petition was filed and the mother has not offered an explanation why she and her attorney could not have conferred at any other time during that one-year period. With respect to the second request, we note that, nearly six weeks before the hearing, the court informed the parties of the hearing date and specifically informed the attorneys that they needed to "make sure that the technology [wa]s there" for the witnesses to testify remotely via Microsoft Teams or in person. During the hearing, when it was time for the mother's attorney to call the mother's witnesses, he was granted a brief adjournment to secure their virtual appearances, but returned to the court, stating that he was unable to contact either witness despite having informed them of the hearing date the week before. The court thereafter denied the request of the mother's attorney for an adjournment of the hearing to locate those witnesses. Where, as here, a party's inability to secure witnesses is due to a lack of diligence in preparing for the hearing, a court does not abuse its discretion in denying that party's request for an adjournment (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Logan P.G.*, 208 AD3d at 1643; *Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]).

Contrary to the mother's additional contention, the court did not err in admitting in evidence petitioner's case file inasmuch as the contents thereof were admissible as business records (*see* CPLR 4518 [a]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *see generally Matter of Leon RR*, 48 NY2d 117, 123 [1979]). Even assuming, arguendo, that the records contained hearsay that was not subject to the business records exception, we find any error in their wholesale admission "to be harmless . . . in light of the other evidence in admissible form that amply supports [the court's] determination" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 n 5 [3d Dept 2022], *lv denied* 39 NY3d 911 [2023]; *see Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

637

KA 19-01762

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEYONTAY BARNETT, DEFENDANT-APPELLANT.

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

DEYONTAY BARNETT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered May 14, 2019. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant's parole officer found the weapon when he and his partner arrived at the apartment where defendant was residing, for a routine home visit and curfew check, and observed signs that defendant had been consuming alcohol, which would violate the conditions of defendant's parole. The parole officers then conducted a search of the apartment, and discovered evidence of several additional parole violations, including a loaded handgun in a back bedroom of the apartment.

We reject defendant's contention in his main brief that County Court erred in refusing to suppress the handgun recovered by the parole officers. A parole officer may conduct a warrantless search where "the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty" (*People v June*, 128 AD3d 1353, 1354 [4th Dept 2015], *lv denied* 26 NY3d 931 [2015] [internal quotation marks omitted]; *see People v Huntley*, 43 NY2d 175, 181 [1977]). Here, the parole officers reasonably suspected that defendant had been consuming alcohol in violation of his parole conditions, and we conclude that their search of the apartment for evidence of other parole violations was rationally and reasonably related to the performance of their duties (*see June*, 128 AD3d at

1354; *People v Nappi*, 83 AD3d 1592, 1593-1594 [4th Dept 2011], *lv denied* 17 NY3d 820 [2011]).

Defendant contends in his main brief that his waiver of the right to a jury trial was not knowing, intelligent, and voluntary. By failing to challenge the adequacy of the allocution related to his jury trial waiver, however, defendant "failed to preserve for our review [his] challenge to the sufficiency of the court's inquiry" (*People v McCoy*, 174 AD3d 1379, 1381 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020] [internal quotation marks omitted]; *see People v Hailey*, 128 AD3d 1415, 1415-1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). In any event, we conclude that defendant's contention lacks merit inasmuch as defendant "waived [his] right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that defendant's waiver was knowing, voluntary and intelligent" (*McCoy*, 174 AD3d at 1381; *see People v Wegman*, 2 AD3d 1333, 1334 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]; *see generally People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]).

Defendant further contends in his main brief that the court erred in denying his motion to set aside the verdict based on newly discovered evidence (*see* CPL 330.30 [3]). We reject that contention inasmuch as defendant "did not establish that the evidence could not have been discovered before trial by the exercise of due diligence and would probably change the result if a new trial were granted" (*People v Carrier*, 270 AD2d 800, 802 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]; *see People v Thomas*, 136 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 27 NY3d 1140 [2016], *reconsideration denied* 28 NY3d 974 [2016]; *People v Robertson*, 302 AD2d 956, 958 [4th Dept 2003], *lv denied* 100 NY2d 542 [2003]).

Defendant additionally contends in his main brief that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In particular, the evidence presented at trial, including the presence of defendant's jacket in the bedroom where the gun was recovered, "went beyond defendant's mere presence in the residence . . . and established a particular set of circumstances from which a [finder of fact] could infer possession" (*People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017] [internal quotation marks omitted]; *see People v McGough*, 122 AD3d 1164, 1166-1167 [3d Dept 2014], *lv denied* 24 NY3d 1220 [2015]). Moreover, 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).

Finally, we have reviewed the remaining contention in the main

brief and the contentions in defendant's pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

640

KA 18-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIEL CRUZ, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 4, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and assault in the second degree (§ 120.05 [2]). The conviction arose from events in which defendant, while riding in the front passenger seat of an SUV driven by his accomplice as they pursued, through parking lots and on public roadways, a minivan that was occupied by two people known to defendant and the accomplice, leaned out of the window and fired numerous gunshots at the minivan over the course of the pursuit, thereby causing a fatal wound to the head of the passenger of the minivan (deceased victim) and a nonfatal wound to the arm of the driver of the minivan (surviving victim). We affirm.

Defendant contends that Supreme Court erred in refusing to suppress the historical cell site location information (CSLI) records related to his cell phone because, according to defendant, the search warrant that authorized law enforcement officials to obtain the CSLI records from defendant's cellular service provider was not supported by probable cause connecting defendant to the shooting. We reject that contention.

The United States Constitution provides that "[t]he right of the

people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (US Const, 4th Amend; *see also* NY Const, art I, § 12; *People v Nieves*, 36 NY2d 396, 400 [1975]). "Given the more modern appreciation that property rights are not the sole measure of Fourth Amendment violations, a person's right to privacy has become the paramount concern in assessing the reasonableness of government intrusions, especially as innovations in surveillance tools . . . ha[ve] enhanced the [g]overnment's capacity to encroach upon areas normally guarded from inquisitive eyes, and courts must continue to secure the privacies of life against arbitrary power" (*People v Schneider*, 37 NY3d 187, 192 [2021], *cert denied* — US —, 142 S Ct 344 [2021] [internal quotation marks omitted]; *see Carpenter v United States*, — US —, —, 138 S Ct 2206, 2213-2214 [2018]). "[A]n individual maintains a legitimate expectation of privacy in the record of [their] physical movements as captured through CSLI" and, therefore, "the [g]overnment must generally obtain a warrant supported by probable cause before acquiring such records" (*Carpenter*, — US at —, —, 138 S Ct at 2217, 2221; *see People v Ozkaynak*, 203 AD3d 1616, 1617 [4th Dept 2022]).

"Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but[, rather, it] merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). " '[T]he legal conclusion [as to whether probable cause existed] is to be made after considering *all* of the facts and circumstances together' . . . A synoptic evaluation is essential because '[v]iewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found' " (*People v Shulman*, 6 NY3d 1, 26 [2005], *cert denied* 547 US 1043 [2006], quoting *Bigelow*, 66 NY2d at 423). With respect to judicial review of the validity of search warrants, it is well established that "search warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest"; rather, such applications "must be considered in the clear light of everyday experience and accorded all reasonable inferences" (*People v Hanlon*, 36 NY2d 549, 559 [1975]; *see People v Griminger*, 71 NY2d 635, 640 [1988]; *People v Hightower*, 207 AD3d 1199, 1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]). Indeed, "reviewing courts should accord the process proper deference and not defeat search warrants (or discourage law enforcement officials from seeking them) by imposing overly technical requirements or interpreting them incompatibly with common sense" (*People v Cahill*, 2 NY3d 14, 41 [2003]). In that regard, "[a]pproval by a reviewing magistrate cloaks a search warrant with 'a presumption of validity' " (*People v DeProspero*, 91 AD3d 39, 44 [4th Dept 2011], *affd* 20 NY3d 527 [2013], quoting *People v Castillo*, 80 NY2d 578, 585 [1992], *cert denied* 507 US 1033 [1993]; *see People v Socciarelli*, 203 AD3d 1556, 1557-1558 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]). "In reviewing the validity of a search warrant to determine whether it

was supported by probable cause . . . , the critical facts and circumstances for the reviewing court are those which were made known to the issuing [m]agistrate at the time the warrant application was determined" (*Nieves*, 36 NY2d at 402).

Applying the requisite standard of review in this case, we conclude that the information contained in the search warrant application subscribed and sworn to by an investigating police officer, along with the supporting depositions of various witnesses submitted therewith (*see* CPL 690.35 [1], [3] [c]), was sufficient to support a reasonable belief that evidence of defendant's involvement in the shooting might be found in his CSLI records (*see People v Ozkaynak*, 217 AD3d 1376, 1377 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Harlow*, 195 AD3d 1505, 1506 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]). In his interview with the investigating police officer and in his supporting depositions, the surviving victim stated that, prior to the shooting, he had been having ongoing "issues" with a group consisting of defendant, the accomplice, and a third male. Indeed, approximately one week before the shooting, the surviving victim was struck in the head with a bottle at a party, and other partygoers informed him that defendant was the assailant. The surviving victim also reported that, on the afternoon of the shooting, after he picked up the deceased victim in a minivan, he noticed that an SUV with two occupants, whom he identified at that time as the accomplice in the driver's seat and the third male in the front passenger seat, were pursuing his minivan at a high rate of speed. As the surviving victim made unsuccessful attempts to drive away from the pursuing SUV, the occupants thereof began firing numerous gunshots at the minivan, and the gunfire continued at various points during the chase. In police interviews and supporting depositions, several bystander witnesses corroborated the details of the shooting, including by identifying the particular SUV by color, model, and license plate and by recounting that the front passenger of the SUV was firing gunshots at the minivan. The accomplice admitted in a police interview following his arrest that, on the day of the shooting, he was operating the SUV, which was registered to his cousin, and that he was accompanied by a passenger, but the accomplice declined to identify the passenger. The cousin recounted in a police interview and in a supporting deposition that, approximately 1 to 1½ hours after the time of the shooting, she received a phone call from the accomplice, who sounded scared, informing her that he had "hit somebody" and requesting that she retrieve the SUV as soon as possible. When the cousin arrived at the arranged location, she observed that defendant, whom the cousin described as a friend of the accomplice, was present with the accomplice. In response to the cousin's observation that there was no damage to the SUV despite the accomplice's claim of a vehicular accident, the accomplice responded that the SUV was not damaged because it was a large-style vehicle. The cousin further reported that the accomplice and defendant then got into a green car that was parked on the street, which may have belonged to a family member of defendant, and left the location; the cousin did not know who else was in the green car. The cousin thereafter arranged through her family members to have the SUV brought

to a salvage yard, from which the police later recovered it.

Here, although the surviving victim may have initially identified the third male as the front passenger of the SUV involved in the rapidly-developing, high-speed pursuit and shooting, we conclude, upon "considering all of the facts and circumstances together" (*Bigelow*, 66 NY2d at 423)—i.e., the ongoing and escalating feud between the surviving victim and the group including defendant, the information that defendant himself had directed violent conduct at the surviving victim approximately one week before the shooting, the accomplice's refusal to definitively identify the third male, rather than defendant, as the passenger, and defendant's presence and subsequent departure with the accomplice shortly after the shooting during an arranged dispossession, under suspicious circumstances, of the SUV that was just involved in the shooting—that "this is one of those situations where the pieces of the puzzle fit in such a manner as to support a finding of probable cause" (*People v Myhand*, 120 AD3d 970, 970 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]). While "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person" (*Ybarra v Illinois*, 444 US 85, 91 [1979], *reh denied* 444 US 1049 [1980]), here, defendant "was not merely near others suspected of criminal activity," but instead was a "person suspected of criminal activity" due to his own conduct (*People v Johnson*, 132 AD3d 1295, 1297 [4th Dept 2015], *lv denied* 27 NY3d 1134 [2016]). To the extent that defendant now challenges the sufficiency of the search warrant application on the ground that it did not adequately identify the source of the information that defendant had struck the surviving victim with a bottle at a party approximately one week before the shooting, we conclude that defendant's challenge is not preserved for our review because he " 'failed to raise that specific contention in his motion papers or at the [suppression] hearing' " (*People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014]; *see* CPL 470.05 [2]), and we decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Based on the foregoing, upon "[a]ffording great deference to the determination of the issuing [m]agistrate and reviewing the application in a common-sense and realistic fashion" (*People v Humphrey*, 202 AD3d 1451, 1451 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]), we conclude that the court did not err in determining that the search warrant for defendant's CSLI records was supported by probable cause.

Defendant next contends for the first time on appeal that he was denied his right to counsel because the police questioned him outside the presence of counsel allegedly after the criminal action had been commenced (*see generally People v Samuels*, 49 NY2d 218, 221 [1980]). "[T]he rule 'authorizing review of unpreserved constitutional right-to-counsel claims' has been applied 'only when the constitutional violation was established on the face of the record' " (*People v McLean*, 15 NY3d 117, 121 [2010], quoting *People v Ramos*, 99 NY2d 27, 37 [2002]). Here, because "the record does not make clear, irrefutably, that a right to counsel violation has occurred, the

claimed violation can be reviewed only on a post-trial motion under CPL 440.10, not on direct appeal" (*id.*). Defendant's related contention that defense counsel was ineffective in failing to pursue that theory of suppression also involves matters outside the record on appeal and thus is properly raised by way of a CPL 440.10 motion (*see People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]).

Defendant further contends that the court erred in failing to charge the jury on manslaughter in the first degree (Penal Law § 125.20 [1]) as a lesser included offense of murder in the second degree with respect to the deceased victim and on attempted assault in the second degree (§§ 110.00, 120.05 [1]) as a lesser included offense of attempted murder in the second degree with respect to the surviving victim. Even assuming, arguendo, that defendant's contention is preserved for our review in its entirety (*see generally People v Christopher D.G.*, 27 AD3d 1181, 1181 [4th Dept 2006], *lv denied* 7 NY3d 753 [2006]), we conclude that it lacks merit. The evidence at trial showed that defendant, while riding in the front passenger seat of the SUV and immediately after discussing with the accomplice the escalating feud between the groups, including the incident in which defendant struck the surviving victim with a bottle at a party and an incident a few days later in which the deceased victim allegedly fired gunshots at the third male's house, spotted the minivan he thought was occupied by the other individuals involved in the feud and thereafter leaned out of the window during the ensuing prolonged pursuit and fired several distinct rounds of numerous gunshots into the minivan, including within the confines of a parking lot, and defendant was prevented from firing additional gunshots only when the accomplice slowed the SUV and grabbed defendant by his pant leg, at which point defendant returned to the interior of the SUV from the window. Viewing the evidence " 'in the light most favorable to [the] defendant' " (*People v Rivera*, 23 NY3d 112, 121 [2014]), we conclude that "there is no reasonable view of the evidence whereby defendant intended to cause serious physical injury to th[e] victim[s] but did not intend to cause [their] death[s]" (*People v Ott*, 200 AD3d 1642, 1643 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]; *see People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Tyler*, 43 AD3d 633, 634 [4th Dept 2007], *lv denied* 9 NY3d 1010 [2007]; *cf. People v Cabassa*, 79 NY2d 722, 728-730 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]).

Relatedly, defendant contends that he was denied effective assistance of counsel on the ground that defense counsel failed to request that the court charge the jury on manslaughter in the second degree (Penal Law § 125.15 [1]) as a lesser included offense of murder in the second degree with respect to the deceased victim. We conclude that defendant's contention lacks merit inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from 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]; *see People v Bailey*, 181 AD3d 1172, 1174 [4th Dept 2020], *lv denied* 35 NY3d 1025

[2020]).

Next, even assuming, arguendo, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of murder in the second degree and attempted murder in the second degree as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, in light of our conclusions, defendant's remaining contention is academic.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

656

CA 22-01468

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

CHRISTOPHER CAROLLO AND BEATRICE CAROLLO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EMILY L. SOLOTES, DEFENDANT-RESPONDENT.

CANTOR WOLFF NICASTRO & HALL, BUFFALO (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 9, 2022. The order granted the motion of defendant for summary judgment and dismissed plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Christopher Carollo (plaintiff) sustained when the motor vehicle he was driving collided with a motor vehicle operated by defendant. At the time of the collision, plaintiff was traveling eastbound on a roadway, and defendant was approaching in a westbound direction. The collision occurred as plaintiff's vehicle passed a moving mail truck and entered defendant's lane of travel. Defendant moved for summary judgment dismissing the complaint, based on, inter alia, application of the emergency doctrine. Plaintiff opposed the motion, contending that issues of fact exist regarding the applicability of the emergency doctrine and the reasonableness of defendant's actions. Supreme Court granted the motion. Plaintiffs appeal, and we reverse.

We conclude that defendant failed to meet her initial burden. Although defendant established that the emergency doctrine applied (*see generally Stewart v Kier*, 100 AD3d 1389, 1389-1390 [4th Dept 2012]), her own submissions raised an issue of fact with respect to the reasonableness of her conduct.

A person facing an emergency is "not automatically absolve[d] . . . from liability" (*Gilkerson v Buck*, 174 AD3d 1282, 1284 [4th Dept 2019] [internal quotation marks omitted]). In determining whether the

actions of a driver are reasonable in light of an emergency situation, the factfinder must consider "both the driver's awareness of the situation and [the driver's] actions prior to the occurrence of the emergency" (*id.*).

Defendant admitted that, after she noticed the mail truck, she observed two motor vehicles pass it by pulling out from behind the truck, crossing completely into the westbound lane, and returning to the eastbound lane of travel, but she nevertheless continued in the westbound lane without deactivating her cruise control. She then saw plaintiff's vehicle cross over into her lane "possibly to see if there was oncoming traffic" before it reentered the eastbound lane. It was not until that point that plaintiff deactivated her cruise control, which had been set to 45 miles per hour. We conclude that issues of fact exist whether, given her observations, defendant responded reasonably under the circumstances (*see Rick v TeCulver*, 211 AD3d 1542, 1543 [4th Dept 2022]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

662

KA 19-02108

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY WATKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered September 9, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends and the People correctly concede that his waiver of the right to appeal is unenforceable because Supreme Court mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Beltran*, 213 AD3d 1293, 1293 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023], *reconsideration denied* 40 NY3d 950 [2023]). With respect to the merits, defendant initially contends that the court should have suppressed the loaded firearm that he was charged with possessing because police officers unlawfully pursued and arrested him. For the same reasons, defendant contends that his subsequent statements to the police should be suppressed as fruit of the poisonous tree. We reject those contentions.

The evidence at the suppression hearing established that two uniformed police officers were responding to a domestic dispute on Depew Street in Rochester when they heard five gunshots in quick succession. The shots sounded like they were fired from an area northwest of the officers' location. The officers then received a dispatch over police radio stating that someone had called 911 and reported shots having been fired on Garfield Street, which runs parallel to Depew Street and is one street to the west. According to

the report, there were three Black "kids" walking southbound on Garfield Street, one of whom had a gun. The caller stated that the person with the gun was wearing a blue or navy blue jacket. The officers immediately responded to the dispatch in separate police vehicles.

As they approached the intersection of Depew Street and Forbes Street, which is less than a block from where shell casings were later found on Garfield Street, the officers observed four Black males walking closely together. There were no other people in the area. When the officers stopped their vehicles and approached the males to ask where they had been coming from, one of the suspects, later identified as defendant, distanced himself from the other three, kept his hands in the pocket of his hooded sweatshirt or waistband and then fled on foot. The other three men remained at the scene with the officers.

At the suppression hearing, the People called one of the two officers involved in the encounter, and he testified that defendant, while running away, held his right hand in front of his body as if he were holding something in his pocket or waistband. Defendant's left arm swung up and down by his side as he ran. Both officers then pursued defendant, who was initially caught by the officer who did not testify at the hearing. The officer who did testify was several feet behind the other officer as they chased defendant, who, upon capture, was found to have a loaded semiautomatic handgun in his hooded sweatshirt. Following a waiver of his *Miranda* rights, defendant told the police that he found the gun on Garfield Street and fired it into the air a number of times to see if it worked.

"[T]he police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provides them with a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see People v De Bour*, 40 NY2d 210, 223 [1976]). Reasonable suspicion is defined as the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*Martinez*, 80 NY2d at 448 [internal quotation marks omitted]; *see People v Cantor*, 36 NY2d 106, 112-113 [1975]). "Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]). On the other hand, a suspect's flight in response to a lawful approach and common-law inquiry by the police may justify pursuit (*see People v Sierra*, 83 NY2d 928, 929 [1994]; *Martinez*, 80 NY2d at 448).

Here, as defendant correctly concedes, the officers, when they encountered defendant on the street, had a "founded suspicion that criminal activity [was] afoot" (*De Bour*, 40 NY2d at 223), thereby justifying a common-law approach and inquiry of all four men (*see People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d

1102 [2012]). Contrary to defendant's contention, we conclude that his flight when lawfully approached by the police justified the ensuing pursuit, especially considering the unorthodox manner in which he was running, which, again, was observed before the officers gave chase (*see People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v Thacker*, 156 AD3d 1482, 1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). At that point, it was reasonable for the officers to suspect that defendant possessed a firearm or was otherwise involved in the shooting that occurred minutes earlier less than a block away.

Defendant further contends that the People did not establish that the subsequent search of his person and arrest were lawful because the officer who initially took him into custody and found the gun did not testify at the suppression hearing. That contention is not preserved for our review (*see People v Owusu*, 234 AD2d 893, 893 [4th Dept 1996], *lv denied* 89 NY2d 1039 [1997]; *see also People v Reyes*, 112 AD3d 465, 465 [1st Dept 2013], *lv denied* 22 NY3d 1158 [2014]). At the hearing, defendant's focus was on the legality of the police pursuit, not the search or arrest. In any event, the testimony of the officer who testified at the hearing, along with the video from that officer's body camera, which was also admitted into evidence, was sufficient to establish the legality of the search and arrest (*see People v Williams*, 4 AD3d 852, 852 [4th Dept 2004], *lv denied* 2 NY3d 809 [2004]; *People v Turner*, 275 AD2d 924, 924 [4th Dept 2000], *lv denied* 95 NY2d 939 [2000]).

Defendant next contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). As defendant correctly concedes, that contention is not preserved for our review (*see People v Wright*, 213 AD3d 1196, 1196 [4th Dept 2023]; *People v Reese*, 206 AD3d 1461, 1462-1463 [3d Dept 2022]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, as defendant contends and the People correctly concede, the presentence investigation report (PSR) has not been corrected as the court ordered during sentencing. Therefore, all copies of the PSR must be redacted in accordance with those directives (*see People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]).

All concur except OGDEN and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that defendant did not validly waive his right to appeal and that defendant's contention that Penal Law § 265.03 (3) is unconstitutional is not preserved for our review. We further agree that all copies of the presentence investigation report must be amended in accordance with Supreme Court's directives (*see People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149

[2022]).

We, however, disagree with the majority that the court properly refused to suppress the evidence in question.

"[T]he police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provides them with a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see People v Leung*, 68 NY2d 734, 736 [1986]; *People v De Bour*, 40 NY2d 210, 223 [1976]). Reasonable suspicion is defined as the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*Martinez*, 80 NY2d at 448 [internal quotation marks omitted]; *see People v Cantor*, 36 NY2d 106, 112-113 [1975]). "Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]).

Although the police officers here were aware that shots had been fired, when the officers observed four men in the general vicinity of those shots, no criminal activity was in progress. Given the recent shots that had been fired, we agree with the majority that the officers had a founded suspicion that criminality was afoot, thus warranting a level two inquiry under *De Bour*. We cannot, however, for the reasons that follow, conclude that the officers had reasonable suspicion to pursue defendant.

First, only one of the two officers who observed and approached the four men testified at the suppression hearing, and we cannot credit that officer's testimony that defendant had his hands in his waistband or that he was running in an "unorthodox" manner with his hands in his waistband. That officer's testimony seemingly conflated the areas of defendant's waistband with the pockets of his sweatshirt and pants, and the body camera footage admitted during the suppression hearing did not show defendant with his hands in his waistband area. Moreover, the placement of one's hands in the pockets of one's sweatshirt or pants on a cold evening in the middle of a Western New York winter is subject to an innocuous, innocent interpretation and cannot ripen an encounter such as that here into one of reasonable suspicion justifying pursuit (*see People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]).

Additionally, while the majority concludes that a suspect's flight in response to a lawful approach and level two common-law inquiry by the police may justify a level three pursuit, in each of the cases the majority cites in support of its conclusion, other circumstances of criminality existed to support such a pursuit that are not present here. For example, in *People v Sierra* (83 NY2d 928, 930 [1994]), the police were patrolling an area known to them as a

"narcotics supermarket" for out-of-state residents and, in *People v Martinez* (80 NY2d 444, 446 [1992]), the police were patrolling a "high-crime area" known for drug activity. The majority also cites two cases from this Court (*People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v Thacker*, 156 AD3d 1482, 1482-1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). In those two cases, the defendant and codefendant " 'matched the general description of the suspects' " (*Thacker*, 156 AD3d at 1483, quoting *Gayden*, 126 AD3d at 1518).

Here, defendant did not match the description provided by the 911 caller of the person the caller said had a gun (*cf. Gayden*, 126 AD3d at 1518; *People v Beltran*, 213 AD3d 1293, 1293-1294 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023], *reconsideration denied* 40 NY3d 950 [2023]; *Thacker*, 156 AD3d at 1483). Although defendant was observed walking in the general vicinity of the reported gun shots, that observation does not provide the "requisite reasonable suspicion," i.e., "in the absence of other objective indicia of criminality that would justify pursuit" (*People v Jones*, 174 AD3d 1532, 1533-1534 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019] [internal quotation marks omitted]).

Furthermore, we disagree with the majority's conclusion that defendant failed to preserve his contentions regarding the officers' search of his person and his arrest. Defendant specifically contested the legality of the search and the seizure of the gun and noted, during the suppression hearing, the "missing evidence" and "critical proof" that was lacking. Notably, the officer who conducted the search did not testify at the suppression hearing, nor did he preserve his body camera footage. Rather, the other officer involved in the encounter—whose body camera footage established that he did not observe the search or seizure of the gun—testified that he was in fact present during the search and that the gun was found in defendant's hooded sweatshirt. We have previously held that the testimony of an officer who was present during a search but who did not conduct the search "was insufficient to establish that the search of defendant's pocket was legal" (*People v Lazcano*, 66 AD3d 1474, 1475 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]). Thus, even assuming, arguendo, that the police were justified in stopping defendant and conducting a pat-down search, we agree with defendant that the People failed to meet their burden of "going forward to show the legality of the police conduct in the first instance" inasmuch as the People "failed to establish that the officer who conducted the pat-down search was justified in reaching into defendant's pocket" and seizing the weapon (*id.* at 1475 [internal quotation marks and emphasis omitted]; *see People v Noah*, 107 AD3d 1411, 1413 [4th Dept 2013]).

In light of the foregoing, we would reverse the judgment, vacate defendant's guilty plea, grant those parts of defendant's omnibus motion seeking to suppress tangible property and statements, and

dismiss the indictment (*see People v Cady*, 103 AD3d 1155, 1157 [4th Dept 2013]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

664

KA 22-00591

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. HOPKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered March 15, 2022. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [a]). We reject defendant's contention that the waiver of the right to appeal is invalid. Although the written waiver included a misleading heading, the oral colloquy, together with the remainder of the written waiver, "was sufficient to support a knowing and voluntary waiver under the totality of the circumstances" (*People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant further contends that the plea was not knowing, intelligent, and voluntary. Although that contention survives his valid waiver of the right to appeal, defendant failed to preserve the contention for our review inasmuch as he did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]), and we conclude that this case does not fall within the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666-667 [1988]). Assuming, arguendo, that defendant's contention concerning County Court's determination revoking his bail survives the valid waiver of the right to appeal (*see generally People v Knoxsah*, 94 AD3d 1505, 1506 [4th Dept 2012]), we conclude that the contention is nevertheless not properly before us inasmuch as no appeal lies from such a determination (*see People v MacLean*, 48 AD3d 1215, 1217 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]; *see also People ex rel. Kuby v Merritt*, 96 AD3d 607, 608 [1st Dept 2012], *lv denied* 19 NY3d

813 [2012]). Moreover, that contention was rendered moot by defendant's conviction (*see People v Ballman*, 64 AD3d 9, 13 [4th Dept 2009], *affd in part & appeal dismissed in part* 15 NY3d 68 [2010]), and defendant has failed to demonstrate the applicability of the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Defendant's remaining contentions are encompassed by his valid waiver of the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

665

KA 18-01868

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN PARNELL, JR., DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), 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 May 22, 2018. The judgment convicted defendant upon a jury verdict of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) for stabbing an unarmed man in the chest with an eight-inch folding knife over a dispute regarding a $10 debt. Although defendant concedes that he intentionally stabbed the victim and that the victim sustained a serious injury as a result of the stabbing that nearly killed him, defendant contends that the evidence at trial was legally insufficient to establish that he intended to cause serious physical injury to the victim and that the verdict is against the weight of the evidence in that regard. We reject those contentions. Viewing the evidence in the light most favorable to the People, as we must when reviewing a contention regarding the legal sufficiency of trial evidence (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found that defendant "intended to cause serious physical injury when he stabbed the victim in the chest with a knife" (*People v Williams*, 134 AD3d 1572, 1573 [4th Dept 2015]; *see People v Goley*, 113 AD3d 1083, 1083 [4th Dept 2014]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

In light of the foregoing, we also reject defendant's contention

that, at most, the evidence established that he acted recklessly and, therefore, he should have been convicted of the lesser included offense of reckless assault in the second degree (Penal Law § 120.05 [4]). The jury was appropriately instructed "to consider the lesser included offense only upon reaching a unanimous verdict of not guilty of the greater" (*People v Boettcher*, 69 NY2d 174, 183 [1987]). Once the jury reached a unanimous verdict of guilty on the greater offense of intentional assault in the first degree (§ 120.10 [1]), it had no occasion to consider the lesser offense of reckless assault in the second degree (§ 120.05 [4]).

Defendant further contends that he was denied effective assistance of counsel when defense counsel failed to pursue an intoxication defense at trial (*see* Penal Law § 15.25). "An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, 'there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis' " (*People v Sirico*, 17 NY3d 744, 745 [2011]). It "requires more than a bare assertion by a defendant that [they were] intoxicated" (*People v Gaines*, 83 NY2d 925, 927 [1994]), and "[t]he decision whether to pursue an intoxication defense is clearly one of strategy" (*People v Russell*, 133 AD3d 1199, 1201 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). Here, although the victim testified that defendant was "drunk" at the time of the incident, there was no evidence regarding "the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state" (*Gaines*, 83 NY2d at 927). Moreover, the police investigator who interviewed defendant on the night of the stabbing had no concerns that defendant was intoxicated.

As a result, the record does not establish that defendant's use of intoxicants was " 'of such nature or quantity to support the inference that [his] ingestion was sufficient to affect [his] ability to form the necessary criminal intent' " (*Sirico*, 17 NY3d at 745, quoting *People v Rodriguez*, 76 NY2d 918, 920 [1990]). We thus conclude that, under the circumstances presented on this record, defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's alleged failure to pursue an intoxication defense" (*Russell*, 133 AD3d at 1201, quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). To the extent that defendant's claim of ineffective assistance of counsel is based on matters outside the record, i.e., with respect to defense counsel's alleged failure to investigate a potential intoxication defense, it must be raised by way of a motion pursuant to CPL 440.10 (*see People v Beasley*, 147 AD3d 1549, 1550 [4th Dept 2017], *lv denied* 29 NY3d 1028 [2017]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

666

KA 22-00760

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 19, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (four counts).

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

Memorandum: In appeal No. 1, defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and four counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) and, in appeal No. 2, he was convicted following the same jury trial of murder in the second degree (§ 125.25 [1]). Those charges arose from three separate shooting incidents that occurred on July 26, 2018, July 27, 2018, and August 16, 2018, each of which involved defendant being driven to the scene of the shooting in the same vehicle by the same person.

Contrary to defendant's contention in both appeals, defendant implicitly waived his rights under *People v Antommarchi* (80 NY2d 247 [1992], *rearg denied* 81 NY2d 759 [1992]) during jury selection "when, after hearing [County Court prior to jury selection] say that he was 'welcome to attend' the bench conferences, he chose not to do so" (*People v Flinn*, 22 NY3d 599, 601 [2014], *rearg denied* 23 NY3d 940 [2014]; *see People v Hymes*, 174 AD3d 1295, 1296 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]). In addition, it was not improper for the court to further advise defendant that, should he choose to attend bench conferences, he would be accompanied by court officers. "Trial courts must retain appropriate discretion to control their courtrooms and trial proceedings generally," including "decisions pertaining to courtroom security" (*People v Gamble*, 18 NY3d 386, 396-397 [2012],

rearg denied 19 NY3d 833 [2012] [internal quotation marks omitted], quoting *People v Vargas*, 88 NY2d 363, 377 [1996]), and the court here gave a curative instruction at defendant's request, advising the jury not to draw any inferences based on defendant's custodial status, which was sufficient to minimize any potential prejudice to defendant (*see People v Harvey*, 100 AD3d 1451, 1451 [4th Dept 2012], *lv denied* 21 NY3d 943 [2013]; *see also People v Diaz*, 163 AD3d 110, 119 [3d Dept 2018], *lv denied* 32 NY3d 1110 [2018]).

Contrary to defendant's further contention in both appeals, the court did not abuse its discretion in refusing to sever the charges relating to the July 26, 2018, and July 27, 2018, shootings from the charges relating to the August 16, 2018, shooting. The counts were properly joined pursuant to CPL 200.20 (2) (b), and the court therefore "lacked statutory authority to grant defendant's [severance] motion" (*People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021] [internal quotation marks omitted]).

Defendant also contends in both appeals that the verdict is against the weight of the evidence because, inter alia, the testimony of his accomplice was incredible as a matter of law. We reject that contention. The People "produced corroborative evidence sufficient to connect defendant to the commission of the offense[s]" (*People v Reome*, 15 NY3d 188, 195 [2010]), including an additional eyewitness in the first incident and identification testimony of a separate witness from surveillance video in the second incident. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and according great deference to the factfinder's resolution of credibility issues (*see People v Ptak*, 37 AD3d 1081, 1082 [4th Dept 2007], *lv denied* 8 NY3d 949 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Additionally, contrary to defendant's contention in both appeals, we conclude that the sentences are not unduly harsh or severe.

We have reviewed defendant's remaining contentions in both appeals and conclude that they do not warrant modification or reversal of the judgments. We note, however, with respect to appeal No. 1, that the certificate of conviction and the uniform sentence and commitment form contain several errors regarding the criminal possession of a weapon in the second degree counts in the consolidated indictment of which defendant was found guilty. Those documents must therefore be amended to reflect that, under count 3 of the consolidated indictment, defendant was convicted of that offense under Penal Law § 265.03 (1) (b) and that, under counts 2, 4, and 9 of the consolidated indictment, defendant was convicted of that offense under Penal Law § 265.03 (3). In addition, those documents must be further amended to reflect that the sentence of incarceration imposed on the conviction of count 3 of the consolidated indictment is to be served concurrently with the remaining sentences, and that the remaining sentences of incarceration are to be served consecutively to each

other.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

667

KA 22-00761

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 19, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Same memorandum as in *People v Graham* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

669

CAF 21-01535

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

IN THE MATTER OF LIAM M.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ROBERT A., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated May 25, 2021, in a proceeding pursuant to Social Services Law section 383-c. The order denied respondent's motion to vacate a prior conditional judicial surrender order with respect to the subject child.

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

Memorandum: In these proceedings pursuant to Social Services Law § 383-c, respondent father appeals in appeal Nos. 1, 2, and 3 from an order and two corrected orders denying his motions seeking to vacate the conditional judicial surrenders that he executed with respect to the three subject children. Initially, with respect to appeal No. 1, Family Court denied the motion at issue in that appeal as moot on the ground that the child who is the subject of that motion has been adopted (*see generally Matter of Jaxon S. [Jason S.]*, 170 AD3d 1687, 1688 [4th Dept 2019]). Inasmuch as the father does not raise any issue in his brief with respect to that dispositive determination, he is deemed to have abandoned any contention with respect to the propriety thereof (*see Liberty Maintenance, Inc. v Alliant Ins. Servs., Inc.*, 215 AD3d 1248, 1248 [4th Dept 2023]; *see generally Matter of Rohrback v Monaco*, 173 AD3d 1774, 1774 [4th Dept 2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In light of our determination, we do not address defendant's contentions with respect to appeal No. 1 (*see Liberty Maintenance, Inc.*, 215 AD3d at 1248). With respect to appeal Nos. 2 and 3, we conclude that defendant's contentions are either unpreserved or lack merit for the reasons that follow.

The father's contention that the surrenders should be vacated because the court did not inform him of certain consequences of the surrenders pursuant to Social Services Law § 383-c (3) (b) is not preserved for our review inasmuch as the father did not raise that ground in support of his motions (*see Matter of Omia M. [Tykia B.]*, 144 AD3d 1637, 1637 [4th Dept 2016]).

Contrary to the father's further contention, the court properly denied the motions without a hearing because the motions "lacked a legal basis upon which [the c]ourt may have rescinded the judicial surrenders" (*Matter of Brittany R. [Annemarie R.]*, 130 AD3d 1271, 1272 [3d Dept 2015], *lv dismissed* 26 NY3d 996 [2015]). "It is well settled that, in the absence of 'fraud, duress or coercion in the execution or inducement of a surrender[,] [n]o action or proceeding may be maintained by the surrendering parent . . . to revoke or annul such surrender' " (*Omia M.*, 144 AD3d at 1637, quoting Social Services Law § 383-c [6] [d]; *see Brittany R.*, 130 AD3d at 1271). In his motions, the father alleged that certain relatives of the subject children were threatened by a foster parent that they would not see the subject children again if they testified on the father's behalf at a hearing that had been scheduled on petitions seeking the termination of his parental rights with respect to those and other children. However, the father was not aware of those alleged threats at the time he executed the surrenders and they therefore cannot be a valid basis for his contention that he was coerced into signing the surrenders. The father's further allegation that petitioner's caseworker told the father that he faced having his parental rights terminated at the conclusion of the scheduled termination of parental rights hearing was also not a valid basis for vacatur of the surrenders. " '[I]nforming a parent of an accurate, albeit unpleasant, event is not coercion' " (*Matter of Jenny A. v Cayuga County Dept. of Health & Human Servs.*, 50 AD3d 1583, 1583 [4th Dept 2008], *lv dismissed* 11 NY3d 809 [2008]). Moreover, the father indicated during the colloquy with respect to the surrenders that no one was forcing him or threatening him to sign the surrenders (*see Matter of Jason F.A. [Francisco A.]*, 151 AD3d 958, 959 [2d Dept 2017]).

The father's primary allegation in support of the motions was that petitioner failed to meet a material condition of the surrenders with respect to visitation. The court properly noted, however, that the father's remedy with respect to that allegation was to file a petition or petitions pursuant to Family Court Act § 1055-a for enforcement of the surrenders' terms, not to file motions to vacate the surrenders (*see Matter of Sabrina H.*, 245 AD2d 1134, 1134-1135 [4th Dept 1997]). We reject the father's alternative contention that the court should have sua sponte treated his motions as ones for enforcement.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

670

CAF 21-01537

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

IN THE MATTER OF MALACHI S.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ROBERT A., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from a corrected order of the Family Court, Erie County (Margaret O. Szczur, J.), dated September 23, 2021, in a proceeding pursuant to Social Services Law section 383-c. The corrected order denied respondent's motion to vacate a prior conditional judicial surrender order with respect to the subject child.

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

Same memorandum as in *Matter of Liam M.A. (Robert A.)* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

671

CAF 21-01538

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

IN THE MATTER OF PEYTON C.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ROBERT A., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from a corrected order of the Family Court, Erie County (Margaret O. Szczur, J.), dated September 23, 2021, in a proceeding pursuant to Social Services Law section 383-c. The corrected order denied respondent's motion to vacate a prior conditional judicial surrender order with respect to the subject child.

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

Same memorandum as in *Matter of Liam M.A. (Robert A.)* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

673

CAF 22-00476

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

IN THE MATTER OF ZAKIYYAH T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LAMAR R., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated March 7, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from two separate orders and respondent stepmother appeals from the second of those two orders. In appeal No. 1, the father appeals, as limited by his brief, from that part of an order adjudging that he abused one of his daughters (older child). In appeal No. 2, the father appeals, as limited by his brief, from that part of an order adjudging that he abused another daughter (younger child), and the stepmother appeals, as limited by her brief, from that part of the same order adjudging that she neglected the younger child.

Contrary to the father's contention in appeal Nos. 1 and 2, Family Court did not err in denying his motion to dismiss the petitions against him at the close of petitioner's proof inasmuch as petitioner established a prima facie case of sexual abuse in the first degree against him with respect to both children (*see* Penal Law § 130.65 [4]). Penal Law § 130.65 (4) is violated when the actor subjects another person to sexual contact when the actor is 21 years old or older and the victim is less than 13 years old (*id.*). " 'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of

either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed" (§ 130.00 [3]). Inasmuch as the term "intimate parts" has been interpreted very broadly, it has been "held that the thigh/upper leg is an intimate part" of the body (*People v Manning*, 81 AD3d 1181, 1182 [3d Dept 2011], *lv denied* 18 NY3d 959 [2012]; *see People v Gray*, 201 AD2d 961, 962 [4th Dept 1994], *lv denied* 83 NY2d 1003 [1994]; *see also People v Beecher*, 225 AD2d 943, 944-945 [3d Dept 1996]). Here, with respect to the element of sexual gratification, a determination that the father's "actions were for the purpose of gratifying his sexual desire . . . may be inferred from a totality of the circumstances" (*Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]; *see Matter of Daniel R. [Lucille R.]*, 70 AD3d 839, 841 [2d Dept 2010]; *see generally People v Hatton*, 26 NY3d 364, 370 [2015]), including the "humiliation evoked" in the victims (*Hatton*, 26 NY3d at 371).

Both children told interviewers that the father committed acts of sexual contact against them. According to the older child, the father touched her vaginal area over clothing, while exposing his erect penis and asking her to perform a sexual act on him. She also stated that, on a separate occasion, the father touched one of her breasts over clothing. The younger child said that the father touched the upper, *inner* area of one of her thighs, while simultaneously attempting to remove her shirt. "The cross-corroborating accounts of the children with respect to the nature and progression of the sexual abuse '[gave] sufficient indicia of reliability to each [child's] out-of-court statements' " (*Matter of Janiece B. [James D.B.]*, 93 AD3d 1335, 1335 [4th Dept 2012], quoting *Matter of Nicole V.*, 71 NY2d 112, 124 [1987], *rearg denied* 71 NY2d 890 [1988]; *see Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1312-1313 [4th Dept 2022]).

The father further contends in both appeals that, in light of the evidence presented by him and the stepmother following the denial of their respective motions to dismiss the petitions against them at the close of petitioner's case, the court's ultimate determination that petitioner established his abuse of the children by a preponderance of the evidence is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463 [4th Dept 2023]). We disagree. Although the father denied the allegations of abuse, his " 'denial[s] of the[ ] allegations, along with other contrary evidence, merely presented a credibility issue for [the court] to resolve' " (*Matter of Lylly M.G. [Theodore T.]*, 121 AD3d 1586, 1587 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]).

Based upon our review of the evidence, we conclude that the testimony of the father and the stepmother at the hearing also served to corroborate the allegations of abuse made by both girls. "We accord great weight and deference to [the court]'s determinations, 'including its drawing of inferences and assessment of credibility,' " and we will not disturb the court's credibility determinations with respect to the abuse allegations against the father inasmuch as those

determinations are supported by the record (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; *see Lylly M.G.*, 121 AD3d at 1587-1588).

With respect to the stepmother's contentions in appeal No. 2, we conclude that, even assuming, arguendo, that the evidence presented by petitioner established a prima facie case of neglect against the stepmother based on the younger child's statements that she told the stepmother about the father's abuse of her and that the stepmother failed to take any steps to protect her, thus warranting the denial of the stepmother's motion (*see generally Matter of Annastasia C. [Carol C.]*, 78 AD3d 1579, 1580 [4th Dept 2010], *lv denied* 16 NY3d 708 [2011]), the court's ultimate determination that petitioner established the stepmother's neglect of the younger child by a preponderance of the evidence is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Mollie W.*, 214 AD3d at 1463).

Petitioner was required to establish by a preponderance of the evidence that the stepmother, as a parent or caretaker, "knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child and *failed to act accordingly*" (*Matter of Crystiana M. [Crystal M.-Pamela J.]*, 129 AD3d 1536, 1537 [4th Dept 2015] [internal quotation marks omitted and emphasis added]; *see Mollie W.*, 214 AD3d at 1464; *see generally* Family Ct Act § 1046 [b] [i]). The evidence presented at the hearing established that, upon being informed of the father's actions against the younger child, the stepmother acted to separate the child from the father and that no further improprieties took place. Thus, even if we were to credit the child's statements to the interviewer that she told the stepmother of the father's conduct, the record does not establish that the stepmother thereafter failed to protect her

We note that the record on appeal reflects that Erie County Child Protective Services has expunged the indicated report of maltreatment against the stepmother following a determination that the alleged maltreatment of the younger child was not proven by a fair preponderance of the evidence. Taking judicial notice of the subsequent court proceedings relevant to these appeals (*see generally HoganWillig, PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1371 [4th Dept 2022]; *Matter of Clifford*, 204 AD3d 1397, 1397 [4th Dept 2022]), we further note that petitioner has since moved to vacate the order of fact-finding and disposition against the stepmother, indicating that it no longer wishes to pursue the matter against her. That motion was denied by the court. In light of the foregoing, we modify the order in appeal No. 2 by vacating the adjudication of neglect against the stepmother and dismissing the petition against her.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

674

CAF 22-00477

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

IN THE MATTER OF SHAYMARI R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LAMAR R. AND JEANETTE R.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT JEANETTE R.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

KELLY M. FORST, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated March 7, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Lamar R. has abused the subject child and that respondent Jeanette R. had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the adjudication of neglect against respondent Jeanette R. and dismissing the petition against her and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Zakiyyah T. (Lamar R.)* (— AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

678

CA 22-01031

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

BRENDA A. SOLLY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PIONEER CENTRAL SCHOOL DISTRICT, ALSO KNOWN AS YORKSHIRE PIONEER CENTRAL SCHOOL DISTRICT, ROBERT T. GRUNWALD, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT PIONEER CENTRAL SCHOOL DISTRICT, ALSO KNOWN AS YORKSHIRE PIONEER CENTRAL SCHOOL DISTRICT.

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR DEFENDANT-APPELLANT ROBERT T. GRUNWALD.

FANIZZI & BARR, P.C., NIAGARA FALLS (KEVIN F. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 24, 2022. The order, insofar as appealed from, denied those parts of the motions of defendants Pioneer Central School District, also known as Yorkshire Pioneer Central School District, and Arcade Elementary School, and Robert T. Grunwald seeking to dismiss the complaint pursuant to CPLR 3211 (a) (8) and to dismiss the seventh cause of action in the complaint pursuant to CPLR 3211 (a) (5) and (a) (7).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants Pioneer Central School District, also known as Yorkshire Pioneer Central School District, and Arcade Elementary School insofar as it sought to dismiss against Pioneer Central School District, also known as Yorkshire Pioneer Central School District, the seventh cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that she was sexually abused during a period from 1974 to 1977 by a physical education teacher, i.e., defendant Robert T. Grunwald, while attending defendant Arcade Elementary School (Arcade) in defendant Pioneer Central School District, also known as Yorkshire Pioneer Central School District (Pioneer) (collectively, District defendants). The District defendants and Grunwald moved separately to, inter alia, dismiss the

complaint against them. Supreme Court granted in part and denied in part the motions, thereby, inter alia, dismissing the complaint against Arcade in its entirety, and Pioneer and Grunwald now separately appeal.

Contrary to the contentions of Pioneer and Grunwald, plaintiff's summons with notice complied with the requirement of CPLR 305 (b) that it state "the nature of the action," and thus the court properly denied the motions insofar as they sought to dismiss the complaint against those defendants for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8). The summons with notice stated that "[t]he nature of this action is for a tort, leading to bodily injury and emotional distress, and is being filed pursuant to the Child Victims Act, codified at CPLR 214-g." Under the circumstances of this case, we conclude that the identification of the action as one sounding in "tort," along with the reference to the Child Victims Act, complied with the requirement of CPLR 305 (b) that the summons with notice identify the nature of the action (*see Andrulis v Fox* [appeal No.1], 284 AD2d 1006, 1006 [4th Dept 2001]; *Pilla v La Flor De Mayo Express*, 191 AD2d 224, 224 [1st Dept 1993]).

We agree with Pioneer, however, that the court erred in denying the District defendants' motion insofar as it sought to dismiss against Pioneer plaintiff's seventh cause of action, for breach of statutory duties to report certain abuse pursuant to Social Services Law former § 413 and § 420, and we therefore modify the order accordingly. Assuming, arguendo, that the seventh cause of action was revived by CPLR 214-g and was thus timely, we conclude that it fails to state a cause of action against Pioneer. On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, we must "accept the facts as alleged in the complaint as true, accord [the] plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). "Whether a plaintiff can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]).

In her complaint, plaintiff alleged that Pioneer violated its statutory reporting duties under Social Services Law former § 413 by failing to report the abuse of plaintiff by Grunwald. Social Services Law former § 413, however, applied only where there was "reasonable cause to suspect that a child . . . [was] an abused or maltreated child" (Social Services Law former § 413). The Social Services Law incorporated the definition of "abused child" in the Family Court Act (*see* Social Services Law former § 412 [1]), which in turn defined that term, as relevant here, as a child harmed by a "parent or other person legally responsible for [the child's] care" (Family Ct Act former § 1012 [e]; *see Hanson v Hicksville Union Free Sch. Dist.*, 209 AD3d 629, 631 [2d Dept 2022]).

Under Family Court Act article 10, however, the definition "should not be construed to include [abuse by] persons who assume fleeting or temporary care of a child such as . . . those persons who provide extended daily care of children in institutional settings, such as teachers" (*Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *see Matter of Zulena G. [Regilio K.]*, 175 AD3d 678, 680 [2d Dept 2019]; *Matter of Jonah B. [Riva V.]*, 165 AD3d 790, 792 [2d Dept 2018]). Inasmuch as Grunwald, based on the allegations in the complaint, could not be the subject of a report for purposes of Social Services Law former § 413, Pioneer was not required to report any suspected abuse by him (*see Hanson*, 209 AD3d at 631; *see generally Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179-180 [2004]).

Plaintiff's reliance upon *Matter of Kimberly S.M. v Bradford Cent. School* (226 AD2d 85 [4th Dept 1996]) is misplaced. In that case, this Court held that it was error to determine that a school had no duty to report alleged abuse by a student's uncle under Social Services Law former § 413 where the uncle "could have been a custodian or a 'person responsible for the child's care at the relevant time' " (*Kimberly S.M.*, 226 AD2d at 90). Here, plaintiff neither alleges nor presents facts to show that Grunwald "acted as the functional equivalent of a parent" (*Yolanda D.*, 88 NY2d at 796; *cf. Brave v City of New York*, 216 AD3d 728, 730 [2d Dept 2023]).

We further reject plaintiff's assertion that our holding in *BL Doe 3 v Female Academy of the Sacred Heart* (199 AD3d 1419 [4th Dept 2021]) leads to a contrary result. In that case, the school did not argue that it lacked a duty to report the alleged abuse on the ground that the alleged abuser could not be the subject of a report under the Social Services Law (*cf. Catherine G.*, 3 NY3d at 179-180; *Hanson*, 209 AD3d at 631). Therefore, such a contention was not before this Court (*see generally Ellis v D.R. Watson Holdings, LLC*, 60 AD3d 1409, 1410 [4th Dept 2009]). *BL Doe 3* is further inapposite inasmuch as, here, there is no allegation that Pioneer's failure to report was knowing and willful, as required to state a claim under Social Services Law former § 413 (*see Estate of Pesante v County of Seneca*, 1 AD3d 915, 918 [4th Dept 2003]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

680

CA 22-00930

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

MICHELLE SMITH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NGM INSURANCE COMPANY, THE MAIN STREET AMERICA GROUP, DAVE MCMAHON INSURANCE AGENCY, INC., AND DEFOREST GROUP, INC., DEFENDANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ FINE P.C., BUFFALO (AGNIESZKA A. WILEWICZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NGM INSURANCE COMPANY AND THE MAIN STREET AMERICA GROUP.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVE MCMAHON INSURANCE AGENCY, INC.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (PAUL G. FERRARA OF COUNSEL), FOR DEFENDANT-RESPONDENT DEFOREST GROUP, INC.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered May 26, 2022. The order granted the motions of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Dave McMahon Insurance Agency, Inc., and reinstating the complaint against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff and her husband, nonparty Josh Smith (Smith), were involved in a single vehicle accident that occurred while Smith was driving, causing plaintiff, the front-seat passenger, serious physical injuries. The vehicle was insured under a commercial automobile policy issued by defendants NGM Insurance Company and The Main Street America Group (collectively, MSA defendants). In anticipation of bidding on a certain painting contract, Smith had contacted defendant Dave McMahon Insurance Agency, Inc. (DMIA), to obtain all of the necessary insurance required by that contract. DMIA had a “Partner Program Services Agreement” with an “insurance aggregator,” defendant DeForest Group, Inc. (DeForest), and would forward applications for insurance to DeForest. DeForest would then

procure insurance proposals for DMIA's customers. As a result of the efforts of DMIA and DeForest, Smith obtained several commercial insurance policies from the MSA defendants, including the subject commercial automobile policy. Smith and plaintiff believed that those policies contained provisions for supplemental spousal liability (SSL) coverage.

After the MSA defendants denied coverage for plaintiff, she commenced this action alleging, inter alia, that the insurance policies issued by the MSA defendants contained SSL coverage and that, as a result, the MSA defendants breached the insurance contract with Smith, and breached the duty of good faith and fair dealing. With respect to DeForest and DMIA, plaintiff contended that they breached their contractual obligations to procure SSL coverage and were negligent in failing to procure SSL coverage. Thereafter, plaintiff commenced a personal injury action against Smith, and she was ultimately awarded a judgment against him.

Defendants filed separate motions in this action seeking summary judgment dismissing the complaint against them. They contended, among other things, that they had no obligation to provide insurance benefits to plaintiff because none of the insurance policies contained an SSL provision and plaintiff was not an intended third-party beneficiary of the insurance policies and lacked the requisite privity with them to maintain the action. Supreme Court granted the motions insofar as they sought summary judgment dismissing the complaint against defendants, and plaintiff now appeals.

Contrary to plaintiff's contentions, DeForest and the MSA defendants met their initial burdens on their motions of establishing as a matter of law that the policies at issue did not contain any SSL provisions, that no SSL premiums were paid on any policy and that they never received any request for such coverage related to Smith's policies. " '[I]n the absence of an express provision in an insured's policy, a carrier is not required to provide insurance coverage for injuries sustained by an insured's spouse' " (*Metropolitan Group Prop. v Kim*, 127 AD3d 943, 945 [2d Dept 2015]). Plaintiff failed to raise any triable issue of fact in opposition to those defendants' motions. Plaintiff's belief that there was coverage does not establish any legal basis to recover from those defendants on nonexistent insurance coverage. Despite their belief that they had paid extra premiums for SSL coverage, the record establishes that plaintiff and Smith were never billed for such insurance coverage. Although plaintiff submitted deposition testimony and affidavits in which plaintiff and Smith contended that they provided a written request for such coverage to DMIA, such testimony and affidavits raised no triable issue of fact whether that request was ever relayed to DeForest or to the MSA defendants. As a result, plaintiff failed to raise a triable issue of fact whether the MSA defendants breached any contractual obligation related to the insurance policies or breached their duty of good faith and fair dealing. In addition, inasmuch as there is no evidence in the record that any request for SSL coverage was relayed to DeForest, plaintiff failed to raise a triable issue of fact whether DeForest breached any obligation to obtain SSL coverage for Smith or was

otherwise negligent in failing to procure such coverage for him.

Moreover, we conclude that DeForest and the MSA defendants established that plaintiff was not an intended third-party beneficiary to the policies with the requisite privity to seek to enforce those policies, and that plaintiff failed to raise a triable issue of fact in that respect (*see generally Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1467-1468 [4th Dept 2012]). " '[A]s a general rule, privity or its equivalent remains a predicate for imposing liability for nonperformance of contractual obligations . . . An obligation rooted in contract may [nevertheless] engender a duty owed to those not in privity when the contracting party knows that the subject matter of a contract is intended for the benefit of others . . . An intention to benefit a third party must be gleaned from the contract as a whole' " (*id.* at 1468). Inasmuch as there is no evidence that either the MSA defendants or DeForest were informed of any desire for SSL coverage, there is no evidence that they could have known that the commercial automobile policy was intended to benefit plaintiff. We thus conclude that those defendants' motions were properly granted insofar as they sought summary judgment dismissing the complaint against them.

We reach a different conclusion with respect to DMIA. Even assuming, arguendo, that DMIA established that Smith never requested SSL coverage and that DMIA therefore did not breach any obligation to Smith and was not negligent in failing to procure such coverage, we conclude that plaintiff raised triable issues of fact sufficient to defeat DMIA's motion.

In opposition to DMIA's motion, plaintiff submitted deposition testimony from herself and Smith, wherein they contended that a DMIA employee informed Smith of the availability of SSL coverage; that Smith informed that employee of Smith's desire to procure that coverage; that the employee provided Smith with an SSL form to be executed by plaintiff; that plaintiff executed that form; and that Smith returned that form to a different DMIA employee, who was no longer employed at DMIA. At no time, however, did plaintiff deal with or have any contact with any employee of DMIA. Plaintiff, who was not a party to the insurance policies, may nevertheless have viable causes of action against DMIA.

"An insurance agent ordinarily does not owe a duty of care to a nonclient; however, where an agent's negligence results in an insured being without coverage, the agent may be liable for damages sustained by an injured third party if the third party was the intended beneficiary of the insurance contract *and* 'the bond between [the agent and the third party is] so close as to be the functional equivalent of contractual privity' . . . The functional equivalent of privity may be found . . . where the defendants are aware that their representations are 'to be used for a particular purpose,' there was 'reliance by a known party or parties in furtherance of that purpose' and there is 'some conduct by the defendants linking them to the party or parties and evincing [the] defendant[s'] understanding of their reliance' " (*Vestal v Pontillo*, 183 AD3d 1146, 1150 [3d Dept 2020], *lv denied* 36

NY3d 907 [2021] [emphasis added], quoting *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419, 425 [1989]; *see Vestal v Pontillo*, 158 AD3d 1036, 1039 [3d Dept 2018]; *Merchants Ins. Co. of N.H., Inc. v Gage Agency, Inc.*, 21 AD3d 1332, 1334 [4th Dept 2005]).

"[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [internal quotation marks omitted]). Thus, "[p]arties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1436 [4th Dept 2021] [internal quotation marks omitted]; *see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]).

If plaintiff can establish that a request for SSL coverage was properly made, she would be considered an intended third-party beneficiary with the requisite level of privity. There is a valid insurance contract between Smith and the MSA defendants, procured through DMIA, and the provision of SSL coverage was arguably intended for plaintiff's benefit and served a particular purpose, i.e., to cover plaintiff and only plaintiff in the event Smith was liable for an accident involving the insured vehicle (*cf. Henry v Guastella & Assoc.*, 113 AD2d 435, 438 [4th Dept 1985], *lv denied* 67 NY2d 605 [1986]; *see generally Oathout v Johnson*, 88 AD2d 1010, 1010 [3d Dept 1982]). Inasmuch as Smith and plaintiff submitted deposition testimony establishing that Smith requested SSL coverage in writing as required by Insurance Law former § 3420 (g) (1), we conclude that plaintiff has raised triable issues of fact whether DMIA breached its contractual obligations or was negligent in failing to procure the specific insurance coverage that would have inured to plaintiff's benefit. Although the veracity of Smith and plaintiff "is called into question by other evidence submitted by [defendants] on [their] motion[s]," we cannot conclude that "the testimony is incredible as a matter of law" (*On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1482 [4th Dept 2022]). The conflict in the evidence submitted by DMIA and plaintiff regarding whether Smith requested SSL coverage in writing " 'raises a question of credibility to be resolved at trial' " (*id.* at 1483; *see Lewis v Carrols LLC*, 158 AD3d 1055, 1057 [4th Dept 2018]), and it "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]; *see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

We therefore modify the order by denying DMIA's motion and reinstating the complaint against that defendant.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

681

CA 23-00088

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

UNIVERSITY SQUARE SAN ANTONIO, TX. LLC,
PLAINTIFF-RESPONDENT,

V ORDER

MEGA FURNITURE DEZAVALA, LLC, MEGA FURNITURE &
ACCESSORIES, LLC, KARIM KANJIYANI, YASMIN
DAREDIA, ARIZONA MEGA FURNITURE, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BARCLAY DAMON LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered November 4, 2022. The order, inter alia, denied the motion of defendants-appellants for summary judgment and granted the cross-motion of plaintiff for, among other things, summary judgment on its first and second causes of action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

682

CA 22-01553

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

GRANT D. REED AND NICOLE M. REED,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG, THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered September 23, 2022. The judgment, inter alia, adjudged that defendant is liable for damages to plaintiffs and ordered a trial on the issue of damages.

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

Memorandum: Plaintiffs, Grant D. Reed (plaintiff) and Nicole M. Reed, commenced this negligence action seeking damages for injuries allegedly sustained by plaintiff when a branch from a silver maple tree owned by defendant fell and struck him on the head while he was walking in his neighborhood. Following a bifurcated trial on liability, a jury found defendant liable. Supreme Court entered a judgment in favor of plaintiffs on the issue of liability and ordered a trial on the issue of damages. Defendant appeals.

Initially, we conclude that defendant's contention that the court erred in denying its pretrial motion for summary judgment dismissing the complaint is not properly before us on this appeal (*see Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1026 [2022], *rearg denied* 38 NY3d 1170 [2022]).

Defendant challenges the verdict on the ground that it is against the weight of the evidence. As a preliminary matter, we conclude that defendant was not required to preserve that contention by making a postverdict motion for a new trial (*see DeFisher v PPZ Supermarkets, Inc.*, 186 AD3d 1062, 1063 [4th Dept 2020]). Contrary to defendant's contention, the verdict is not against the weight of the evidence. A verdict should not be set aside as contrary to the weight of the evidence unless "the verdict could not have been reached upon any fair

interpretation of the evidence" (*Siemucha v Garrison*, 111 AD3d 1398, 1401 [4th Dept 2013] [internal quotation marks omitted]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Here, the jury's conclusion that defendant's inspection procedures with respect to its older, larger trees, such as the silver maple tree in question, were unreasonable and that, had a reasonable inspection of such trees been performed, the dangerous condition of the tree in question would have been revealed, is supported by a fair interpretation of the evidence.

Finally, we conclude that the court properly denied defendant's request for a jury charge on comparative negligence. "The issue of negligence, whether of the plaintiff or defendant, is usually a question of fact. It should be submitted to the jury if there is a valid line of reasoning and permissible inferences from which rational people can draw a conclusion of negligence on the basis of the evidence presented at trial" (*Bruni v City of New York*, 2 NY3d 319, 328 [2004]). Contrary to defendant's contention, the evidence presented at trial supports no valid line of reasoning that could lead a rational person to the conclusion that plaintiff was negligent for taking a walk in light of the weather conditions that were present when the incident took place. Indeed, the evidence established that, at the time of his walk, the weather was abnormally warm for a February evening, with only calm winds.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

683

CA 22-01159

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

NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO, LOCAL 3471, STEVE VINE, AS PRESIDENT OF LOCAL 3471, RANDALL GRENIER, JR., AND DANIEL HICKEY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF GENEVA, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

JESSICA FARRELL, THERESA JOHNSON, CHARLES KING, AMARIS ELLIOTT-ENGEL, AHMAD WHITFIELD, WIL WOLF AND CARRIE CORRON, AS MEMBERS OF FORMER GENEVA POLICE REVIEW BOARD, PROPOSED-INTERVENORS DEFENDANTS-APPELLANTS.

FRESHFIELDS BRUCKHAUS DERINGER US LLP, NEW YORK CITY (DAVID M. HOWARD OF COUNSEL), FOR PROPOSED-INTERVENORS DEFENDANTS-APPELLANTS.

ENNIO J. CORSI, GENERAL COUNSEL, ALBANY (CHRISTINE CAPUTO GRANICH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

MIDEY, MIRRAS & RICCI, LLP, GENEVA (EMIL J. BOVE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered July 11, 2022. The order denied the motion of appellants for leave to intervene and file a notice of appeal.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration invalidating Local Law No. 1-2021 (Local Law) of defendant City of Geneva (City), which amended the Geneva City Charter to establish a Police Review Board (Board). Supreme Court thereafter entered a judgment (denominated order) that, inter alia, granted plaintiffs' cross-motion for summary judgment on the complaint and declared the Local Law invalid, thereby effectively dissolving the Board. Appellants, as members of the former Board, then filed a motion seeking leave to intervene as party defendants for the purpose of taking an appeal from the judgment and, on appeal, defending the validity of the Local Law. Plaintiffs and defendants opposed the

motion on, inter alia, the ground that appellants lacked capacity to intervene in the litigation. Appellants now appeal from an order that denied their motion. We affirm.

Initially, to the extent that appellants contend that the issue of capacity is irrelevant because they are seeking to intervene only for the purpose of taking an appeal as party defendants, and not to commence litigation as plaintiffs, we reject that contention. Capacity "concerns a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]; *see Matter of County of Chautauqua v Shah*, 126 AD3d 1317, 1320 [4th Dept 2015], *affd* 28 NY3d 244 [2016]), including the "authority to sue or be sued" (*Silver v Pataki*, 96 NY2d 532, 537 [2001], *rearg denied* 96 NY2d 938 [2001]). " 'Being artificial creatures of statute, such [governmental] entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate' " (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41-42 [2005], quoting *Community Bd. 7 of Borough of Manhattan*, 84 NY2d at 155-156).

It is undisputed that appellants lack express authority to intervene in this matter inasmuch as the Local Law does not confer any such authority on the Board or its members (*see City of New York v State of New York*, 86 NY2d 286, 293 [1995]; *Matter of James v Donovan*, 130 AD3d 1032, 1034 [2d Dept 2015], *lv denied* 26 NY3d 1048 [2015]). Appellants correctly contend that "[a]n express grant of authority is not always necessary. Rather, capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity . . . , provided, of course, that there is no clear legislative intent negating [such authority]" (*Matter of Citizen Review Bd. of the City of Syracuse v Syracuse Police Dept.*, 150 AD3d 121, 125 [4th Dept 2017] [internal quotation marks omitted]; *see Town of Riverhead*, 5 NY3d at 42; *Matter of Graziano v County of Albany*, 3 NY3d 475, 479 [2004]).

Contrary to appellants' contention, however, we conclude that section 7.5 of the Geneva City Charter, which grants the authority to pursue litigation and appeals involving the rights of the City to the "City Attorney . . . with the approval of the City Council," evinces a "clear legislative intent" to deny such authority to the Board (*Citizen Review Bd. of the City of Syracuse*, 150 AD3d at 125). Furthermore, we reject appellants' contention that the power to enforce the validity of the enabling legislation may be inferred from the enabling legislation itself. "[T]he power to bring a particular claim may be inferred when the agency in question has 'functional responsibility within the zone of interest to be protected' " (*Community Bd. 7 of Borough of Manhattan*, 84 NY2d at 156, quoting *Matter of City of New York v City Civ. Serv. Commn.*, 60 NY2d 436, 445 [1983], *rearg denied* 61 NY2d 759 [1984]). Here, while the Board's functional responsibility included enforcement of the provisions of the Local Law, its " 'zone of interest' " did not include defending

the validity of that ordinance (*id.*). We therefore conclude that appellants lack the capacity to intervene in this matter for the purpose of taking an appeal from the judgment, and that appellants' motion was thus properly denied.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

691

CAF 21-00014

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF JOSAPH M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA A., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered December 17, 2019, in a proceeding pursuant to Family Court Act article 10. The order appointed a guardian ad litem for respondent in this proceeding.

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

Same memorandum as in *Matter of Josaph M. (Wanda A.)* ([appeal No. 3] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

692

CAF 21-00017

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF JOSAPH M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA A., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered July 2, 2020, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, directed the disclosure of certain medical and mental health treatment records regarding respondent.

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

Same memorandum as in *Matter of Josaph M. (Wanda A.)* ([appeal No. 3] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

693

CAF 22-00406

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF JOSAPH M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA A., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered July 30, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent Wanda A. claims that she received ineffective assistance of counsel during the hearing to determine whether to reappoint a guardian ad litem, and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order that appointed a guardian ad litem for her pursuant to CPLR 1202. In appeal No. 2, respondent appeals from an order granting petitioner's application for a subpoena duces tecum with respect to respondent's medical and mental health treatment records. In appeal No. 3, respondent appeals from an order of fact-finding and disposition that, inter alia, adjudged the subject child to be neglected.

As a preliminary matter, we note that, shortly after issuing the order in appeal No. 1, Family Court terminated the representation by the guardian ad litem, and we therefore dismiss the appeal from the order in appeal No. 1 as moot (*see Chase Natl. Bank of City of N.Y. v von Kageneck*, 260 App Div 941, 941 [2d Dept 1940]; *cf. Matter of Elliot Z. [Joseph Z.]*, 165 AD3d 682, 683 [2d Dept 2018]; *see generally Matter of Wellman v Surles*, 185 AD2d 464, 465 [3d Dept 1992]).

We further note that respondent does not raise any issues with respect to the order in appeal No. 2 and has therefore abandoned any contentions with respect thereto (*see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1634 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Jaquish v Town Bd. of Town of German Flatts*, 160 AD3d 1372, 1372-1373 [4th Dept 2018]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]). We thus dismiss the appeal from the order in appeal No. 2.

Contrary to respondent's contention in appeal No. 3, because she failed to appear at the fact-finding hearing and because her attorney, although present, did not participate in the hearing, the order of fact-finding and disposition was entered upon respondent's default (*see Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]). No appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511; *Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]). Nevertheless, respondent's appeal from the order brings up for review "matters which were the subject of contest" before the court (*James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]), i.e., respondent's claim that she was denied effective assistance of counsel at the hearing to determine whether to reappoint a guardian ad litem (*see generally Matter of Buljeta v Fuchs*, 209 AD3d 730, 732 [2d Dept 2022]; *Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080-1081 [4th Dept 2019]).

Respondent contends that she was denied effective assistance of counsel based on counsel's statements to the court at that hearing that counsel was unable to communicate with respondent and that respondent was not cooperating with her. We reject that contention. "[C]ourts cannot shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants" (*Matter of Jesten J.F. [Ruth P.S.]*, 167 AD3d 1527, 1528 [4th Dept 2018] [internal quotation marks omitted]). Thus, the court, on its own initiative or upon the motion of "any other party to the action," may appoint a guardian ad litem (CPLR 1202 [a] [3]) to appear on behalf of "an adult incapable of adequately prosecuting or defending [their] rights" (CPLR 1201). When an attorney becomes "aware of their client's apparent incompetence, it [is] incumbent upon . . . counsel to move, pursuant to CPLR 1202 (a) (3), for appointment of a guardian ad litem to protect [their client's] interests" (*Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300, 300 [1st Dept 2001]; *see e.g. Jesten J.F.*, 167 AD3d at 1528; *Matter of Anastasia E.M. [Niasia F.]*, 146 AD3d 887, 888 [2d Dept 2017]). Inasmuch as counsel's comments were relevant to the court's determination whether to appoint a guardian ad litem, we conclude that respondent failed to demonstrate the absence of a strategic or other legitimate explanation for counsel's alleged shortcomings (*see Matter of Bryleigh E.N. [Derek G.]*, 187 AD3d 1685, 1687 [4th Dept 2020]; *see also People v Boodrow*, 205 AD3d 1134, 1137 [3d Dept 2022]; *People v Ellis*, 169 AD2d 838, 839 [2d Dept 1991], *lv*

denied 77 NY2d 960 [1991]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

698

CA 22-01644

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

PATRICK HARDEN AND KATHERINE HARDEN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID N. WEINRAUB, BROWN AND WEINRAUB,
PLLC, LINDSAY ROBINSON AND JODI LYNN MCKAY,
DEFENDANTS-RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (SHARON STERN GERSTMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PILLINGER MILLER TARALLO, LLP, BUFFALO (KENNETH A. KRAJEWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DAVID N. WEINRAUB AND BROWN AND WEINRAUB, PLLC.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT LINDSAY ROBINSON.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT JODI LYNN MCKAY.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered August 31, 2022. The order granted the motion and cross-motions of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants David N. Weinraub and Brown and Weinraub, PLLC and the cross-motion of defendant Lindsay Robinson are denied, the complaint is reinstated against those defendants and against defendant Jodi Lynn McKay, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this action seeking to recover damages for injuries plaintiff Patrick Harden allegedly sustained in a motor vehicle accident. Defendants David N. Weinraub and Brown and Weinraub, PLLC (collectively, Weinraub defendants) moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint against them as time-barred. Defendant Jodi Lynn McKay cross-moved to dismiss the complaint against her as time-barred or, in the alternative, for failure to state a cause of action. Defendant Lindsay Robinson cross-moved to dismiss the complaint against her as time-barred. Supreme Court determined that the complaint was time-barred, and plaintiffs now appeal from an order that granted the motion and cross-motions.

We reverse.

"On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). Once a defendant meets that initial burden, the burden shifts "to plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*id.* at 1562 [internal quotation marks omitted]).

Here, defendants met their respective burdens of establishing that the limitations period had expired. Pursuant to CPLR 214 (5), a three-year statute of limitations applies to an action to recover damages for personal injury. Plaintiffs' cause of action accrued on December 4, 2018, the date of the accident (*see Torres v Greyhound Bus Lines, Inc.*, 48 AD3d 1264, 1264-1265 [4th Dept 2008]; *Peace v Yumin Zhang*, 15 AD3d 956, 957 [4th Dept 2005]; *Marino v Proch*, 258 AD2d 628, 628 [2d Dept 1999]), and plaintiffs did not commence this action until May 18, 2022. However, in response, plaintiffs established that the statute of limitations was tolled. On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" (9 NYCRR 8.202.8). Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 (*see* Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28], 202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]). "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020], *rearg denied* 36 NY3d 962 [2021]). "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (*id.*).

Here, 472 days of the 1,095-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020, the remaining 623 days of the limitation period began to run again, expiring on July 20, 2022 (*see Matter of New York City Tr. Auth. v American Tr. Ins. Co.*, 211 AD3d 643, 643 [2d Dept 2022]). Thus, the action was timely commenced on May 18, 2022 (*see Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]; *Matter of Roach v Cornell Univ.*, 207 AD3d 931, 932-933 [3d Dept 2022]; *Brash v Richards*, 195 AD3d 582, 582 [2d Dept 2021]).

Defendants contend that the toll is inapplicable here because plaintiffs could have timely commenced the action at any point between December 4, 2018, and March 20, 2020, or between November 3, 2020, and

December 4, 2021. We reject that contention. "[A] toll operates to compensate a claimant for the shortening of the statutory period in which it must commence . . . an action, irrespective of whether the stay has actually deprived the claimant of *any* opportunity to do so" (*Lubonty v U.S. Bank, N.A.*, 34 NY3d 250, 256 [2019], *rearg denied* 34 NY3d 1149 [2020]; *see Matter of Hickman [Motor Veh. Acc. Indem. Corp.]*, 75 NY2d 975, 977 [1990]). Thus, plaintiffs were entitled to the benefit of tolling for the entire 228-day duration of the COVID-19 Executive Orders.

We therefore reverse the order, deny the Weinraub defendants' motion and Robinson's cross-motion, and reinstate the complaint. Inasmuch as the court did not address the alternative ground for dismissal raised in McKay's cross-motion, we remit the matter to Supreme Court to consider that ground and determine McKay's cross-motion anew (*see Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]; *see also Julius v County of Erie*, 196 AD3d 1058, 1059 [4th Dept 2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

699

CA 22-01376

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

BUFFALO RIVERWORKS LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SCHENNE, P.E., AND JOHN SCHENNE, P.E., DOING BUSINESS AS SCHENNE & ASSOCIATES, DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered July 27, 2022. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as it seeks damages for loss of profits/business, and as modified the order is affirmed without costs.

Memorandum: Plaintiff and defendants entered into an oral contract pursuant to which defendants were to provide engineering services for plaintiff's construction project. Completion of the project was delayed, and plaintiff commenced this action asserting claims for negligence and breach of contract and seeking damages for, inter alia, "loss of profits/business" (lost profits) and additional construction costs incurred with respect to the project. Defendants now appeal from an order denying their motion for summary judgment dismissing the complaint.

We reject defendants' contention that Supreme Court erred in denying the motion insofar as it sought summary judgment dismissing plaintiff's claim for damages based on additional construction costs it incurred. Assuming, arguendo, that defendants met their initial burden with respect to that part of the motion, we conclude, contrary to defendants' contention, that plaintiff, through its general ledger, deposition testimony, invoices, and affidavits, tendered sufficient admissible evidence to create a triable issue of fact whether it incurred additional construction costs as a result of defendants' alleged negligence or breach of contract (*see* CPLR 4518 [a]; *Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1027-1028

[4th Dept 1995]).

We agree with defendants, however, that the court erred in denying the motion insofar as it sought summary judgment dismissing plaintiff's claim for damages for lost profits, and we therefore modify the order accordingly. To recover damages for lost profits, "it must be shown that: (1) the damages were caused by the breach; (2) the alleged loss must be capable of proof with reasonable certainty[;] and (3) the particular damages were within the contemplation of the parties to the contract at the time it was made" (*Ashland Mgt. v Janien*, 82 NY2d 395, 404 [1993]; *see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [*Kenford I*]).

We conclude that defendants met their initial burden on the motion of demonstrating that damages for lost profits were not within the parties' contemplation at the time they entered into their contract. Here, the oral contract between the parties made no provision for the recovery of lost profits and it did not provide that the construction was to be completed by a date certain. In the absence of any provision in the contract for such damages, "the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject" (*Kenford I*, 67 NY2d at 262; *see Val Tech Holdings, Inc. v Wilson Manifolds, Inc.*, 119 AD3d 1327, 1329 [4th Dept 2014]). "In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered" (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989] [*Kenford II*]; *see Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183-184 [1st Dept 2007], *affd* 14 NY3d 791 [2010]), i.e., " 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made' " (*Kenford II*, 73 NY2d at 319, quoting *Globe Ref. Co. v Landa Cotton Oil Co.*, 190 US 540, 544 [1903]). Under the circumstances of this case, we conclude that "[i]t would be highly speculative and unreasonable to infer an intent to assume the risk of lost profits in what was to be a start-up venture" (*Awards.com*, 42 AD3d at 184). We further agree with defendants that it is immaterial whether they became aware of project deadlines during weekly project meetings after the contract was formed inasmuch as the relevant inquiry is whether "the particular damages were within the contemplation of the parties to the contract at the time it was made" (*Ashland Mgt.*, 82 NY2d at 404).

Further, even assuming, arguendo, that defendants contemplated liability for lost profits at the time they made the contract, we conclude that defendants met their initial burden of establishing that plaintiff's damages are not "capable of measurement based upon known reliable factors without undue speculation" (*id.* at 403) and that plaintiff failed to raise a triable issue of fact in opposition. Plaintiff did not "identif[y] any benchmark in the form of comparable businesses to permit a factfinder to determine that the claimed lost profits are reliable or demonstrated with reasonable certainty" (*Awards.com*, 42 AD3d at 185), nor did it adduce any expert proof. The lay assumption by plaintiff that it would have earned the same net

profit during the months in which completion of the project was delayed as it did during the same months of the following year is too speculative to support a calculation of damages (*see Ashland Mgt.*, 82 NY2d at 403).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

702

CA 22-01720

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

SUSAN A. BAIRD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. BAIRD, DEFENDANT-APPELLANT.

JOEL R. BRANDES, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered August 4, 2022. The order denied the motion of defendant to dismiss the complaint and for summary judgment.

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

Memorandum: Plaintiff commenced this postjudgment matrimonial proceeding seeking to reform the parties' Property Settlement and Parenting Agreement (agreement), which was incorporated but not merged into their judgment of divorce. Plaintiff asserted that the agreement should be reformed to include an equitable distribution of her marital interest in defendant's pension, which she alleged was omitted from the agreement due to mutual mistake or fraud. Defendant moved to dismiss the complaint pursuant to CPLR 3211 and for summary judgment dismissing the complaint pursuant to CPLR 3212. Supreme Court denied the motion, and defendant appeals.

Defendant contends, as limited by his brief, that the court erred in denying his motion insofar as it sought dismissal of the complaint because the complaint failed to sufficiently plead a cause of action for reformation based on fraud or mutual mistake and because the allegations lack the specificity required by CPLR 3016 (b). We reject that contention.

" 'A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake' " (*EGW Temporaries, Inc. v RLI Ins. Co.*, 83 AD3d 1481, 1481 [4th Dept 2011]; *see Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]). "A mutual mistake exists where the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*EGW Temporaries, Inc.*, 83 AD3d at 1481-1482 [internal quotation marks

omitted]; *see Greater N.Y. Mut. Ins. Co.*, 36 AD3d at 443). "When an error is not in the agreement itself, but in the instrument that embodies the agreement, equity will interfere to compel the parties to execute the agreement which they have actually made, rather than enforce the instrument in its mistaken form" (*Hadley v Clabeau*, 161 AD2d 1141, 1141 [4th Dept 1990] [internal quotation marks omitted]).

We conclude that the complaint sufficiently states a cause of action for reformation of the agreement based on mutual mistake by alleging that the parties agreed to "the distribution of all assets owned jointly or in the individual name of either party" and then omitted the distribution of plaintiff's marital interest in a defined benefit pension that defendant was entitled to because neither party was aware of defendant's entitlement to those benefits at the time the agreement was negotiated and executed (*see Walker v Walker*, 67 AD3d 1373, 1374-1375 [4th Dept 2009]; *see also Mancuso v Graham*, 173 AD3d 1808, 1809 [4th Dept 2019]). Those allegations contain sufficient detail to satisfy the particularity requirement of CPLR 3016 (b) (*cf*. *Hilgreen v Pollard Excavating, Inc.*, 193 AD3d 1134, 1136-1138 [3d Dept 2021], *appeal dismissed* 37 NY3d 1002 [2021]).

We also conclude that the complaint sufficiently states a cause of action for reformation of the agreement based on fraud. "[A] fraud cause of action must allege that the defendant: (1) made a representation to a material fact; (2) the representation was false; (3) the defendant intended to deceive the plaintiff; (4) the plaintiff believed and justifiably relied on the statement and in accordance with the statement engaged in a certain course of conduct; and (5) as a result of the reliance, the plaintiff sustained damages" (*Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1255 [4th Dept 2014]). Here, the complaint alleges that defendant represented during the divorce negotiations that he did not have a defined benefit plan due to his employer's bankruptcy; that defendant's representation was false; that defendant intended to deceive plaintiff; that plaintiff justifiably relied on defendant's misrepresentation in negotiating the agreement; and that, as a result of her reliance, plaintiff did not receive her marital share of defendant's pension. Those allegations "sufficiently pleaded the elements of fraud . . . and supplied sufficient detail to satisfy the specific pleading requirements of CPLR 3016 (b)" (*Kaufman v Kaufman*, 135 AD2d 786, 787 [2d Dept 1987]; *see Gaines v Gaines*, 188 AD2d 1048, 1048-1049 [4th Dept 1992]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

704

CA 22-01463

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

ELLICOTTVILLE INN CONDOMINIUM ASSOCIATION,
PLAINTIFF-RESPONDENT,

V ORDER

BRIAN D. KEMPISTY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

PETERS & MORIARTY, PC, ELLICOTTVILLE (KATHLEEN MORIARTY FLEMING OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), entered July 14, 2022. The order granted plaintiff's motion for summary judgment in lieu of complaint.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

705

CA 22-01464

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

ELLICOTTVILLE INN CONDOMINIUM ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN D. KEMPISTY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

PETERS & MORIARTY, PC, ELLICOTTVILLE (KATHLEEN MORIARTY FLEMING OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), entered July 27, 2022. The judgment awarded plaintiff the sum of $2,500 with interest.

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

Memorandum: By motion for summary judgment in lieu of complaint (*see* CPLR 3213), plaintiff moved for judgment in the amount of $2,500.00, plus interest, pursuant to a memorandum of understanding between the parties regarding the installation and maintenance of a gutter, downspout, and fence between their adjoining properties. County Court granted the motion, and defendant appeals from the judgment awarding plaintiff damages in the amount of $2,500 plus interest.

Preliminarily, we note that defendant's contention that service of process did not confer personal jurisdiction over him inasmuch as plaintiff did not comply with the due diligence requirement of CPLR 308 (4) was raised for the first time on appeal and thus is not properly before us (*see Robert K. Lesser Living Trust, Dated Apr. 21, 2005 v United Secular Am. Ctr. for the Disabled, Inc.*, 164 AD3d 1659, 1661 [4th Dept 2018]).

We agree with defendant, however, that the court erred in granting the motion inasmuch as the parties' memorandum of understanding is not "an instrument for the payment of money only" (CPLR 3213; *see Divito v Zastawrny LLC*, 129 AD3d 1668, 1668 [4th Dept 2015]). Where, as here, an agreement " 'requires something in

addition to [an] explicit promise to pay a sum of money, CPLR 3213 is unavailable' " (*Divito*, 129 AD3d at 1668; *see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]; *Whitley v Pieri*, 48 AD3d 1175, 1176 [4th Dept 2008]). We therefore reverse the judgment and deny the motion. In accordance with CPLR 3213, "the moving and answering papers shall be deemed the complaint and answer, respectively."

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

709

KA 22-01739

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DONALD M. LEWINSKI, DEFENDANT-RESPONDENT.

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

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (HERBERT L. GREENMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), dated October 4, 2022. The order granted that part of the omnibus motion of defendant seeking to dismiss the indictment and dismissed the indictment.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment on the ground that, inter alia, the evidence before the grand jury was not legally sufficient to establish the charged offense of criminally negligent homicide (Penal Law § 125.10). We affirm.

"To dismiss an indictment on the basis of insufficient evidence before a Grand Jury, a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury" (*People v Gaworecki*, 37 NY3d 225, 230 [2021] [internal quotation marks omitted]). "In the context of grand jury proceedings, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*id.* [internal quotation marks omitted]; *see People v Grant*, 17 NY3d 613, 616 [2011]). On our review, we must determine "whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference" (*Gaworecki*, 37 NY3d at 230 [internal quotation marks omitted]).

As relevant here, the People were required to present competent evidence demonstrating that defendant, acting with "criminal negligence," caused the victim's death (Penal Law § 125.10). A person

acts with criminal negligence in this context when that person "fails to perceive a substantial and unjustifiable risk" that death will result (§ 15.05 [4]). "Criminal negligence also requires the defendant's conduct to be a gross deviation from the standard of care that a reasonable person would observe in the situation" (*Gaworecki*, 37 NY3d at 230-231 [internal quotation marks omitted]). Criminally negligent homicide cannot be predicated on every careless act merely because that carelessness results in another's death (*see People v Haney*, 30 NY2d 328, 335 [1972]). Proof of facts which tend to merely show, through the occurrence of the result and the concurrence of the defendant's conduct, that the risk existed and ultimately resulted from the defendant's conduct is not sufficient (*see generally People v Warner-Lambert Co.*, 51 NY2d 295, 305-306 [1980], *cert denied* 450 US 1031 [1981]).

We conclude that the evidence presented to the grand jury failed to establish a prima facie case that defendant acted with criminal negligence. The evidence showed that defendant and the victim were engaged in a verbal altercation at a restaurant over the course of several hours. The victim made various comments and threats to defendant, including that the victim would kill defendant. The victim left his seat and approached defendant, who was standing at the bar to pay his bill. The men were standing face-to-face and engaging in a verbal altercation when defendant gave a single shove to the victim. The victim fell straight backwards and hit his head on the floor. We conclude that the evidence, viewed most favorably to the People, did not establish "the kind of seriously condemnatory behavior that the Legislature envisioned when it defined 'criminal negligence,' even though the consequences here were fatal" (*People v Cabrera*, 10 NY3d 370, 378 [2008]).

In light of our determination, we do not address the remaining contention of the People.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

710

KA 22-01638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON WEEKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered May 4, 2022. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, endangering the welfare of a child (two counts), and sexual abuse in the third 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 one count of predatory sexual assault against a child (Penal Law § 130.96), two counts of endangering the welfare of a child (§ 260.10 [1]), and two counts of sexual abuse in the third degree (§ 130.55). Defendant failed to preserve his contention that County Court should have recused itself (*see* CPL 470.05 [2]; *People v Strohman*, 66 AD3d 1334, 1335-1336 [4th Dept 2009], *lv dismissed* 13 NY3d 911 [2009]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his motion for a mistrial based on the testimony of one of the victims concerning her recollection of certain lyrics to a song that defendant played during an act of sexual abuse (*see generally People v Urrutia*, 181 AD3d 1338, 1338 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]). Under the circumstances of this case, the victim's testimony regarding the lyrics "shed light on the circumstances under which" defendant played and listened to the music and was properly admitted inasmuch as it was relevant to show his intent, his consciousness of guilt, and the victim's recollection of the incident and the probative value of that testimony was not outweighed by its prejudicial effect (*People v Wallace*, 59 AD3d 1069,

1070 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]; *see People v Green*, 92 AD3d 953, 956 [2d Dept 2012], *lv denied* 19 NY3d 864 [2012]; *see generally People v James*, 176 AD3d 1492, 1495 [3d Dept 2019], *lv denied* 34 NY3d 1078 [2019]).

We reject defendant's contention that he received ineffective assistance of counsel. Although defendant contends that defense counsel was ineffective for failing to challenge a prospective juror, defendant " 'failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge th[e] prospective juror[]' " (*People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]; *see generally People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). Defendant's contention that defense counsel failed to adequately cross-examine the victim at trial "involves a simple disagreement[] with strategies, tactics or the scope of possible cross-examination," and thus does not establish ineffective assistance of counsel (*People v Powell*, 81 AD3d 1307, 1307 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011] [internal quotation marks omitted]). Further, although defendant contends that defense counsel was ineffective for failing to request that the court recuse itself, the record does not establish a basis for recusal (*see People v Holley*, 188 AD3d 1644, 1646-1647 [4th Dept 2020], *lv denied* 37 NY3d 965 [2021]), and defense counsel cannot be deemed ineffective for failing to make a motion that would have had little to no chance of success (*see generally People v Nary*, 209 AD3d 1275, 1276 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]).

Viewing "the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Brown*, 204 AD3d 1390, 1392 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]), we reject defendant's contention that the evidence was legally insufficient to support his conviction. In addition, although "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings" (*People v Roman*, 107 AD3d 1441, 1442 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]), viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and affording the requisite deference to the jury's opportunity to view the witnesses (*see Roman*, 107 AD3d at 1442), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Zeitz*, 148 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 29 NY3d 1089 [2017]).

Contrary to defendant's further contention, the court did not err in permitting the mother of one of the victims to make a statement at sentencing. Although the mother, under the circumstances of this case, did not qualify as a "victim" pursuant to CPL 380.50 (2) (a), that did not preclude the court from allowing, in its discretion, the mother's statement (*see People v Hemmings*, 2 NY3d 1, 6 [2004], *rearg denied* 2 NY3d 824 [2004]; *People v Iovinella*, 295 AD2d 753, 753 [3d Dept 2002], *lv denied* 99 NY2d 536 [2002]), and we perceive no abuse of

discretion here (*see generally People v Minemier*, 124 AD3d 1408, 1409 [4th Dept 2015]).

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

715

CAF 22-01144

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

IN THE MATTER OF ANIYAH J.

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

MEMORANDUM AND ORDER

KATARA J., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered June 28, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order terminating her parental rights with respect to the subject child based upon a finding of permanent neglect. We reject the mother's contention that Family Court erred in refusing to adjourn the fact-finding and dispositional hearing. "The grant or denial of a [request] for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Steven B.*, 6 NY3d 888, 889 [2006] [internal quotation marks omitted]). Here, the mother had failed to appear on a prior date, appeared late on the day of the hearing, and when she ultimately appeared for the hearing spoke to her counsel only briefly before leaving the courthouse. Under these circumstances, we perceive no abuse of discretion in the court's refusal to adjourn the hearing (*see Matter of Wilson v McCray*, 125 AD3d 1512, 1513 [4th Dept 2015], *lv denied* 25 NY3d 908 [2015]).

The mother failed to preserve for our review her further contention that the court erred in disqualifying her initial assigned counsel upon finding a conflict of interest in the attorney's continued representation (*see generally Matter of Sean W. [Brittany*

W.], 87 AD3d 1318, 1320 [4th Dept 2011], *lv denied* 18 NY3d 802 [2011]). Although the mother's initial assigned counsel filed her own motion to be reinstated, the record does not reflect that the mother joined in that motion, that she made her own motion seeking to reinstate her initial assigned counsel, or that she otherwise raised the issues now raised on appeal. Moreover, to the extent that the contention is based on matters outside the record, the contention cannot be reviewed on this appeal in any event (*see Matter of Baron C. [Dominique C.]*, 101 AD3d 1622, 1622-1623 [4th Dept 2012]; *see generally Killian v Captain Spicer's Gallery, LLC*, 170 AD3d 1587, 1589 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

716

CA 23-00130

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

JOSEPH CALLOWAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN PARK PLACE, INC., AND IRON SMOKE WHISKEY, LLC, DEFENDANTS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SEGAR & SCIORTINO, ROCHESTER (JASON D. POSELOVICH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered January 13, 2023. The order, among other things, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1).

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for an injury that he sustained when he fell while working on a ladder in a building owned by defendant American Park Place, Inc., and leased by defendant Iron Smoke Whiskey, LLC. Plaintiff's employer was a contractor hired to install a new plumbing, heating and cooling system in the building. At the time of the incident, plaintiff and his coworker were removing the original ductwork. The ducts were in long strips, which were first removed from the straps holding them. Plaintiff and his coworker then carried the ducts, while resting them on their shoulders, down their respective ladders. Plaintiff was on his ladder when a duct that was being removed from its straps slipped from his hand, and then hit a wall and then hit plaintiff's ladder, causing the ladder and plaintiff to fall. Plaintiff moved for partial summary judgment on liability on his Labor Law § 240 (1) cause of action, and defendants cross-moved for summary judgment seeking dismissal of the complaint. Supreme Court, inter alia, granted plaintiff's motion and denied defendants' cross-motion with respect to the Labor Law § 240 (1) cause of action. Defendants now appeal, and we affirm.

Contrary to defendants' contentions, the court properly granted plaintiff's motion and properly denied defendants' cross-motion with respect to the Labor Law § 240 (1) cause of action. We conclude that

plaintiff met his initial burden on the motion of establishing that the ladder was "not so placed . . . as to give proper protection to [him]," and the burden thus shifted to defendants to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident" (*Kin v State of New York*, 101 AD3d 1606, 1607 [4th Dept 2012] [internal quotation marks omitted]; *see also Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007]; *Sniadecki v Westfield Cent. School Dist.*, 272 AD2d 955, 955 [4th Dept 2000]). Defendants failed to meet that burden. Although defendants' expert averred that defendants did not violate Labor Law § 240 (1) because plaintiff was provided with a stable ladder that was sufficient for him to safely perform the job, evidence that the ladder was structurally sound and not defective "is not relevant on the issue of whether it was properly placed" (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1402 [4th Dept 2015] [internal quotation marks omitted]). In addition, although plaintiff's coworker testified at his deposition that he believed that the duct fell due to plaintiff's failure to hold it securely and that plaintiff then fell due to his failure to keep his balance, we conclude that such testimony established, at most, contributory negligence on the part of plaintiff (*see Miller v Rerob, LLC*, 197 AD3d 979, 980 [4th Dept 2021]). Because plaintiff established that a statutory violation was a proximate cause of his injury, he "cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *see Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]).

For the same reasons, we conclude that defendants failed to meet their initial burden on their cross-motion with respect to the Labor Law § 240 (1) cause of action (*see generally Gonzalez v Romero*, 178 AD3d 1401, 1402 [4th Dept 2019]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

717

CA 22-01318

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

KERI SPRING, AS THE DULY APPOINTED ADMINISTRATOR OF THE ESTATE OF GREGORY SPRING, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLEGANY-LIMESTONE CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION OF ALLEGANY-LIMESTONE CENTRAL SCHOOL DISTRICT AND KEVIN STRAUB, PRINCIPAL, DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOSMAN LAW, L.L.C., BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered August 16, 2022. The order, among other things, denied the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: In this wrongful death action arising from the suicide of plaintiff's son (decedent) a few days after the conclusion of his sophomore year of high school, plaintiff alleges, in relevant part, that defendants were negligent in failing to adequately address and safeguard against harassment and bullying directed at decedent at school and that the negligent acts and omissions of defendants were a proximate cause of decedent's suicide. Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the amended complaint. We affirm.

Preliminarily, to the extent that defendants contend that they are entitled to summary judgment on the ground that plaintiff is unable to prove with admissible evidence all the elements of the cause of action in the amended complaint, we reject that contention. "A moving party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]; *see Freeland v Erie County*, 204 AD3d 1465, 1467 [4th Dept 2022]; *Martin v United Parcel Serv. of Am., Inc.*, 104 AD3d

1173, 1174 [4th Dept 2013]).

Defendants next contend that they owed no duty to decedent because his suicide occurred off school premises and during summer vacation, i.e., it occurred when decedent was not within the orbit of defendants' authority. We reject that contention as well.

In a wrongful death action, tortfeasors may "be held liable for the suicide of [a] person[ ] who, as the result of [the tortfeasors'] negligence, suffer[s] mental disturbance destroying the will to survive" (*Fuller v Preis*, 35 NY2d 425, 428 [1974]; *see Watkins v Labiak*, 282 AD2d 601, 602 [2d Dept 2001], *lv dismissed* 96 NY2d 897 [2001]; *D'Addezio v Agway Petroleum Corp.*, 186 AD2d 929, 931 [3d Dept 1992]). As relevant to the negligence alleged in this case, "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Hauburger v McMane*, 211 AD3d 715, 716 [2d Dept 2022]). "[T]he nature of the duty is that the school must exercise such care of [its students] as a parent of ordinary prudence would observe in comparable circumstances" (*Stephenson v City of New York*, 19 NY3d 1031, 1033 [2012] [internal quotation marks omitted]; *see Mirand*, 84 NY2d at 49). "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*Mirand*, 84 NY2d at 49; *see Pratt v Robinson*, 39 NY2d 554, 560 [1976]). "The school's duty is thus coextensive with and concomitant to its physical custody of and control over the child" (*Pratt*, 39 NY2d at 560). "When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases" (*id.*; *see Stephenson*, 19 NY3d at 1034). Thus, "[g]enerally, the duty of care does not extend beyond school premises" (*Stephenson*, 19 NY3d at 1034).

Here, contrary to defendants' contention, "[t]he duty that is relevant in this case is the duty of a school to provide its students with adequate supervision" while they are in the school's physical custody and control (*Hauburger*, 211 AD3d at 716). Plaintiff's cause of action is premised on the allegation that the "relevant conduct occurred on school premises or [otherwise] within the orbit of [defendants'] authority" (*id.* at 717; *cf. Boyle v Brewster Cent. Sch. Dist.*, 209 AD3d 619, 621 [2d Dept 2022]), i.e., that defendants' negligence in failing to adequately address and safeguard against harassment and bullying directed at decedent at school caused decedent to "suffer mental disturbance destroying [his] will to survive" (*Fuller*, 35 NY2d at 428).

Defendants further contend that they established as a matter of law that they did not breach any duty owed to decedent. We reject that contention. "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school

authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49).

Here, viewing the evidence in the light most favorable to plaintiff as the nonmovant on summary judgment and affording her the benefit of every available inference (*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]; *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that defendants' own submissions raise triable issues of fact whether they had sufficiently specific knowledge or notice of the alleged bullying and whether they adequately supervised the students (*see Motta v Eldred Cent. Sch. Dist.*, 141 AD3d 819, 821-822 [3d Dept 2016]). Defendants submitted the testimony of plaintiff, who recounted that decedent had a lengthy history of enduring bullying by other students, which included being called various derogatory names, threatened with physical harm, and mocked for the tics he exhibited as a result of Tourette's syndrome. Plaintiff also testified about instances when decedent would purportedly respond physically to the bullying and would then receive discipline and other sanctions. Plaintiff further testified that both she and decedent repeatedly complained about the bullying to several school employees, including defendant Kevin Straub, Principal, and that such complaints were not taken seriously or adequately addressed. Importantly, Straub acknowledged during his deposition that plaintiff had reported to him on more than one occasion that decedent was being bullied and had provided him with reading materials about bullying. Consequently, we conclude that defendants failed to eliminate triable issues of fact whether they breached their duty to provide adequate supervision (*see id.*).

We further conclude on this record that, contrary to defendants' contention, they failed to establish that decedent's suicide was not a reasonably foreseeable consequence of their alleged negligence (*see Freeland*, 204 AD3d at 1467; *Ferrer v Riverbay Corp.*, 214 AD2d 312, 312 [1st Dept 1995]; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316-317 [1980], *rearg denied* 52 NY2d 784 [1980]).

Defendants also contend that summary judgment is warranted because they established as a matter of law that the causal nexus is too tenuous to permit a factfinder to infer that any of their acts or omissions was a proximate cause of decedent's suicide. We reject that contention.

"Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was [a] proximate cause of the injuries sustained" (*Mirand*, 84 NY2d at 50; *see Dean v Falconer Cent. School Dist.*, 259 AD2d 1034, 1035 [4th Dept 1999]). "The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence" (*Mirand*, 84 NY2d at 50). Where, as here, the alleged injury sustained is mental disturbance destroying the will to survive that results in suicide, the question is "whether

the defendants' negligence substantially contributed to [the] death" (*Fuller*, 35 NY2d at 433). In resolving that question, there may be cases "where the causal nexus becomes too tenuous to permit a jury to 'speculate' as to the proximate cause of the suicide" (*id.* at 434). Nevertheless, "[b]ecause questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve" (*Derdiarian*, 51 NY2d at 315; *see Mirand*, 84 NY2d at 51; *Motta*, 141 AD3d at 821).

Here, we note that "[w]hile it is true that a material issue of fact may not rest upon speculation . . . , '[t]he absence of direct evidence does not require a ruling in defendant[s'] favor[inasmuch as] proximate cause may be inferred from the facts and circumstances surrounding the event' " (*DiBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1327 [3d Dept 2010]; *see Kerrick v Finger Lakes Racing Assn.*, 181 AD2d 984, 985 [4th Dept 1992]). Defendants' own submissions included plaintiff's testimony that decedent expressed to her that he felt humiliated and ostracized "every time he received punishment for sticking up for himself after a bully bullied him," and that decedent, on more than one occasion, would come home from school crying and physically upset. Plaintiff also testified that decedent, in the months preceding his suicide, exhibited anger every day due, at least in part, to bullying by two particular students. According to plaintiff, she had a conversation with decedent the day before his suicide regarding the stress he was under, part of which included a complaint that he did not feel safe at school. Given those personal interactions and exchanges with decedent regarding the apparent effect that the alleged bullying had on him, plaintiff opined that, while other factors may have contributed, the bullying was the root cause of decedent's suicide a few days after the conclusion of an academic year that allegedly involved persistent and unaddressed mistreatment at school (*cf. Sullivan v Welsh*, 132 AD2d 945, 945-946 [4th Dept 1987], *appeal dismissed* 70 NY2d 796 [1987]). Viewing that evidence in the light most favorable to plaintiff as the nonmovant, we conclude that defendants' own submissions contain facts and circumstances from which a factfinder could reasonably infer that defendants' negligence "substantially contributed to [the] death" (*Fuller*, 35 NY2d at 433). Therefore, it cannot be said on this record that defendants established as a matter of law that their alleged negligence was "simply too attenuated to be [a] proximate cause of decedent's suicidal act" (*Wells v St. Luke's Mem. Hosp. Ctr.*, 129 AD2d 952, 954 [3d Dept 1987], *lv denied* 70 NY2d 605 [1987]; *cf. D'Addezio*, 186 AD2d at 931; *Sullivan*, 132 AD2d at 945-946).

Moreover, contrary to defendants' suggestion, the fact that text messages sent from decedent to his former girlfriend on the day of the suicide indicated that decedent's suicide may have been prompted by despondence over the former girlfriend's lack of response and apparent unwillingness to get back together does not eliminate triable issues of fact regarding proximate cause. " '[T]here may be more than one proximate cause of an injury' " (*Mazella v Beals*, 27 NY3d 694, 706 [2016]). Consequently, here, "[t]he presence of other stressful

factors in decedent's life does not displace defendant[s'] alleged acts as a proximate cause of the suicide, since it is necessary only that [such acts] 'substantially contributed' to the death" (*Koren v Weihs*, 201 AD2d 268, 269 [1st Dept 1994]).

Based on the foregoing, we conclude that defendants failed to meet their initial burden of establishing entitlement to summary judgment, and thus the burden never shifted to plaintiff to raise a triable issue of fact in opposition (*see Freeland*, 204 AD3d at 1467; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

718

CA 22-01481

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

IN THE MATTER OF KIM STANZ AND MICHAEL STANZ,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
RESPONDENT-RESPONDENT.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (THOMAS D. LYONS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

RUPP PFALZGRAF, LLC, BUFFALO (BRANDON SNYDER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered August 25, 2022. The order, among other things, set aside the appraisal award and remitted the matter for further deliberations.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the first ordering paragraph remitting the matter to the court-appointed umpire and the appraisers for further deliberations consistent with the insurance policy requirements, and by vacating the second through fourth ordering paragraphs in their entirety, and as modified the order is affirmed without costs.

Memorandum: Petitioners are the owners of a residence that was insured by respondent against loss or damage caused by fire. In early 2019, petitioners' home was damaged in a fire. Petitioners submitted a claim under their policy with respondent, and respondent, after conducting an investigation, issued actual cost value payments to petitioners totaling approximately $370,000. Dissatisfied with this outcome, petitioners demanded an appraisal of the loss with respect to, inter alia, the replacement cost value and actual cost value of the home, pursuant to the terms of the insurance policy and Insurance Law § 3404 (e). Respondent initially rejected petitioners' demand for an appraisal.

Petitioners thereafter commenced this proceeding seeking, inter alia, to compel respondent to participate in an appraisal. Supreme Court granted the petition to compel appraisal, and each party nominated an appraiser. The court thereafter appointed an umpire to work with the dueling appraisers and, after the umpire issued an

appraisal award, petitioners moved for, inter alia, an order confirming the award. Respondent opposed the motion, contending that the award should not be confirmed due to errors made by the umpire. The court, inter alia, set aside the appraisal award. Petitioners appeal, as limited by their brief, from the order insofar as it remitted the matter to the umpire and the appraisers for further deliberations consistent with the requirements of the insurance policy.

Initially, we conclude that petitioners' contention that the court erred in remitting the matter for further appraisal proceedings is preserved for our review because petitioners specifically advanced that argument before the motion court (*cf. McGuire v McGuire*, 214 AD3d 1310, 1310 [4th Dept 2023]; *see generally* CPLR 5501 [a]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). On the merits, we agree with petitioners that the court erred in remitting the appraisal to the umpire and appraisers for further deliberations. It is well settled that "after an appraisal proceeding has terminated in an award and the award has been set aside, without any fault on the part of the insured[s], [they] need not submit to any further appraisement but may sue on the policy" (*Gervant v New England Fire Ins. Co.*, 306 NY 393, 400 [1954]; *see Matter of Delmar Box Co. [Aetna Ins. Co.]*, 309 NY 60, 64 [1955]; *see generally Aetna Ins. Co. v Hefferlin*, 260 F 695, 700 [9th Cir 1919]). Here, it is undisputed that the court set aside the appraisal award due to errors made by the court-appointed umpire—i.e., not due to any fault of petitioners. Consequently, the court could not properly compel petitioners to participate in further appraisal proceedings (*see Gervant*, 306 NY at 400). Indeed, we note that petitioners are now entitled to pursue a plenary action in Supreme Court seeking full recovery on their insurance claim under the policy (*see id.*; *see generally Kaiser v Hamburg-Bremen Fire Ins. Co.*, 59 App Div 525, 526, 531 [4th Dept 1901], *affd* 172 NY 663 [1902]; *Uhrig v Williamsburg City Fire Ins. Co.*, 101 NY 362, 366 [1886]). We therefore modify the order by vacating that part of the first ordering paragraph remitting the matter to the umpire and appraisers. We further modify the order by vacating the second through fourth ordering paragraphs in their entirety.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

720

CA 22-00812

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

EILEEN C. DRAKE, DANIEL R. DRAKE AND
EILEEN C. DRAKE, AS TEMPORARY ADMINISTRATOR
OF THE ESTATE OF LILLIAN COATS, DECEASED,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF LIMA AND VILLAGE OF LIMA DEPARTMENT
OF PUBLIC WORKS, DEFENDANTS-APPELLANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (SHANNON BRAE VANDERMEER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (MELISSA M. VALLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Livingston County (Thomas E. Moran, J.), entered April 4, 2022. The order granted in part and denied in part the motion of defendants to, inter alia, dismiss certain causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking dismissal of the second and fourth causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages arising from defendants' alleged failure to properly maintain and operate a sewer main, which allowed a blockage of grease and other objects to form in the sewer main, causing sewage to backflow into plaintiffs' home. Plaintiffs' amended complaint asserted causes of action for, inter alia, negligence, trespass, public nuisance, private nuisance, and inverse condemnation or de facto taking and sought injunctive and other relief. Defendants moved pursuant to CPLR 3211 to dismiss, inter alia, plaintiffs' causes of action for trespass, public nuisance, private nuisance, and inverse condemnation or de facto taking; the amended complaint insofar as it asserted a claim for damages arising from personal injury to Lillian Coats; all claims against defendant Village of Lima Department of Public Works (Department); and plaintiffs' claim for injunctive relief. Defendants now appeal and plaintiffs cross-appeal from an order that, inter alia, granted those parts of the motion with respect to the causes of action for public nuisance and inverse condemnation or de facto taking and plaintiffs' claim for injunctive relief.

Defendants contend on their appeal that Supreme Court erred in denying the motion with respect to the claims against the Department inasmuch as the Department lacks the capacity to be sued. We reject that contention. Although defendants are correct that administrative units of municipal entities may lack the capacity to be sued (*see Andrews, Pusateri, Brandt, Shoemaker & Roberson, P.C. v Niagara County Sewer Dist. No. 1*, 71 AD3d 1374, 1375 [4th Dept 2010], *lv dismissed in part & denied in part* 15 NY3d 741 [2010]), defendants failed to establish that the Department is such an entity.

Defendants contend that the court erred in denying that part of the motion seeking to dismiss plaintiffs' claim for damages arising from personal injury to plaintiffs' decedent, Lillian Coats, inasmuch as that theory of liability was not included in the notice of claim. We reject that contention. The notice of claim includes "information sufficient to enable the [municipality] to investigate the claim" (*O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]) inasmuch as it identifies Coats as a claimant and asserts that the claimants suffered loss of quality of life and emotional distress (*cf. Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199, 1201 [4th Dept 2012]; *see generally Hart v City of Buffalo*, 218 AD3d 1140, 1149 [4th Dept 2023]).

We agree with defendants, however, that the court erred in denying the motion with respect to plaintiffs' second cause of action, for trespass, and we therefore modify the order accordingly. Among other elements, a claim for trespass requires "an intentional entry" (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013], *lv denied* 24 NY3d 911 [2014]; *see National Fuel Gas Distrib. Corp. v PUSH Buffalo [People United for Sustainable Hous.]*, 104 AD3d 1307, 1309 [4th Dept 2013]). Intent, in this context, "is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act" (*Marone*, 109 AD3d at 883 [internal quotation marks omitted]; *see Ivancic v Olmstead*, 66 NY2d 349, 352 [1985], *rearg denied* 66 NY2d 1036 [1985], 67 NY2d 754 [1986], *cert denied* 476 US 1117 [1986]). Here, accepting the allegations in the amended complaint as true (*see Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]), we conclude that the amended complaint does not state a cause of action for trespass inasmuch as it failed to allege an intentional entry onto plaintiffs' property (*see generally Marone*, 109 AD3d at 882-883).

Defendants contend that the court also erred in denying the motion with respect to plaintiffs' fourth cause of action, for private nuisance. Plaintiffs' private nuisance cause of action is based on the same facts, alleges the same wrongs, and seeks the same damages as their negligence cause of action, and we thus agree with defendants that the private nuisance cause of action should have been dismissed as duplicative of the negligence cause of action (*see generally Olney v Town of Barrington*, 180 AD3d 1364, 1365-1366 [4th Dept 2020]; *517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC*, 156 AD3d 1187, 1191 [3d Dept 2017]; *Trulio v Village of Ossining*, 153 AD3d 577, 579 [2d Dept 2017]). We therefore further modify the order accordingly.

Addressing the cross-appeal, we reject plaintiffs' contention that the court erred in granting that part of the motion seeking dismissal of their sixth cause of action, for inverse condemnation or de facto taking, insofar as it was based on the deprivation of personal property. Assuming, arguendo, that such a cause of action could be based on deprivation of personal property (*see generally O'Brien*, 54 NY2d at 357), we conclude that the court properly determined that the amended complaint does not state that cause of action inasmuch as the allegations therein refer to "Property," which the amended complaint defined solely as plaintiffs' real property.

Contrary to plaintiffs' further contention, the court did not err in determining that the amended complaint fails to state a cause of action for public nuisance. In contrast to private nuisance, which involves interference with a particular person's right to enjoy his or her property, public nuisance requires interference with a public right common to all (*see Andersen v University of Rochester*, 91 AD2d 851, 851 [4th Dept 1982], *appeal dismissed* 59 NY2d 968 [1983]; *see generally Williams v Beemiller, Inc.*, 103 AD3d 1191, 1192 [4th Dept 2013]). Although plaintiffs' third cause of action alleged that the blockage in the sewer "interfered with the rights common to all," the amended complaint's factual allegations discussed the harm to plaintiffs and their property only and presented no factual allegation supporting the claimed interference with a public right. "[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *see Fika Midwifery PLLC v Independent Health Assn., Inc.*, 208 AD3d 1052, 1056 [4th Dept 2022]; *Medical Care of W. N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]).

Finally, we reject plaintiffs' contention that the court erred in dismissing their claim for injunctive relief. Plaintiffs have failed to plead facts demonstrating that they would experience irreparable injury in the absence of injunctive relief and instead have claimed a loss that is calculable in monetary terms (*see Caruso v Bumgarner*, 120 AD3d 1174, 1175-1176 [2d Dept 2014]; *cf. Friscia v Village of Geneseo*, 197 AD3d 848, 850-851 [4th Dept 2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

722

CA 22-01133

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

IN THE MATTER OF GEORGE BORRELLO, NEW YORK STATE SENATOR, CHRIS TAGUE, NEW YORK STATE ASSEMBLYMAN, MICHAEL LAWLER, NEW YORK STATE ASSEMBLYMAN, AND UNITING NYS, LLC, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KATHLEEN C. HOCHUL, NEW YORK STATE GOVERNOR, MARY T. BASSETT, NEW YORK STATE COMMISSIONER OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH AND PUBLIC HEALTH AND HEALTH PLANNING COUNCIL, RESPONDENTS-DEFENDANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

COX LAWYERS, PLLC, BRONXVILLE (ROBERTA A. FLOWER COX OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

GREGORY DOLIN, WASHINGTON, DC, FOR NEW CIVIL LIBERTIES ALLIANCE, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered July 11, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment adjudged 10 NYCRR 2.13 null, void, and unenforceable and permanently enjoined respondents from enforcing and from readopting that regulation.

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

Memorandum: At the outset of the COVID-19 pandemic, the Governor of the State of New York declared a state disaster emergency and authorized the Commissioner of respondent-defendant New York State Department of Health (DOH) to promulgate emergency regulations and amend the State Sanitary Code (*see* Executive Order [A. Cuomo] No. 202 [9 NYCRR 8.202]). DOH responded by promulgating and then regularly readopting a series of emergency regulations, including 10 NYCRR 2.13, which replaced preexisting related regulations and set forth isolation and quarantine procedures aimed at controlling the spread of highly contagious communicable diseases. DOH eventually expressed its intent

to adopt 10 NYCRR 2.13 permanently.

Petitioners-plaintiffs (petitioners), consisting of three members of the New York State Legislature (legislator petitioners) and an advocacy organization (organization petitioner), commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, among other things, a declaration that respondents-defendants (respondents) promulgated the subject regulation in violation of the State Constitution and the separation of powers doctrine and that the regulation is invalid, as well as an injunction preventing respondents from implementing or enforcing the regulation. Supreme Court, without addressing whether petitioners had standing despite respondents having raised that threshold issue in their answer and opposition papers, determined that respondents violated the separation of powers doctrine in promulgating the regulation by exceeding the scope of their delegated powers and encroaching upon the legislative domain of policymaking. The court therefore adjudged 10 NYCRR 2.13 null, void, and unenforceable and permanently enjoined respondents from enforcing and from readopting that regulation. Respondents appeal, and we now reverse the judgment and dismiss the third amended petition-complaint on the ground that petitioners lack standing.

"Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*id.*). "Under the common law, there is little doubt that a 'court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected' " (*id.* at 772, quoting *Schieffelin v Komfort*, 212 NY 520, 530 [1914]; *see Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019]). "Related to this principle is 'a general prohibition on one litigant raising the legal rights of another' " (*Daniels*, 33 NY3d at 50, quoting *Society of Plastics Indus.*, 77 NY2d at 773). Thus, if the issue of standing is raised, "[a] petitioner challenging government agency action pursuant to an article 78 petition has the burden of demonstrating an injury in fact and that the alleged injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted" (*Matter of Stevens v New York State Div. of Criminal Justice Servs.*, — NY3d —, —, 2023 NY Slip Op 05351, *3 [2023] [internal quotation marks omitted]; *see Daniels*, 33 NY3d at 50; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). "The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm . . . that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention" (*Daniels*, 33 NY3d at 50 [internal quotation marks omitted]; *see Stevens*, — NY3d at —, 2023 NY Slip Op 05351, *3; *New York State Assn. of Nurse Anesthetists*, 2 NY3d at 214; *Society of*

Plastics Indus., 77 NY2d at 772).

Addressing first respondents' contention that the legislator petitioners lack standing, we note that "[c]ases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power" (*Silver v Pataki*, 96 NY2d 532, 539 [2001], *rearg denied* 96 NY2d 938 [2001]). "Only circumstances presented by the latter two categories confer legislator standing" (*id.*). Thus, "in limited circumstances, legislators do have . . . standing to sue when conduct unlawfully interferes with or usurps their duties as legislators" (*id.* at 542). Nonetheless, to confer legislator standing, the alleged action must have caused "a direct and personal injury [that] is . . . within a legislator's zone of interest and . . . represents a concrete and particularized harm" (*id.* at 540 [internal quotation marks omitted]; *see Matter of Townsend v Spitzer*, 69 AD3d 1026, 1027 [3d Dept 2010], *lv denied* 15 NY3d 702 [2010]; *Matter of Montano v County Legislature of County of Suffolk*, 70 AD3d 203, 216 [2d Dept 2009]; *see generally Raines v Byrd*, 521 US 811, 818-830 [1997]). When there is no vote nullification and a legislator otherwise "suffer[s] no direct, personal injury beyond an abstract institutional harm," the legislator lacks standing (*Silver*, 96 NY2d at 540; *see Montano*, 70 AD3d at 215-216; *Urban Justice Ctr. v Pataki*, 38 AD3d 20, 25-26 [1st Dept 2006], *appeal dismissed & lv denied* 8 NY3d 958 [2007]; *see generally Raines*, 521 US at 821, 826, 829).

In the case before us, "[n]o vote nullification [is] alleged" (*Silver*, 96 NY2d at 540) inasmuch as the legislator petitioners have expressly disclaimed any reliance on that category of legislator standing, and thus only the usurpation category is at issue. With respect to that category, we conclude that the legislator petitioners failed to fulfill the injury-in-fact requirement to establish standing inasmuch as we discern no allegation of "a direct and *personal* injury" that "represents a *concrete* and *particularized* harm" (*id.* [emphasis added and internal quotation marks omitted]; *see Urban Justice Ctr.*, 38 AD3d at 25; *see also Montano*, 70 AD3d at 215-216). The legislator petitioners, who sued in their official capacities, alleged in the operative pleading that respondents, in promulgating the challenged regulation, exceeded their executive powers, thereby usurping the power of the legislator petitioners "and all New York State legislators similarly situated" by prohibiting them from performing their duties to represent their constituents and to make laws on behalf of the people of New York. The legislator petitioners specifically alleged that respondents violated the separation of powers doctrine because the ability to make laws lies with the legislature and yet respondents had "exceeded the scope of their authority, . . . abused their regulat[ion-]making power, and . . . impermissibly crossed into the realm of law-making to the detriment of [the legislator petitioners] and all those legislators similarly situated." Indeed, regarding the purported usurpation of their power, the legislator petitioners alleged that they sustained the "same injury" as all other legislators. Inasmuch as the legislator petitioners merely asserted an alleged harm to the separation of

powers shared by the legislative branch as a whole, they failed to establish that they suffered a "direct, *personal* injury beyond an abstract institutional harm" (*Silver*, 96 NY2d at 540 [emphasis added]; *see Urban Justice Ctr.*, 38 AD3d at 25; *see also Montano*, 70 AD3d at 215-216; *see generally Raines*, 521 US at 821). Unlike circumstances in which a legislator demonstrates a concrete, personal injury arising from, for example, deprivation of a specific statutory right to participate in the legislative process as an individual member of a particular committee (*see Dodak v State Admin. Bd.*, 441 Mich 547, 559-561, 495 NW2d 539, 545-546 [1993]) or disproportionate allocation of funds to operate a legislative office (*see Urban Justice Ctr.*, 38 AD3d at 25), we conclude that the injury alleged by the legislator petitioners here "involve[s] only 'a type of institutional injury (the diminution of legislative power),' which does not provide standing" (*id.*). To the extent that the legislator petitioners assert that they have standing based on alleged harm to the participation of their constituents in the policymaking process, we reject that assertion because the legislator petitioners "may not raise legal grievances on behalf of others" (*id.* at 27; *see Society of Plastics Indus.*, 77 NY2d at 773).

Next, addressing respondents' contention that the organization petitioner lacks standing, we note that "[a]n organization can establish standing in several ways" (*Daniels*, 33 NY3d at 51). An organization "may demonstrate 'associational standing' by asserting a claim on behalf of its members, provided 'that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members' " (*id.*, quoting *New York State Assn. of Nurse Anesthetists*, 2 NY3d at 211). "Alternatively, an organization can demonstrate 'standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy' " (*id.*, quoting *Warth v Seldin*, 422 US 490, 511 [1975]; *see Society of Plastics Indus.*, 77 NY2d at 772-773). "Under this option, an organization—just like an individual—must show that it has suffered an 'injury in fact' and that its concerns fall within the 'zone of interests' sought to be protected by the statutory provision under which the government agency has acted" (*Daniels*, 33 NY3d at 51).

Here, we agree with respondents that the organization petitioner also lacks standing. First, the organization petitioner failed to demonstrate that " 'at least one of its members would have standing to sue' " (*id.*). The organization petitioner did not claim that any of its members had been personally subjected to isolation and quarantine under any regulation, and the affidavits of certain members of the organization petitioner setting forth potential impacts of an isolation and quarantine order on others fail to establish that any member "has suffered a cognizable harm . . . that is not tenuous, ephemeral, or conjectural but is [instead] sufficiently concrete and particularized to warrant judicial intervention" (*id.* at 50 [internal quotation marks omitted]; *see Rudder v Pataki*, 93 NY2d 273, 279 [1999]). Insofar as the organization petitioner alleged the generalized concern that promulgation of the regulation deprived its

members of a voice in the policymaking process, the organization petitioner failed to "articulate any direct injury to its [members], other than the injury every citizen allegedly suffers by reason of the challenged [action] of the . . . executive branch[ ]" (*Urban Justice Ctr.*, 38 AD3d at 24; *see Matter of Brennan Ctr. for Justice at NYU Sch. of Law v New York State Bd. of Elections*, 159 AD3d 1301, 1304-1305 [3d Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Schulz v Cuomo*, 133 AD3d 945, 947 [3d Dept 2015], *appeal dismissed* 26 NY3d 1139 [2016], *lv denied* 27 NY3d 907 [2016], *reconsideration denied* 27 NY3d 1047 [2016]; *see generally Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]). Second, we conclude for the same reason that the organization petitioner lacks standing to bring the challenge in its own name inasmuch as it "has failed to allege a personally concrete and demonstrable injury distinct from that suffered by the public at large" (*Urban Justice Ctr. v Silver*, 66 AD3d 567, 568 [1st Dept 2009]).

Finally, we are cognizant that "standing rules should not be applied in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" (*Stevens*, — NY3d at —, 2023 NY Slip Op 05351, *3 [internal quotation marks omitted]). However, inasmuch as the legislature retains its power to address the regulation and there exists a large pool of potential challengers to the regulation who could assert a concrete and particularized harm, we conclude that "this is not a case where to deny standing to these [petitioners] would insulate government action from judicial scrutiny" (*Rudder*, 93 NY2d at 280; *see Society of Plastics Indus.*, 77 NY2d at 779).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

723

CA 22-01582

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

MICHAEL SANTARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VINCENT J. FINOCCHIO, JR., VINCENT J. FINOCCHIO, JR., P.C., AND FINOCCHIO & ENGLISH, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

THE ARQUETTE LAW FIRM, PLLC, CLIFTON PARK (ALEXANDRA J. BUCKLEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CABANISS CASEY LLP, ALBANY (DAVID B. CABANISS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 5, 2022. The order, among other things, granted defendants' motion to dismiss the complaint.

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

Same memorandum as in *Santaro v Finocchio* ([appeal No. 2] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

724

CA 22-01583

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

MICHAEL SANTARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VINCENT J. FINOCCHIO, JR., VINCENT J. FINOCCHIO, JR., P.C., AND FINOCCHIO & ENGLISH, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE ARQUETTE LAW FIRM, PLLC, CLIFTON PARK (ALEXANDRA J. BUCKLEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CABANISS CASEY LLP, ALBANY (DAVID B. CABANISS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 31, 2022. The order granted plaintiff's motion for leave to reargue, and upon reargument, adhered to a prior order granting defendants' motion to dismiss the complaint.

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

Memorandum: In this legal malpractice action, plaintiff seeks damages for the alleged negligence of defendants in their representation of him in a proceeding pursuant to Family Court Act article 4. As alleged in the complaint in this action, defendants prepared and timely filed objections to the Support Magistrate's order in the Family Court proceeding on August 19, 2019. Although defendants possessed an affidavit of mailing sworn to on August 19, 2019, detailing service of the objections that same day, defendants did not file the affidavit of mailing until two days later, on August 21, 2019.

Family Court sua sponte dismissed the objections based upon defendants' failure to strictly comply with Family Court Act § 439 (e) by failing to file proof of service at the same time as the objections. However, on appeal, this Court reversed, reinstated the objections, and remitted the matter to Family Court for further proceedings on the objections, holding that "[s]trict adherence to this deadline is not required" and that, under the circumstances, dismissal of the objections was not warranted (*Matter of Sigourney v Santaro*, 192 AD3d 1482, 1483 [4th Dept 2021] [internal quotation marks omitted]). In so holding, this Court noted that there was no dispute

that the two-day delay did not result in any prejudice inasmuch as the petitioner in the Family Court proceeding was served with a copy of the objections within the statutory time period (*see id.*).

Plaintiff then commenced this action, seeking damages arising from the additional litigation expenses allegedly caused by defendants' two-day delay in filing proof of service. Defendants moved to dismiss the complaint, and Supreme Court, inter alia, granted that motion. Plaintiff thereafter moved for leave to reargue his opposition to defendants' motion to dismiss the complaint. The court granted the motion for leave to reargue but, upon reargument, adhered to its original determination. Plaintiff now appeals, in appeal No. 1, from the court's original order and appeals, in appeal No. 2, from the order entered upon reargument.

As an initial matter, we note that appeal No. 1 must be dismissed inasmuch as the order in that appeal was superseded by the order in appeal No. 2 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

With respect to appeal No. 2, it is well settled that, "[t]o establish a cause of action for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care" (*Harvey v Handelman, Witkowicz & Levitsky, LLP*, 130 AD3d 1439, 1441 [4th Dept 2015] [internal quotation marks omitted]; *see Leder v Spiegel*, 9 NY3d 836, 837 [2007], *cert denied* 552 US 1257 [2008]). On a motion pursuant to CPLR 3211 (a) (7), a cause of action for legal malpractice is properly dismissed where the conduct alleged in the complaint, "even if accepted as true[,] does not establish negligence" (*Leder*, 9 NY3d at 837; *see generally Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 847 [2d Dept 2012], *lv denied* 20 NY3d 857 [2013]).

Although Family Court may properly dismiss objections for failure to comply with Family Court Act § 439 (e) under some circumstances (*see generally Matter of Minka v Minka*, 219 AD2d 810, 810-811 [4th Dept 1995]), strict compliance with the statute is not always required (*see Sigourney*, 192 AD3d at 1483). Here, the complaint alleged that defendants timely filed the objections, possessed an affidavit of mailing detailing proper service on the day of filing, and delayed just two days in filing proof of service, and the complaint also alleged that opposing counsel filed a rebuttal. Contrary to plaintiff's contention, the allegations in the complaint do not support even an inference that any prejudice was caused by the two-day delay, nor do they support any inference that such delay would warrant dismissal of the objections by Family Court. Consequently, we conclude that plaintiff's allegations, even if accepted as true, fail to allege a prima facie case of legal malpractice (*see* CPLR 3211 [a] [7]; *Leder*, 9 NY3d at 837).

In light of our determination, plaintiff's remaining contention

is academic.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

725

CA 22-01441

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

DONALD HOLLER, PLAINTIFF,

V MEMORANDUM AND ORDER

DOMINION ENERGY TRANSMISSION, INC., AND
LMC INDUSTRIAL CONTRACTORS, INC.,
DEFENDANTS-RESPONDENTS.

LMC INDUSTRIAL CONTRACTORS, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

O'CONNELL ELECTRIC COMPANY, INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF JOHN WALLACE, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (SETH M. WEINBERG OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

GORDON REES SCULLY MANSUKHANI, LLP, HARRISON (LYNN ABELSON LIEBMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT DOMINION ENERGY TRANSMISSION, INC.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT AND DEFENDANT-RESPONDENT LMC INDUSTRIAL CONTRACTORS, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered August 4, 2022. The judgment, insofar as appealed from, granted in part the motions of defendant-third-party plaintiff LMC Industrial Contractors, Inc. and defendant Dominion Energy Transmission, Inc. for partial summary judgment.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motions are denied, and the declarations in the third through sixth decretal paragraphs are vacated.

Memorandum: While working on a construction project and walking between job assignments, plaintiff slipped and fell on ice. Plaintiff subsequently commenced this action seeking damages for the injuries that he sustained from the fall. In his complaint, plaintiff asserted

causes of action for common-law negligence, and violations of Labor Law § 200, and Labor Law § 241 (6) against defendant Dominion Energy Transmission, Inc. (Dominion), the property owner, and defendant-third-party plaintiff, LMC Industrial Contractors, Inc. (LMC Industrial), the general contractor (collectively, defendants). LMC Industrial thereafter commenced a third-party action seeking, inter alia, defense and indemnification from third-party defendant, O'Connell Electric Company, Inc. (O'Connell), plaintiff's employer.

Defendants separately moved for partial summary judgment against O'Connell, seeking certain declarations with respect to the issues of defense and indemnification. In appeal No. 1, O'Connell appeals, as limited by its brief, from a judgment insofar as it granted those parts of defendants' motions seeking declarations that O'Connell is required to contractually indemnify defendants on a conditional basis, that O'Connell must reimburse and pay for all of defendants' past and future defense costs and litigation expenses, and that, because defendants are additional insureds and contractual indemnitees of O'Connell, O'Connell must financially protect defendants on a conditional basis against all damages, cross-claims and counterclaims on a primary and non-contributory basis. In appeal No. 2, O'Connell appeals, as limited by its brief, from an order insofar as it denied that part of its motion for leave to renew its opposition to defendants' motions.

Addressing first appeal No. 1, we agree with O'Connell that Supreme Court erred in granting those parts of defendants' motions seeking the declarations at issue on this appeal, i.e., the declarations in the third through sixth decretal paragraphs, and we therefore reverse the judgment insofar as appealed from and vacate those declarations. With respect to whether defendants are entitled to a conditional order of indemnification as contractual indemnitees of O'Connell, the relevant indemnification provision in the subcontract between LMC Industrial and O'Connell requires indemnification for claims "that arise from the performance of [O'Connell's w]ork, but only to the extent caused by the negligent acts or omissions of [O'Connell or its agents]." Defendants failed to establish that they are entitled to a conditional order of indemnification as contractual indemnitees because they failed to eliminate all triable issues of fact whether plaintiff's claims arose from the negligent acts or omissions of O'Connell (*see Ross v Northeast Diversification, Inc.*, 218 AD3d 1244, 1247 [4th Dept 2023]; *Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014]). Likewise, because the "duty to defend [a] contractual indemnitee is no broader than [the] duty to indemnify," defendants failed to establish that they are entitled to past and future defense and litigation expenses as contractual indemnitees (*Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 [1st Dept 2010]; *see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2d Dept 2009]; *see generally County of Monroe v Clough Harbour & Assoc., LLP*, 154 AD3d 1281, 1281-1282 [4th Dept 2017]).

We further agree with O'Connell that the court erred in granting

those parts of defendants' motions concerning their entitlement to defense costs and a conditional order of indemnification based on defendants' status as additional insureds. Defendants failed to establish their entitlement to such relief inasmuch as their rights as additional insureds relate to the obligation of O'Connell's insurance company and are separate and apart from those rights that may be asserted against O'Connell (*see Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739-740 [2d Dept 2003]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 401-402 [1st Dept 1996]). The proper remedy is to commence a separate action for a declaratory judgment against O'Connell's insurance company (*see Clyde v Franciscan Sisters of Allegany, N.Y., Inc.*, 217 AD3d 1353, 1356 [4th Dept 2023]; *Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 1510-1511 [4th Dept 2009]).

Finally, we dismiss appeal No. 2 as moot in light of our determination in appeal No. 1 (*see JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

726

CA 23-00009

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

DONALD HOLLER, PLAINTIFF,

V MEMORANDUM AND ORDER

DOMINION ENERGY TRANSMISSION, INC., AND
LMC INDUSTRIAL CONTRACTORS, INC.,
DEFENDANTS-RESPONDENTS.

LMC INDUSTRIAL CONTRACTORS, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

O'CONNELL ELECTRIC COMPANY, INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICES OF JOHN WALLACE, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (SETH M. WEINBERG OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

GORDON REES SCULLY MANSUKHANI, LLP, HARRISON (LYNN ABELSON LIEBMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT DOMINION ENERGY TRANSMISSION, INC.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT AND DEFENDANT-RESPONDENT LMC INDUSTRIAL CONTRACTORS, INC.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered December 2, 2022. The order, insofar as appealed from, denied that part of the motion of third-party defendant seeking leave to renew its opposition to the motions for partial summary judgment of defendant-third-party plaintiff LMC Industrial Contractors, Inc. and defendant Dominion Energy Transmission, Inc.

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

Same memorandum as in *Holler v Dominion Energy Transmission, Inc.* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

728

KA 22-01545

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENTRELL L. BARNER, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered May 25, 2022. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his statements and all physical evidence should have been suppressed because law enforcement officers unlawfully stopped his vehicle and detained him without the requisite level of suspicion and, further, because his consent to the search of his vehicle was not voluntarily given. In the alternative, he contends that the matter should be remitted for a *Darden* hearing inasmuch as the evidence at the suppression hearing established that the officers relied, in part, on information obtained from a confidential informant (informant). We agree with defendant that, even if the evidence at the suppression hearing regarding the information relayed by the informant is considered and further assuming, arguendo, that the requisite level of suspicion existed to stop defendant's vehicle, the subsequent vehicular search was unlawful.

At the suppression hearing, the People called only one witness, a detective with the Jefferson County Sheriff's Department who was working as part of the Metro-Jefferson Drug Task Force (Task Force). According to the detective, the Task Force had "received information

that [defendant] was delivering narcotics to customers in the Watertown area from Syracuse." The detective did not indicate who provided that information or when it was received. The detective "believe[d]" that Task Force members had received a description of the vehicle defendant would be driving, but he did not "recall how detailed that description was." According to the detective, other officers in the Task Force located defendant's vehicle at a motel in Watertown and followed it to a residence in Watertown that was owned by someone who "was periodically under investigation by the task force for narcotics activity."

The driver of the vehicle, later identified as defendant, parked the car in the driveway next to the house in question and remained there for approximately 90 minutes. Although the detective observed a number of people enter the house and leave shortly thereafter, which, according to the detective, was indicative of drug activity, he did not see defendant or anyone else exit defendant's vehicle, nor did he see anyone approach defendant's vehicle in the driveway. When defendant eventually drove away, the detective requested that a Watertown police officer stop the vehicle. Following the stop, the detective approached defendant and explained that he suspected that defendant was delivering drugs from Syracuse to customers in Watertown. The detective further stated that he intended to obtain a warrant to search the vehicle but, if defendant consented to a warrantless search, the detective would allow him to leave regardless of whether contraband was found, with the understanding that charges could be lodged later if contraband was discovered. The detective testified that he told defendant that his "intention was to search [defendant's] vehicle, that [he] did not have a search warrant yet, [and that he] would be glad to apply for a search warrant, but if [defendant] wanted to speed up the process, [defendant] could give [him] consent." The detective made clear to defendant that the vehicle would be detained until the warrant was obtained.

Defendant agreed to a warrantless search and signed a written consent form. As the detective began searching the vehicle, defendant said that "[t]he stuff" was in the back seat, where the detective later found a backpack containing heroin and cocaine. Consistent with his promise, the detective did not arrest defendant that day. An indictment was later handed down charging defendant with, inter alia, two counts of criminal possession of a controlled substance in the third degree.

In the absence of exigent circumstances, which did not exist here, " 'all warrantless searches presumptively are unreasonable per se,' and the People have the burden of overcoming the presumption" (*People v Wideman*, 121 AD3d 1514, 1516 [4th Dept 2014]; *see People v Hodge*, 44 NY2d 553, 557 [1978]). Although consent to search is a recognized exception to the warrant requirement, "it is well settled that the People have the heavy burden of establishing voluntary consent" (*People v McCray*, 96 AD3d 1480, 1481 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]; *see People v Gonzalez*, 39 NY2d 122, 127-128 [1976]). The People's burden to establish voluntariness is not easily carried inasmuch as a consent to search is voluntary only "when

it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" (*Gonzalez*, 39 NY2d at 128).

Here, the record establishes that defendant consented to the search of his vehicle with the understanding that, if he refused, the detective would obtain a warrant and search the vehicle anyway, and that in the meantime the vehicle would be detained at the scene. We note that a suspect's consent to search that is based on threatened action by the police is deemed voluntary only where there are valid legal grounds for the threatened action (*see People v Storelli*, 216 AD2d 891, 891 [4th Dept 1995], *lv denied* 86 NY2d 803 [1995]; *People v LaDuke*, 206 AD2d 859, 860 [4th Dept 1994]; *see also People v Rodriguez*, 189 AD3d 2122, 2123 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Further, we agree with defendant that the voluntariness of his consent therefore turns on whether the detective could lawfully have obtained a search warrant, which may be issued "only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]; *see generally People v Mercado*, 68 NY2d 874, 875-876 [1986], *cert denied* 479 US 1095 [1987]).

In our view, the detective did not have probable cause to believe that defendant had committed a crime or that the vehicle contained contraband when defendant consented to the warrantless search, and, thus, the detective's threat to obtain a search warrant was hollow and misleading. All the detective knew at that point was that a confidential informant had said that defendant had been transporting narcotics from Syracuse to Watertown on some unidentified date and that someone operating a vehicle that may have matched the description of defendant's vehicle had driven from a motel in Watertown to the driveway of a suspected drug house in Watertown. Such information does not rise to the level of probable cause as required for issuance of a search warrant. Indeed, the People do not contend otherwise. Instead, the People merely contend that probable cause will be established if, as defendant requests in the alternative, we remit the matter for a *Darden* hearing, which the People concede County Court erred in refusing to conduct upon defendant's timely request. The purpose of a *Darden* hearing, however, is "to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him entirely fabricated" (*People v Darden*, 34 NY2d 177, 182 [1974]; *see People v Serrano*, 93 NY2d 73, 77 [1999]). Although testimony at a *Darden* hearing can also establish whether the informant had a sufficient basis of knowledge to satisfy the *Aguilar-Spinelli* test (*see People v Hightower*, 207 AD3d 1199, 1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]; *People v Steinmetz*, 177 AD3d 1292, 1293 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]), we agree with defendant that *Darden* hearing testimony cannot be used by the People to supplement the evidence adduced at the suppression hearing to establish probable cause. In other words, where the evidence at a suppression hearing fails to establish probable cause to arrest or search a defendant, the People cannot fill in the gaps with additional

evidence adduced at a subsequent *Darden* hearing.

We conclude that, inasmuch as the People failed to meet their burden of proof at the suppression hearing, the court erred in refusing to suppress the drugs found in defendant's vehicle and his statements to the detective. We therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking to suppress physical evidence and statements, and dismiss the indictment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

738

CA 22-01344

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

IN THE MATTER OF DANIELLE DILL, PSY.D.,
EXECUTIVE DIRECTOR, CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN S., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN L. NELSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered August 12, 2022. The order authorized petitioner to administer medication to respondent over his objection.

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

Memorandum: Petitioner commenced this proceeding seeking authorization to administer psychiatric medication to respondent over his objection pursuant to the parens patriae power of the State of New York (*see Matter of Guttmacher [James M.]*, 181 AD3d 1313, 1313 [4th Dept 2020]; *see generally Rivers v Katz*, 67 NY2d 485, 496-498 [1986], *rearg denied* 68 NY2d 808 [1986]). We conclude that Supreme Court properly granted the petition. Contrary to respondent's contention, petitioner met her burden of establishing by clear and convincing evidence that respondent lacks "the capacity to make a reasoned decision with respect to [the] proposed treatment" (*Rivers*, 67 NY2d at 497). Petitioner's evidence demonstrated that, although it was not possible to conduct full diagnostic psychiatric interviews and formal mental health evaluations due to respondent's uncooperativeness, respondent's treating physician and the reviewing physician diagnosed him with unspecified bipolar and related disorder with psychotic features. Petitioner further demonstrated that respondent's lack of insight prevents him from recognizing that he suffers from a mental illness and considering treatment options (*see Matter of Sawyer [R.G.]*, 68 AD3d 1734, 1734 [4th Dept 2009]).

Contrary to respondent's further contention, petitioner also established by clear and convincing evidence that the proposed one-year treatment plan was "narrowly tailored to give substantive effect

to [respondent's] liberty interest" (*Rivers*, 67 NY2d at 497; *see Sawyer*, 68 AD3d at 1735). In determining whether the treatment is so narrowly tailored, a court must take "into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (*Rivers*, 67 NY2d at 497-498). Petitioner's evidence demonstrated that respondent posed a significant risk of danger to himself and others without treatment for his mental illness. The evaluation reports of the treating and reviewing physicians identified the proposed medications for respondent's treatment and the purported benefits thereof, including remission of threatening behavior, psychosis, and mood symptoms that cause respondent to pose a significant threat of danger to himself and others. The physicians noted that, with treatment, respondent's risk of harm to himself and others may be reduced, which would allow respondent to benefit from a less restrictive treatment environment. The physicians also set forth possible side effects of the medication and indicated that there was a plan for monitoring respondent for any of those adverse side effects.

We have examined respondent's remaining contention and conclude that it is without merit.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

739

CA 22-01083

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

IN THE MATTER OF RONNIE DORRITY,
PETITIONER-RESPONDENT,

V ORDER

TERRY JAMES DORRITY, RESPONDENT-APPELLANT.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR RESPONDENT-APPELLANT.

FINER & FANELLI, UTICA (MATTHEW J. FANELLI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Lewis County (James P. McClusky, J.), entered July 12, 2022, in a proceeding pursuant to CPLR article 75. The judgment awarded petitioner $82,887 plus interest upon confirmation of an award of the arbitrator.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

741

CA 23-00125

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

DIXIE D. LEMMON, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF WATERLOO AND WATERLOO TOWN BOARD,
DEFENDANTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered July 26, 2022. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

746

KA 18-02107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. MIGHTY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered March 27, 2018. The judgment convicted defendant, upon a plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of murder in the second degree (Penal Law § 125.25 [3]). 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 Dearmas*, 218 AD3d 1165, 1165 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]; *People v McCracken*, 217 AD3d 1543, 1543 [4th Dept 2023]). We thus conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless

conclude that the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

747

KA 22-01413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC WATSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Melissa Lightcap Cianfrini, J.), dated July 8, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

748

KA 22-01851

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. VANDERMALLIE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered September 29, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). As the People correctly concede, County Court improperly assessed 10 points under risk factor 15 because the People did not establish by the requisite clear and convincing evidence (*see People v Pettigrew*, 14 NY3d 406, 408 [2010]) that defendant's living situation was inappropriate (*see People v Hagen*, 193 AD3d 991, 992 [2d Dept 2021]; *People v Morris*, 140 AD3d 843, 844 [2d Dept 2016], *lv denied* 28 NY3d 904 [2016]). The evidence relied on by the People at the hearing established, at most, that defendant's living situation was uncertain, which, standing alone, is insufficient to show that the living situation was inappropriate (*see People v Patel*, 192 AD3d 1052, 1053 [2d Dept 2021]; *People v Rodriguez*, 130 AD3d 897, 898 [2d Dept 2015]; *see generally People v Alemany*, 13 NY3d 424, 432 [2009]). The court determined that defendant's score on the Risk Assessment Instrument should be assessed at 110 points, but that score must therefore be reduced by 10 points, which results in a total score of 100 and renders defendant a presumptive level two risk. We modify the order accordingly.

In light of our determination, defendant's remaining contention

is academic.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

750

KA 18-01294

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH E. HULSIZER, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 4, 2017. The judgment convicted defendant, upon a 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]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence. Nevertheless, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

752

KA 19-01143

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES PHILLIPS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 1, 2018. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the first degree (Penal Law § 140.30 [4]). We affirm.

Preliminarily, as defendant contends and as the People correctly concede, the record does not establish that defendant validly waived his right to appeal. County 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 Shanks*, 37 NY3d 244, 253 [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant next contends that his guilty plea should be vacated because his factual recitation did not affirmatively establish each and every element of the crime. Defendant failed to preserve for our review that challenge to the factual sufficiency of the allocution, and we conclude that this case does not fall within the rare exception to the preservation requirement (*see People v Barnes*, 206 AD3d 1713, 1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *see generally*

People v Lopez, 71 NY2d 662, 665-666 [1988]).

Finally, defendant contends that he was denied the right to effective assistance of counsel because, prior to his guilty plea, his attorney failed to obtain a ruling on that part of his omnibus motion seeking to suppress evidence. We reject that contention because defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Liepke*, 184 AD3d 1109, 1110 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020] [internal quotation marks omitted]), and "the record establishes that defendant received 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Cato*, 199 AD3d 1388, 1390 [4th Dept 2021], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

753

CAF 22-01880

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

IN THE MATTER OF DONNELL MARSHALL,
PETITIONER-APPELLANT,

V ORDER

BRIDGET M. SINGLETARY, RESPONDENT-RESPONDENT.

KATHLEEN E. CASEY, BARKER, FOR PETITIONER-APPELLANT.

ASHLEY N. LYON, ADAMS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered October 17, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued a prior order of joint legal custody with respect to the subject children, with respondent having primary physical custody.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

755

CAF 22-01104

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

IN THE MATTER OF ARIC D.B. AND MICHAEL H.B.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CARRIE B., RESPONDENT-APPELLANT.

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

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered June 23, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent mother appeals from an order that terminated her parental rights with respect to the subject children on the ground of permanent neglect.

Contrary to the mother's contention, we conclude that petitioner established that it made diligent efforts to encourage and strengthen the relationship between the mother and the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1667-1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]). The record demonstrates that the mother received services to work on maintaining her home and other life skills. In addition, she received parenting counseling and a referral for counseling to address her mental health needs. We reject the mother's contention that petitioner failed to establish diligent efforts because it did not offer financial assistance to the mother. The services that petitioner arranged for the mother were tailored to address the problems that gave rise to the removal of the children from her care (*see generally Matter of Sheila G.*, 61 NY2d 368, 385 [1984]). Contrary to the mother's contention, despite the services that were offered and provided to her, the mother failed to plan for the future of the children or to progress meaningfully to overcome the issues that led to their removal from her care (*see Matter of Aubree R.*

[Natasha B.], 217 AD3d 1565, 1566 [4th Dept 2023], *lv denied* — NY3d — [2023]). Petitioner is not required to " 'guarantee that . . . parent[s] succeed in overcoming [their] predicaments' " (*Kemari W.*, 153 AD3d at 1668).

The mother further contends that Family Court erred in accepting opinion testimony from the testifying mental health counselor. The mother failed to preserve that contention inasmuch as she failed to object to the testimony that she now contends constitutes improper opinion testimony. In any event, to the extent that the court erred in admitting the testimony of the mental health counselor, we conclude that "[a]ny error in the admission of [that testimony] is harmless because the result reached herein would have been the same even had such [testimony] been excluded" (*Matter of Bryson M. [Victoria M.]*, 184 AD3d 1138, 1139 [4th Dept 2020] [internal quotation marks omitted]).

Finally, we reject the mother's contention that the court erred in terminating her parental rights. "Unlike a fact-finding hearing [that] resolves the issue of permanent neglect and in which the best interests of the child[ren] play no part in the court's determination, the court in the dispositional hearing must be concerned only with the best interests of the child[ren]" (*Matter of Star Leslie W.*, 63 NY2d 136, 147 [1984]; *see* Family Ct Act § 631; *Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007]). We conclude that the record provides ample support for the court's determination that terminating the mother's parental rights is in the best interests of the children (*see Brendan S.*, 39 AD3d at 1190).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

756

CA 22-01151

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

IN THE MATTER OF MARGUERITE A. ROSS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF FAYETTEVILLE, VILLAGE OF FAYETTEVILLE ZONING BOARD OF APPEALS, MICHAEL JONES, IN HIS CAPACITY AS CODE ENFORCEMENT OFFICER OF VILLAGE OF FAYETTEVILLE, FOUBU ENVIRONMENTAL SERVICES, LLC, NORTHWOOD REAL ESTATE VENTURES, LLC, RESPONDENTS-RESPONDENTS, AND VILLAGE OF FAYETTEVILLE PLANNING BOARD, INTERESTED OR NECESSARY PARTY.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PETITIONER-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS VILLAGE OF FAYETTEVILLE, VILLAGE OF FAYETTEVILLE ZONING BOARD OF APPEALS AND MICHAEL JONES, IN HIS CAPACITY AS CODE ENFORCEMENT OFFICER OF VILLAGE OF FAYETTEVILLE.

BARCLAY DAMON LLP, SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR RESPONDENT-RESPONDENT FOUBU ENVIRONMENTAL SERVICES, LLC.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KATHLEEN M. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT NORTHWEST REAL ESTATE VENTURES, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 27, 2022, in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul a determination of respondent Village of Fayetteville Zoning Board of Appeals (ZBA) that adopted the interpretation of respondent Michael Jones, in his capacity as Code Enforcement Officer of the Village of Fayetteville (CEO), that the zoning code of respondent Village of Fayetteville (Village) permits an alteration, renovation, or redevelopment of a lawfully nonconforming

structure that results in a smaller, but still nonconforming, structure without loss of the structure's lawfully nonconforming status. Supreme Court denied the petition and petitioner appeals.

The present matter concerns the proposed redevelopment of a vacant 137,000-square-foot die casting facility by respondent Northwood Real Estate Ventures, LLC, on property owned by respondent Foubu Environmental Services, LLC (collectively, developers), into a 56,550-square-foot grocery store. The existent die casting facility is located on the portion of the property zoned for industrial uses, and the die casting facility has been certified as a lawful nonconforming structure within the meaning of the zoning code inasmuch as it preexisted the zoning code's current prohibition of buildings in excess of 10,000 square feet in industrial zones. Under section 187-14 of the Fayetteville Zoning Code, prior lawful nonconforming structures may continue to be "used, repaired and maintained" and, under certain circumstances, even be enlarged without losing their status as lawfully nonconforming. Section 187-14 is silent, however, with respect to any reduction in the size of the lawful nonconforming structure.

Here, the ZBA adopted the CEO's rationale that the significant alteration and redevelopment of the die casting facility proposed by the developers, including the demolition of the existent walls and floors down to all or part of a concrete slab foundation, constituted a use, repair, or maintenance of that structure such that the resulting grocery store remained a lawful nonconforming structure within the meaning of the zoning code. Initially, as the ZBA noted in its resolution, the terms " 'used,' 'repaired,' and 'maintained' " are not expressly defined in the Fayetteville Zoning Code. Contrary to petitioner's contention, the ZBA's interpretation of those undefined terms is not a matter of "pure statutory construction," but rather the ZBA's interpretation of those terms and application of them to the subject property is a determination that would benefit from the expertise of specialists in land use planning (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419-420 [1998]; *see Cleere v Frost Ridge Campground, LLC*, 155 AD3d 1645, 1648 [4th Dept 2017]). In concluding that the proposed grocery store would be the result of the use, repair, and/or maintenance of the existent lawful nonconforming structure, the CEO opined, among other things, that those terms included more than just incidental painting or landscaping but also encompassed more significant changes, such as alterations required to ensure the structure's continued compliance with applicable building and property codes. Further, the modification of the existent lawful nonconforming structure from one permitted industrial zone use (here, the prior use of die casting) to another permitted use (the retail grocery store) would require significant alterations to the structure even absent a change in the overall square footage. The proposed redevelopment here also included a significant brownfield remediation, which the CEO characterized as the ultimate repair of the existent lawful nonconforming structure (*see generally* ECL 27-1403). As the ZBA expressly noted in its resolution, although the proposed grocery store would remain nonconforming, the redevelopment would reduce the degree

of that nonconformity by over 50%, thereby improving the overall property pursuant to the intent of the zoning code. Inasmuch as that interpretation of section 187-14 “is neither ‘irrational, unreasonable nor inconsistent with the governing statute’ ” (*New York Botanical Garden*, 91 NY2d at 419), we affirm.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

757

CA 22-00951

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

CARI CHIAZZESE, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

5775 MAELOU DRIVE, LLC, DEFENDANT-RESPONDENT,
MICHAEL LAING AND MICHAEL LAING, DOING BUSINESS
AS PROFESSIONAL LANDSCAPES, DEFENDANTS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

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

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 13, 2022. The order granted the motion of defendant 5775 Maelou Drive, LLC, for summary judgment and denied the motion of defendants Michael Laing and Michael Laing, doing business as Professional Landscapes for summary judgment.

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

Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries that she sustained in a slip and fall accident that occurred in a parking lot owned by defendant 5775 Maelou Drive, LLC (Maelou Drive), and leased to plaintiff's employer, a nonparty tenant. Defendants Michael Laing and Michael Laing, doing business as Professional Landscapes (collectively, Laing defendants), were contracted by the tenant to provide snow plowing and salting services for the parking lot. Plaintiff appeals, as limited by her brief, from that part of an order granting Maelou Drive's motion for summary judgment dismissing the amended complaint against it. The Laing defendants appeal, as limited by their brief, from that part of the same order denying their motion for summary judgment dismissing the amended complaint against them. We affirm.

With respect to plaintiff's appeal, we reject plaintiff's contention that Maelou Drive is not entitled to summary judgment dismissing the amended complaint against it on the ground that it is as an out-of-possession landlord. "Landowners generally owe a duty of

care to maintain their property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty" (*Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]; *see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). However, "a landowner who has transferred possession and control [i.e., an out-of-possession landlord] is generally not liable for injuries caused by dangerous conditions on the property" (*Henry*, 34 NY3d at 142 [internal quotation marks omitted]; *see Gronski*, 18 NY3d at 379). "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*Gronski*, 18 NY3d at 380-381).

Here, we conclude that Maelou Drive met its initial burden on the motion of establishing that it was an out-of-possession landlord that had relinquished control of the premises and was not obligated to perform repairs or maintenance of the premises, including removal of snow (*see Adolf v Erie County Indus. Dev. Agency*, 174 AD3d 1519, 1519 [4th Dept 2019]; *Sexton v Resinger*, 70 AD3d 1360, 1361 [4th Dept 2010]). In support of its motion, Maelou Drive submitted, inter alia, the lease agreement between itself and its tenant, which provided that the tenant was responsible for all maintenance and repair of the premises, and the snow removal contract that its tenant subsequently executed with the Laing defendants (*see Tarantelli v 7401 Willowbrook Rd. Assoc., LLC*, 13 AD3d 1184, 1184 [4th Dept 2004]).

Contrary to plaintiff's contention, the deposition testimony of Maelou Drive's corporate representative did not create a question of fact whether Maelou Drive was the landlord or merely a tenant that operated a business at the property, because Maelou Drive submitted an errata sheet sworn to by the corporate representative wherein the representative stated that he misunderstood some questions during the deposition and corrected his answers to reflect that Maelou Drive owned the property and was actually the landlord. Further, the corporate representative's testimony, as corrected by the errata sheet, is supported by documentary evidence submitted in support of the motion, including the lease between Maelou Drive and the tenant. Additionally, "[t]he fact that [Maelou Drive] . . . retained the right to visit the premises [and direct the tenant to perform maintenance and repairs necessary to comply with the lease and governing regulations] is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord" (*Ferro v Burton*, 45 AD3d 1454, 1455 [4th Dept 2007] [internal quotation marks omitted]; *see Schwegler v City of Niagara Falls*, 21 AD3d 1268, 1269-1270 [4th Dept 2005]).

We also reject plaintiff's contention that Maelou Drive owed a non-delegable duty to maintain the parking area in a reasonably safe condition. While there are exceptions to the general rule that an out-of-possession landlord does not have a duty to maintain its

property in a reasonably safe condition where the out-of-possession landlord: (1) "rents premises for a public use when [it] knows, or should have known, that they are in a dangerous condition at the time of the lease" (*Fuller v Marcello*, 38 AD3d 1162, 1163 [4th Dept 2007] [internal quotation marks omitted]; *see Brady v Cocozzo*, 174 AD2d 814, 814 [3d Dept 1991]); (2) "is contractually obligated to repair the premises"; or (3) "has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision" (*Weaver v DeRonde Tire Supply, Inc.*, 211 AD3d 1503, 1504 [4th Dept 2022], *appeal dismissed* 39 NY3d 1149 [2023]), none of those exceptions have been established here.

In light of our determination that Maelou Drive is entitled to summary judgment dismissing the amended complaint against it, plaintiff's remaining contentions are academic.

With respect to the Laing defendants' appeal, we conclude that Supreme Court properly denied their motion. "As a general rule, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party" (*Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1583 [4th Dept 2022] [internal quotation marks omitted]). There are, however, " 'three situations in which a party who enters into a contract to render [snow removal] services may be said to have assumed a duty of care–and thus be potentially liable in tort–to third persons [who slipped on snow or ice:]' . . . [1] where the contracting party fails to exercise reasonable care in the performance of [their] duties and thereby launches a force or instrument of harm[; 2] where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and [3] 'where the contracting party has entirely displaced the other party's duty to maintain the premises safely' " (*Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 760-761 [4th Dept 2006], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

We agree with the Laing defendants that the snow removal contract was not so comprehensive and exclusive that it entirely displaced the duty of the tenant to maintain the premises because the contract defined the snowfall conditions that required the Laing defendants to plow, and provided that additional plowing and salting would be performed "upon [the tenant's] request" (*Espinal*, 98 NY2d at 141; *see Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1396-1397 [4th Dept 2017]). We also agree with the Laing defendants that they established that plaintiff did not detrimentally rely on their snow removal services because plaintiff testified at her deposition that she did not know the identity of the snow removal contractor or what was required by the snow removal contract (*see Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]).

However, we reject the Laing defendants' contention that there is no question of fact whether they launched a force or instrument of harm. Assuming, arguendo, that the Laing defendants met their initial burden on their motion with respect to that issue, in her affidavit in

opposition to the Laing defendants' motion, plaintiff averred that "the amount of ice in the parking lot had increased . . . because the snow piles behind [her] car would melt throughout the day due to the sunshine, and freeze when the sun went down," which raises a question of fact whether the Laing defendants "create[d] the allegedly dangerous condition" and thereby launched a force or instrument of harm (*Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1436 [4th Dept 2021]; *see Bregaudit*, 211 AD3d at 1585; *Nicosia v Bucky Demelas & Son Landscape Contrs.*, 194 AD3d 826, 828 [2d Dept 2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

758

CA 23-00393

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

IN THE MATTER OF AZUJHON SIMS,
PETITIONER-APPELLANT,

V ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
ON BEHALF OF TONIQUA L. DUNCAN,
RESPONDENT-RESPONDENT.

AZUJHON SIMS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered February 17, 2023, in a proceeding pursuant to CPLR article 78. The judgment denied the relief sought in the petition.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

760

CA 22-01459

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

LG 47 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT, ROCHESTER CITY SCHOOL DISTRICT BOARD OF EDUCATION, AND TIMOTHY BLANDING, DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 8, 2022. The order, insofar as appealed from, denied that part of the motion of plaintiff seeking a damages assessment against defendant Timothy Blanding.

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

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act seeking damages for personal injuries sustained by plaintiff as a result of sexual abuse allegedly perpetrated in 1982 through 1983 by defendant Timothy Blanding who, at the time, was employed by defendant Rochester City School District. Plaintiff thereafter moved, pursuant to CPLR 3215 (a), for an order determining that Blanding was in default and directing a determination of damages against Blanding. There was no opposition to plaintiff's motion. Supreme Court granted that part of the motion seeking a determination that Blanding was in default, but denied the motion to the extent that plaintiff sought an assessment of damages, thereby staying entry of the default judgment until the time of trial or other disposition of the case against the non-defaulting defendants. Plaintiff appeals from the order insofar as it partially denied the motion.

"[W]here . . . a court has before it a motion for a judgment against one defaulting defendant and other non-defaulting defendants, the court is afforded discretion to decide whether the determination of damages against the defaulting defendant should await the disposition of the matter against the non-defaulting defendants" (*Doe v Jasinski*, 195 AD3d 1399, 1402 [4th Dept 2021]). We conclude that the court did not abuse its discretion inasmuch as, prior to denying that part of the motion seeking a determination of damages, the court carefully balanced the interest of judicial economy against the potential prejudice to plaintiff, noting that the latter would be

mitigated by the court's ability to monitor discovery in the litigation against the non-defaulting defendants. Further, contrary to the cases on which plaintiff relies, we find no facts in the present record that would warrant the substitution of our own discretion (*cf. LG 46 Doe v Jackson*, 199 AD3d 1464, 1466-1467 [4th Dept 2021]; *Jasinski*, 195 AD3d at 1402-1403; *Doe v Friel*, 195 AD3d 1409, 1409 [4th Dept 2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

761

CA 23-00280

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

ROBIN HARBINGER AND MATTHEW HARBINGER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HIROSHI KATO, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered February 6, 2023. The order, among other things, denied the motion of defendant Hiroshi Kato, M.D. for summary judgment dismissing plaintiffs' complaint and any cross-claims against him.

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

Memorandum: Plaintiffs commenced this medical malpractice action alleging, inter alia, that Hiroshi Kato, M.D. (defendant) was negligent in the care and treatment that he rendered to Robin Harbinger (plaintiff) and that, as a result of the negligence, plaintiff suffered serious and permanent injuries. Defendant appeals from an order that, inter alia, denied his motion for summary judgment dismissing the complaint and all cross-claims against him. Contrary to defendant's contention, Supreme Court properly denied the motion. "It is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]). Here, defendant met his initial burden of establishing that he did not deviate or depart from the accepted medical standard of care in his treatment of plaintiff by presenting factual evidence, including a detailed affidavit of his expert, with accompanying medical records, that " 'address[ed] each of the specific factual claims of negligence raised in plaintiffs[']s [amended] bill of particulars . . . and was detailed, specific and factual in nature' " (*Pasek*, 186 AD3d at 1036).

We conclude, however, that defendant did not meet his initial burden on the issue of causation, and thus the burden shifted to plaintiffs to raise an issue of fact on the issue of deviation only (*see Allen v Grimm*, 208 AD3d 1589, 1590 [4th Dept 2022]). We further conclude that plaintiffs raised an issue of fact in opposition by submitting, inter alia, a detailed expert affirmation that "squarely oppose[d]" the opinion of defendant's expert (*id.* [internal quotation marks omitted]). The result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]). We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

764

TP 23-00439

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

IN THE MATTER OF ERNESTO DELGADO, PETITIONER,

V MEMORANDUM AND ORDER

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

ERNESTO DELGADO, PETITIONER PRO SE.

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 order of the Supreme Court, Seneca County [Barry L. Porsch, A.J.], entered March 7, 2023) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

It is hereby ORDERED that the determination is unanimously modified on the law and the amended petition is granted in part by annulling that part of the determination finding that petitioner violated incarcerated individual rules 104.11 (7 NYCRR 270.2 [B] [5] [ii]), 104.13 (7 NYCRR 270.2 [B] [5] [iv]), and 107.10 (7 NYCRR 270.2 [B] [8] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of those incarcerated individual rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated incarcerated individual rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [direct order]) and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]). As respondent correctly concedes, the determination that petitioner violated rules 104.11, 104.13 and 107.10 is not supported by substantial evidence. We therefore modify the determination by granting the amended petition in part and annulling that part of the determination finding that petitioner violated those rules, and we direct respondent to expunge from petitioner's institutional record

all references thereto (*see generally Matter of Johnson v Eckert*, 197 AD3d 1011, 1011-1012 [4th Dept 2021]; *Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Contrary to petitioner's contention, however, the misbehavior report and hearing testimony constitute substantial evidence supporting the determination that he violated rules 102.10 and 106.10 (*see generally Matter of Thomas v Annucci*, 193 AD3d 1356, 1357 [4th Dept 2021]; *Matter of Williams v Annucci*, 162 AD3d 1530, 1531 [4th Dept 2018]). Any conflicting testimony from petitioner and the other incarcerated individual witnesses merely presented credibility issues for the Hearing Officer to resolve (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

We have reviewed petitioner's remaining contentions and conclude that none warrants annulment or further modification of the determination.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

767

KA 22-00419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL L. WALLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 10, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and driving while intoxicated.

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 contempt in the first degree (Penal Law § 215.51 [c]) and driving while intoxicated as a misdemeanor (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [b] [i]). "Although defendant's release to parole supervision does not render his challenge to the severity of the sentence moot because he remains under the control of the Parole Board until his sentence has terminated" (*People v Williams*, 160 AD3d 1470, 1471 [4th Dept 2018] [internal quotation marks omitted]), we reject defendant's contention that the sentence in this case is unduly harsh and severe insofar as it runs consecutively to a prior undischarged sentence (*see People v Romanowski*, 196 AD3d 1080, 1081 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

769

KA 19-01734

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SHEPPARD, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered June 28, 2019. The judgment convicted defendant upon a plea of guilty of aggravated sexual abuse 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 aggravated sexual abuse in the second degree (Penal Law § 130.67 [1] [a]). 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 Jackson*, 207 AD3d 1077, 1077 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]; *People v Pace*, 201 AD3d 1296, 1296 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]; *see generally People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Contrary to defendant's contention, however, the court properly denied his motion seeking, inter alia, to dismiss the indictment on the ground that the grand jury proceeding was defective. Defendant contends that "the integrity [of the grand jury proceeding was] impaired" when the prosecutor failed to correct a police investigator's allegedly false testimony (CPL 210.35 [5]). Although that contention is not forfeited by the plea (*see People v Taylor*, 65 NY2d 1, 5 [1985]), dismissal of the indictment on that ground is an "exceptional remedy" that is not warranted in this case (*People v Darby*, 75 NY2d 449, 455 [1990]; *see People v Bean*, 66 AD3d 1386, 1386 [4th Dept 2009], *lv denied* 14 NY3d 769 [2010]). Upon our review of

the grand jury minutes, we conclude that "[t]here is no indication that the People knowingly or deliberately presented false testimony before the [g]rand [j]ury, and thus there is no basis for finding that the integrity of the [g]rand [j]ury proceeding was impaired . . . by the alleged false testimony" (*Bean*, 66 AD3d at 1386 [internal quotation marks omitted]; *see People v Klosin*, 281 AD2d 951, 951 [4th Dept 2001], *lv denied* 96 NY2d 864 [2001]; *People v Bennett*, 244 AD2d 923, 925 [4th Dept 1997], *lv denied* 91 NY2d 889 [1998], *reconsideration denied* 92 NY2d 847 [1998]).

We further conclude that the bargained-for sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

770

KA 20-01637

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALONZO P. TAYLOR, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 31, 2020. The judgment convicted defendant, upon a plea of guilty, of burglary in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, and identity theft in the third degree.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

771

KA 17-02137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICA L. BELL, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM 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 (Christopher S. Ciaccio, J.), rendered November 8, 2017. The judgment convicted defendant upon a nonjury verdict of murder in the second degree and manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [4]) and manslaughter in the first degree (§ 125.20 [4]). Defendant's conviction stems from her conduct in punching her boyfriend's three-year-old child three times in the abdomen with enough force to perforate the bowel. Although the child displayed symptoms of serious illness, she was not taken to a hospital until at least two days after her symptoms started. Despite lifesaving measures provided at the hospital, the child succumbed to her injuries.

Defendant contends that, with respect to the conviction of murder in the second degree, the evidence is legally insufficient to establish circumstances evincing a depraved indifference to human life or that she recklessly engaged in conduct that created a grave risk of death or serious physical injury to the child. Viewing the evidence in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's guilt of depraved indifference murder (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). To establish that defendant was guilty of depraved indifference murder of a child, the People were required to establish two states of mind: "at the time the crime occurred, defendant had a mens rea of 'utter disregard for the

value of human life,' . . . [and] a second mens rea [of] . . . recklessness as to a grave risk of serious physical injury or death" (*People v Barboni*, 21 NY3d 393, 400 [2013]).

Sometime after the assault of the victim by defendant, the victim became pale and listless, would not eat or drink, and vomited numerous times. Despite the urging of multiple people for defendant and her boyfriend to get medical attention for the child, they failed to do so until it was too late. Defendant told people that the child merely had the flu, and even urged her boyfriend to wait to take the child for medical treatment. "Given defendant's knowledge of how the injuries were inflicted and [her] failure to seek immediate medical attention . . . until it was too late," we conclude that there is sufficient evidence for the factfinder to determine that "defendant evinced a wanton and uncaring state of mind" (*id.* at 402; *see People v Hall*, 182 AD3d 1023, 1027 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]; *see also People v Best*, 202 AD2d 1015, 1017 [4th Dept 1994], *affd* 85 NY2d 826 [1995]), i.e., an utter disregard for the value of human life. There is also sufficient evidence for County Court to conclude that defendant, by forcefully striking the child and then failing to obtain medical attention for her, consciously disregarded the substantial and unjustifiable risk that death or serious physical injury would result (*see Barboni*, 21 NY3d at 404-405; *Best*, 202 AD2d at 1016-1017; *People v Jamison*, 45 AD3d 1438, 1439 [4th Dept 2007], *lv denied* 10 NY3d 766 [2008]).

Defendant further contends that, with respect to the conviction of manslaughter in the first degree, the evidence is legally insufficient to establish that she intended to cause physical injury to the child. We reject that contention. A factfinder "is entitled to infer that a defendant intended the natural and probable consequences of [their] acts" (*People v Bueno*, 18 NY3d 160, 169 [2011]) and, here, the court could have rationally inferred that defendant intended to cause physical injury to the child when she punched her three times.

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant testified that her boyfriend inflicted the injuries upon the victim and that she lied and said that she was the perpetrator only to protect him. The court was in the best position to assess the credibility of the witnesses, and we perceive no reason to reject the court's credibility determinations (*see People v Broomfield*, 134 AD3d 1443, 1444 [4th Dept 2015], *lv denied* 27 NY3d 1129 [2016]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

772

KA 22-01643

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE SINGLETON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered July 20, 2022. The order denied the petition of defendant for a modification of his risk level assessment pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (SORA) (§ 168 *et seq.*). We affirm.

Defendant contends that he was denied due process because, prior to County Court's initial SORA risk level determination upon a redetermination hearing conducted in 2006 under the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456 [SD NY 1998]), the People allegedly failed to prepare and provide a new risk assessment instrument (RAI). We conclude that defendant's contention is not properly before us inasmuch as " 'Correction Law § 168-o . . . does not provide a vehicle for reviewing whether defendant's circumstances were properly analyzed in the first instance to arrive at his risk level' " (*People v Singleton*, 181 AD3d 1232, 1232 [4th Dept 2020], *lv denied* 35 NY3d 914 [2020], quoting *People v David W.*, 95 NY2d 130, 140 [2000]; *see People v Anthony*, 171 AD3d 1412, 1413 [3d Dept 2019]). Defendant's contention "should have been raised on a direct appeal of th[e] order [following the redetermination hearing] . . . , rather than an application pursuant to Correction Law § 168-o (2)," yet defendant did not appeal from the order following the redetermination hearing (*Anthony*, 171 AD3d at 1413).

To the extent that defendant further contends that he was denied

due process because an updated RAI was not prepared and provided prior to the hearing on his present petition for modification pursuant to Correction Law § 168-o (2), we conclude that his contention is not preserved for our review because he did not raise that contention before the SORA court (*see generally People v Poleun*, 26 NY3d 973, 974-975 [2015]; *People v Charache*, 9 NY3d 829, 830 [2007]; *People v Neuer*, 86 AD3d 926, 926 [4th Dept 2011], *lv denied* 17 NY3d 716 [2011]). In any event, that contention lacks merit. The statute specifies in pertinent part that, upon receipt of a petition pursuant to section 168-o, "the court shall forward a copy of the petition to the [B]oard [of Examiners of Sex Offenders (Board)] and request an updated recommendation pertaining to the sex offender" (§ 168-o [4]). The record establishes that the court "followed th[at] procedure and received an 'updated recommendation' from the Board, in the form of a letter" (*People v Williams*, 128 AD3d 788, 789 [2d Dept 2015], *lv denied* 26 NY3d 902 [2015]). Conversely, "[t]he RAI, an 'objective assessment instrument' created by the Board to assess an offender's 'presumptive risk level' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3 [2006])[,] was designed to assist the courts in reaching an initial SORA determination" (*id*. at 789-790). We thus conclude that a new RAI was not required in the context of defendant's petition for modification pursuant to Correction Law § 168-o (2) (*see id*. at 790).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

774

CAF 22-00599

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

IN THE MATTER OF STEVEN M.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SCOTT M., RESPONDENT-APPELLANT.

ROBERT J. GALLAMORE, ST. GEORGE, UTAH, FOR RESPONDENT-APPELLANT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered February 24, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights over the subject child to petitioner.

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

Memorandum: Respondent appeals from an order terminating his parental rights pursuant to Social Services Law § 384-b (4) (c) on the ground of mental illness. We affirm. We conclude that petitioner established by clear and convincing evidence that respondent is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [his] child" (*id.*; *see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1633 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]). Petitioner presented the testimony of a licensed psychologist, several caseworkers assigned to respondent, mental health staff who interacted with respondent, and two former foster parents of the child, along with the psychologist's written report and respondent's records from mental health and substance abuse providers. The evidence established that respondent suffers from antisocial personality disorder, "which is characterized by a lack of empathy, the failure to adhere to social norms, aggression, impulsiveness, and a failure to plan" (*Michael S.*, 165 AD3d at 1633; *see Matter of Neveah G. [Jahkeya A.]*, 156 AD3d 1340, 1341 [4th Dept 2017], *lv denied* 31 NY3d 907 [2018]), and that the child "would be in danger of being neglected if [he was] returned to [respondent's] care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Michael S.*, 165 AD3d at 1633).

We also reject respondent's related contention that Family

Court's determination did not have a sound and substantial basis in the record inasmuch as it was not supported by sufficient admissible evidence. The psychologist who testified that, as a result of respondent's antisocial personality disorder, the child would be placed in immediate jeopardy of neglect or harm if he was returned to respondent's care, was qualified as an expert in the field of psychology, including the administration of psychiatric assessments, without objection. The fact that the court later noted that the psychologist was not qualified as "a psychiatrist or a mental health expert" is irrelevant because the statute expressly provides that a determination to terminate parental rights may be based upon the testimony of either a psychiatrist or psychologist (*see* Social Services Law § 384-b [6] [c]; *see e.g. Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). Likewise, the fact that the psychologist diagnosed respondent with a personality disorder, and not a mental illness, is irrelevant inasmuch as personality disorders, such as antisocial personality disorder, are "mental condition[s]" as that term is used in the definition of "mental illness" in Social Services Law § 384-b (6) (a) and may provide a sound and substantial basis to support a determination terminating parental rights (*see e.g. Michael S.*, 165 AD3d at 1633; *Neveah G.*, 156 AD3d at 1341). Additionally, respondent's counsel stipulated to the admission of respondent's medical records, without objection. Thus, to the extent respondent challenges the court's reliance on those records in reaching its determination, his challenge is waived (*see Matter of Byler v Byler*, 207 AD3d 1072, 1073 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]; *Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1187 [4th Dept 2008]).

Respondent's contention that the court erred in failing to order an independent psychiatric or psychological examination of him pursuant to Social Services Law § 384-b (6) (e) is not preserved for our review (*see Matter of Jasmine F.*, 298 AD2d 997, 997 [4th Dept 2002], *lv denied* 99 NY2d 506 [2003]; *cf*. *Matter of Rahsaan I. [Simone J.]*, 180 AD3d 1162, 1164 [3d Dept 2020]).

We reject respondent's contention that the court abused its discretion in denying his request for an adjournment. "The grant or denial of a motion for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Dixon v Crow*, 192 AD3d 1467, 1467 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021] [internal quotation marks omitted]; *see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]), and we conclude that the court did not abuse its discretion.

Finally, we have reviewed respondent's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

775

CAF 22-00267

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

IN THE MATTER OF ARIONA P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DEMETRIUS D., RESPONDENT-APPELLANT.

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the child to be a neglected child. Initially, we note that the father contends that he has been denied adequate appellate review because the transcript of the testimony of several of petitioner's witnesses is missing due to the apparent failure to record the proceedings of that day. The father failed to seek a reconstruction hearing with respect to the missing parts of the record (*see Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1348 [4th Dept 2014]). Thus, the father's contention is not properly before us inasmuch as it is raised for the first time on appeal (*see generally Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, we conclude that "the record as submitted is sufficient for this Court to determine" the issues raised on appeal (*Matter of Stephen B.* [appeal No. 2], 195 AD2d 1065, 1065 [4th Dept 1993]).

The father further contends that petitioner failed to establish neglect by a preponderance of the evidence. We reject that contention. To establish neglect, the petitioner must establish, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent

danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). Although a parent may use reasonable force to discipline their child and to promote the child's welfare (*see Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the infliction of excessive corporal punishment constitutes neglect (*see* § 1012 [f] [i] [B]), and a single incident of excessive corporal punishment can be sufficient to support a finding of neglect (*see Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1309 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *Balle S.*, 194 AD3d at 1395; *Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]).

Here, the evidence at the fact-finding hearing included the testimony of the nurse practitioner who examined the child two days after the incident and observed "wounds about the left eye," as well as "bruising and swelling." In addition, the nurse practitioner testified that the child reported having been kicked in the abdomen and "beaten with a broom." The child reported pain in the abdomen and head. The nurse practitioner testified that the child presented as anxious and restless. She referred the child to the emergency room for further treatment due to the pain in the child's abdomen. We therefore conclude that petitioner established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporal punishment (*see Matter of Amarion M. [Faith W.]*, 214 AD3d 1457, 1458 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]; *Matter of Kayla K. [Emma P.-T.]* [appeal No. 1], 204 AD3d 1412, 1413 [4th Dept 2022]; *Balle S.*, 194 AD3d at 1395; *see generally* Family Ct Act § 1046 [a] [vi]*; Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

776

CAF 22-01291

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

IN THE MATTER OF LILLYANA B., ALSO KNOWN AS LILLYANA M.

---------- MEMORANDUM AND ORDER

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

BRITTNEY B., RESPONDENT.

RONDELL T.M., APPELLANT.
(APPEAL NO. 1.)

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR APPELLANT.

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered February 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child and placed the child with her maternal grandparents.

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

Memorandum: The father of the child who is the subject of these proceedings, a nonparty in appeal No. 1 and the petitioner in appeal No. 2, appeals from an order of disposition in appeal No. 1 entered in a proceeding pursuant to Family Court Act article 10 that made a finding of neglect against respondent mother and placed the child with her maternal grandparents. In appeal No. 2, the father appeals from an order dismissing his petition for custody of the child. On both appeals, the father contends that he was denied his constitutional right to raise his child without first being proven to be unfit. We reject that contention.

Shortly before the child turned one year old, petitioner in appeal No. 1, the Oswego County Department of Social Services (DSS), filed a neglect petition against the mother. At the time, paternity for the child had not been established. The following day, the father signed and filed an acknowledgment of paternity for the child. The child was removed from the mother’s care and placed with the maternal

grandparents. Approximately three months later, the father filed a petition for custody of the child. Family Court adjudicated the child a neglected child by the mother, and over the course of several months held a combined dispositional hearing on the article 10 proceeding and a hearing on the father's custody petition.

Where, as here, Family Court Act articles 6 and 10 proceedings are pending at the same time, the court "may jointly hear the hearing on the custody and visitation petition under [article 6] and the dispositional hearing on the petition under article [10] . . . ; provided, however, the court must determine the custody and visitation petition in accordance with the terms of . . . article [6]" (Family Ct Act § 651 [c-1]; *see* § 1055-b [a-1]; *Matter of Nevaeh MM. [Sheri MM.—Charles MM.]*, 158 AD3d 1001, 1002 [4th Dept 2018]). In an article 6 custody proceeding, it is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied absent a finding that the parent has relinquished that right because of "surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]; *see Matter of Michael J.M. v Lisa M.H.*, 192 AD3d 1470, 1471 [4th Dept 2021]; *Matter of Smith v Ballam*, 176 AD3d 1591, 1592 [4th Dept 2019]). If extraordinary circumstances are established, then the court may make an award of custody based on the best interests of the child (*see Bennett*, 40 NY2d at 548).

We agree with the court that extraordinary circumstances existed here based on the father's abandonment of the child (*see Matter of Nicole L. v David M.*, 195 AD3d 1058, 1061 [3d Dept 2021]; *Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]; *Nevaeh MM.*, 158 AD3d at 1003). DSS's witnesses testified that the father had not visited with the child much, if at all, before the neglect petition was filed and, after the neglect petition was filed, the father visited the child only twice in the one-year period before the hearing concluded. Although the father testified that he visited with the child on many occasions before the neglect petition was filed, the court found his testimony not credible. We see "no reason to disturb the court's credibility determinations inasmuch as they are supported by the record" (*Matter of Aaren F. [Amber S.]*, 181 AD3d 1167, 1168 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]). In addition to failing to establish or maintain contact with the child, the father also did not provide financial support for the child or contact the grandparents or the DSS caseworker regarding the child's well being.

We have considered the father's remaining contention and conclude that it is without merit.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

777

CAF 22-00460

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

IN THE MATTER OF RONDELL T.M.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA K.B., GREGORY B.B., AND
BRITTNEY A.B., RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PETITIONER-APPELLANT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered February 25, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Lillyana B. (Brittney B.)* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

778

CA 23-00237

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

CLAUDIO SOUZA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 130337.)

LAWRENCE PERRY BIONDI, P.C., WHITE PLAINS (LISA M. COMEAU OF COUNSEL), FOR CLAIMANT-APPELLANT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA MASTRIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Ramon E. Rivera, J.), entered September 30, 2022. The order, insofar as appealed from, denied the motion of claimant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

782

CA 23-00306

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

ANNE MACKIEWICZ, AS EXECUTOR OF THE ESTATE OF
PAUL O. JESSEN, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AUTUMN VIEW HEALTH CARE FACILITY, AUTUMN VIEW
HEALTH CARE FACILITY, LLC, THE MCGUIRE GROUP, INC.,
VESTRA SPVI, LLC, AND VESTRA SPV2, LLC,
DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, NEW YORK CITY (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI, LLP, BUFFALO (ANDREA N. CONJERTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 14, 2022. The order, inter alia, denied the motion of defendants insofar as it sought to dismiss the complaint.

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

Memorandum: As limited by their brief, defendants appeal from an order that, inter alia, denied their motion insofar as it sought to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7). We conclude that the appeal must be dismissed inasmuch as that order was materially amended by a subsequent order (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]), and we decline to exercise our discretion to treat the notice of appeal as one taken from the subsequent order (*see Matter of Justeen T.*, 17 AD3d 1148, 1148 [4th Dept 2005]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

784

CA 22-01665

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

IN THE MATTER OF COR VAN RENSSELAER STREET COMPANY III, INC., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, DOING BUSINESS AS EMPIRE STATE DEVELOPMENT, RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR RESPONDENT-APPELLANT.

COSTELLO COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered September 12, 2022, in a proceeding pursuant to CPLR article 78. The judgment granted the amended petition in part and directed respondent to approve certain funding to petitioner.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered May 13, 2020 insofar as appealed from is reversed on the law without costs.

Memorandum: Petitioner, a developer, commenced this CPLR article 78 proceeding seeking several items of relief, including an order compelling respondent, a public benefit corporation, to present to its Board of Directors for approval an incentive proposal offered to petitioner that would grant funding for a development project and compelling the Board of Directors to approve the incentive proposal. By order entered May 13, 2020, Supreme Court, inter alia, granted petitioner mandamus relief insofar as respondent was compelled to submit the incentive proposal to the Board of Directors for review and denied without prejudice as unripe for determination petitioner's request for mandamus relief compelling the Board of Directors to approve the incentive proposal. We subsequently dismissed respondent's appeal from that nonfinal order (*Matter of Cor Van Rensselaer St. Co., III, Inc. v New York State Urban Dev. Corp.*, 197 AD3d 976, 977 [4th Dept 2021]). Thereafter, in compliance with the nonfinal order, respondent submitted the incentive proposal for review by the Board of Directors, which then denied funding under the incentive proposal. Petitioner filed an amended petition seeking, inter alia, an order compelling respondent to approve the incentive

proposal on the ground that such approval was a ministerial act over which respondent had no discretion or, in the alternative, annulling the determination to deny funding under the incentive proposal as arbitrary and capricious. Respondent now appeals from an "order" granting the amended petition insofar as it sought to compel respondent to approve the funding consistent with the incentive proposal.

Preliminarily, we conclude that the paper from which respondent appeals constitutes a final judgment (*see Burke v Crosson*, 85 NY2d 10, 15 [1995]; *Matter of Monroe County Fedn. of Social Workers, IUE-CWA Local 381 v Stander*, 169 AD3d 1479, 1480 [4th Dept 2019]), which brings up for review the nonfinal order in this case (*see* CPLR 5501 [a] [1]; *see also Baum v Javen Constr. Co., Inc.*, 195 AD3d 1378, 1378-1379 [4th Dept 2021]). As limited by its brief, respondent contends with respect to the nonfinal order that the court erred in compelling it to present the incentive proposal to the Board of Directors for review because the proceeding insofar as it sought that relief was untimely. We agree.

"[W]here, as here, the proceeding is in the nature of mandamus to compel, it 'must be commenced within four months after refusal by respondent, upon demand of petitioner, to perform its duty' " (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017]; *see* CPLR 217 [1]; *Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]). " '[A] petitioner[, however,] may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches' " (*Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182 [4th Dept 2014]). "The term laches, as used in connection with the requirement of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time" and "does not refer to the equitable doctrine of laches" (*Matter of Devens v Gokey*, 12 AD2d 135, 137 [4th Dept 1961], *affd* 10 NY2d 898 [1961]). Inasmuch as "[t]he problem . . . is one of the [s]tatute of [l]imitations[,] . . . it is immaterial whether or not the delay cause[s] any prejudice to the respondent" (*id.*; *see Matter of Norton v City of Hornell*, 115 AD3d 1232, 1233 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]; *Matter of Thomas v Stone*, 284 AD2d 627, 628 [3d Dept 2001], *appeal dismissed* 96 NY2d 935 [2001], *lv denied* 97 NY2d 608 [2002], *cert denied* 536 US 960 [2002]; *Matter of Curtis v Board of Educ. of Lafayette Cent. School Dist.*, 107 AD2d 445, 448 [4th Dept 1985]; *see also Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979], *rearg denied* 46 NY2d 1076 [1979]). "[T]he four-month limitations period of CPLR article 78 proceedings has been 'treat[ed] . . . as a measure of permissible delay in the making of the demand' " (*Norton*, 115 AD3d at 1233; *see Granto*, 148 AD3d at 1696).

Here, the record establishes that funding under the incentive proposal offered to petitioner was contingent upon, among other things, approval by the Board of Directors and that respondent reserved the right to reconsider the incentive proposal in the event of a material change in circumstances. The incentive proposal was scheduled for consideration by the Board of Directors at its July 2016 meeting. However, after respondent learned that principals of petitioner were the subject of a pending criminal investigation by federal prosecutors, respondent's project manager informed petitioner approximately one week prior to the scheduled meeting that the incentive proposal would not be presented to the Board of Directors at that meeting as planned. Although the project manager promised to provide more details as they became available and petitioner subsequently asked whether the incentive proposal would be considered by the Board of Directors at its August 2016 meeting, the project manager provided no further response. Petitioner was thus aware at least as of August 2016 that the incentive proposal would not be presented to the Board of Directors for consideration. Petitioner's demand, therefore, should have been made no later than December 2016, but petitioner instead proceeded to complete the project and did not make its demand that the incentive proposal be considered by the Board of Directors until March and April 2019, which was well beyond four months after petitioner knew or should have known of the facts that provided it a clear right to relief (*see Granto*, 148 AD3d at 1696; *Densmore*, 265 AD2d at 839).

Contrary to petitioner's contention that it had a reasonable excuse for the delay in making the demand, we conclude that the alleged conversation between petitioner's Chief Executive Officer (CEO) and respondent's representative that occurred in January 2017, which itself was beyond the time that petitioner should have made its demand, simply reaffirmed that of which petitioner was already aware: respondent was not submitting the incentive proposal to the Board of Directors for consideration (*see Granto*, 148 AD3d at 1696). As further evinced by the affidavit of petitioner's CEO, there was no uncertainty that consideration by the Board of Directors was the next procedural step required to obtain funding under the incentive proposal (*cf. Matter of Chevron U.S.A. Inc. v Commissioner of Envtl. Conservation*, 86 AD3d 838, 841 [3d Dept 2011]). We also agree with respondent that the court, in rejecting the laches defense, erroneously relied on the April 2020 deadline in the incentive proposal. That was the deadline for requesting the disbursement of funds to which petitioner would have been entitled under the incentive proposal, but approval by the Board of Directors was a prerequisite to establish entitlement to any funds, and petitioner, for the reasons discussed, unreasonably delayed in demanding that respondent submit the incentive proposal for consideration by the Board of Directors (*see Granto*, 148 AD3d at 1696; *cf. Speis*, 114 AD3d at 1183).

Even assuming, arguendo, that laches did not bar the mandamus relief granted in the nonfinal order, we further agree with respondent that the court erred in compelling respondent in the judgment to approve the incentive proposal on the ground that such approval was a ministerial act over which respondent had no discretion. A writ of

mandamus to compel "is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* — US —, 139 S Ct 2651 [2019], *reh denied* — US —, 140 S Ct 18 [2019] [internal quotation marks omitted]). "Such remedy will lie 'only to enforce a clear legal right where the public [entity or] offic[er] has failed to perform a duty enjoined by law' " (*id.*, quoting *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005], *rearg denied* 4 NY3d 882 [2005]; *see* CPLR 7803 [1]). Thus, the writ "is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Alliance to End Chickens as Kaporos*, 32 NY3d at 1093; *Matter of Gimprich v Board of Educ. of City of N.Y.*, 306 NY 401, 406 [1954]). "A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result' " (*New York Civ. Liberties Union*, 4 NY3d at 184, quoting *Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

Here, we conclude that mandamus to compel does not lie because the Board of Directors retained discretion to approve or disapprove the incentive proposal (*see Matter of Citywide Factors, Inc. v New York City School Constr. Auth.*, 228 AD2d 499, 500 [2d Dept 1996]). As noted, the incentive proposal stated that funding thereunder was subject to approval by the Board of Directors and that respondent reserved the right to reconsider the incentive proposal in the event of a material change in circumstances (*see Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 93 [1981]; *cf. Matter of County of Wyoming v Division of Criminal Justice Servs. of State of N.Y.*, 83 AD2d 25, 27 [4th Dept 1981]). The Board of Directors exercised that discretion in this case by denying funding under the incentive proposal in accordance with the recommendation of respondent's staff (*see generally* McKinney's Uncons Laws of NY § 6254 [10] [Urban Development Corporation Act (UDCA) § 4 (10), as added by L 1968, ch 174, § 1, as amended]), which was based on, among other things, the intervening federal criminal convictions of two of petitioner's principals and the subsequent transfer of those principals' ownership stake in petitioner to trusts controlled by their respective spouses (*see Citywide Factors, Inc.*, 228 AD2d at 499-500). Contrary to the court's determination and petitioner's assertion, the discretionary nature of the Board of Directors' consideration of incentive proposals is not altered by the evidence that the Board of Directors had a past practice of approving incentive proposals as recommended by respondent's staff because the Board of Directors "was under no *obligation* to merely 'rubber stamp' " the incentive proposals (*Matter of Hussain v Lynch*, 215 AD3d 121, 127 [3d Dept 2023] [emphasis added]; *see Hamptons Hosp. & Med. Ctr.*, 52 NY2d at 96-97). Inasmuch as the Board of the Directors' approval of incentive proposals " 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results' " rather than " 'direct adherence to a governing rule or standard with a compulsory result,' " we conclude

that such approval "cannot be compelled by writ of mandamus" (*New York Civ. Liberties Union*, 4 NY3d at 184).

We further agree with respondent that the court erred in concluding, in the alternative, that the determination to deny funding under the incentive proposal should be annulled as arbitrary and capricious. On this record, it cannot be said that respondent's action was "taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Inasmuch as the court should not have compelled respondent to present the incentive proposal to the Board of Directors for review in the first instance, we reverse the nonfinal order insofar as appealed from and vacate the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

785

CA 22-01758

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

JOSEPH R. OISHEI, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN J. GEBURA, DEFENDANT, AND
PAUL J. BRINK, DEFENDANT-APPELLANT.

PILLINGER MILLER TARALLO, LLP, BUFFALO (KENNETH A. KRAJEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (LEONARD D. ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 2, 2022. The order denied the motion of defendant Paul J. Brink for summary judgment.

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

Memorandum: Plaintiff, a police officer with the Town of Amherst Police Department, commenced this action seeking damages for injuries he sustained when he attempted to stop a vehicle driven by defendant Stephen J. Gebura. Gebura had stolen the vehicle, owned by Paul J. Brink (defendant), the day before from the parking lot of defendant's place of employment. Defendant had left his vehicle unlocked with a spare key inside the vehicle, which Gebura found and used to steal the vehicle. Supreme Court denied defendant's motion for summary judgment dismissing the complaint against him. We affirm.

As defendant correctly contends and plaintiff does not dispute, Vehicle and Traffic Law § 388 (1), which makes an owner of a vehicle liable for the injuries to a person resulting from the negligence in the use or operation of such vehicle by any person using or operating the same with the owner's permission (*see Murdza v Zimmerman*, 99 NY2d 375, 379-380 [2003]), is inapplicable here. The vehicle was stolen and was therefore not being used or operated with defendant's express or implied permission (*see Holmes v McCrea*, 186 AD3d 1043, 1044-1045 [4th Dept 2020]). Plaintiff, however, relied on Vehicle and Traffic Law § 1210 (a), i.e., the "key in the ignition statute," to support his negligence claim (*see Raczka v Ramirez*, 70 AD3d 1480, 1482 [4th Dept 2010]).

Defendant contends that Vehicle and Traffic Law § 1210 (a) is

inapplicable here inasmuch as his vehicle was not parked in a parking lot as that term is defined in section 129-b (*see* § 1100 [a]). That contention is unpreserved for appellate review inasmuch as defendant failed to raise that issue before the motion court (*see* CPLR 5501 [a] [3]; *Panaro v Athenex, Inc.*, 207 AD3d 1069, 1070 [4th Dept 2022]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). Defendant's further contention that section 1210 (a) is inapplicable because the key to the vehicle was sufficiently hidden inside the vehicle (*see generally Banellis v Yackel*, 49 NY2d 882, 884 [1980]; *Gore v Mackie*, 278 AD2d 879, 880 [4th Dept 2000]) is raised for the first time on appeal and is therefore not properly before us (*see generally Ciesinski*, 202 AD2d at 985). In any event, defendant failed to meet his initial burden on the motion of demonstrating that the key was sufficiently hidden because his own submissions raised a triable issue of fact with respect thereto (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Although defendant submitted his deposition testimony in which he testified that the key was hidden underneath the passenger seat, he also submitted the deposition testimony of Gebura, who testified that the key was on the console of the vehicle, which he saw "pretty quickly" after entering the unlocked vehicle.

Finally, defendant contends that the passage of time between the theft of his vehicle and the accident vitiated any proximate cause as a matter of law. As a general rule, the issue of proximate cause is for the factfinder to resolve (*see Derdiarian v Felix Constr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]), and this case does not present an exception to the general rule (*see Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548 [4th Dept 2012]; *see generally Johnson v Manhattan & Bronx Surface Tr. Operating Auth.*, 71 NY2d 198, 207 [1988]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

787

TP 23-00818

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

IN THE MATTER OF CHARLES BLANCHARD, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU 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 order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 4, 2023) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated incarcerated individual rule 107.10 (7 NYCRR 270.2 [B] [8] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that incarcerated individual rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination, following a tier II disciplinary hearing, that he violated incarcerated individual rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). As respondent correctly concedes, the determination that petitioner violated incarcerated individual rule 107.10 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling the part of the determination finding that petitioner violated rule 107.10, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see generally Matter of Johnson v Eckert*, 197 AD3d 1011, 1012 [4th Dept

2021]; *Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Johnson*, 197 AD3d at 1012; *Washington*, 150 AD3d at 1701).

Contrary to petitioner's contention, the misbehavior report and hearing testimony constitute substantial evidence supporting the determination that he violated rules 106.10 and 107.11 (*see generally Matter of Thomas v Annucci*, 193 AD3d 1356, 1357 [4th Dept 2021]; *Matter of Williams v Annucci*, 162 AD3d 1530, 1531 [4th Dept 2018]). Any conflicting testimony from petitioner and the other incarcerated individuals merely presented credibility issues for the hearing officer to resolve (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Finally, petitioner contends that incarcerated individual rule 107.11 cannot constitutionally prohibit the use of obscene language directed at correctional staff. That same contention, however, was considered and rejected by this Court in *Matter of Nicholas v Herbert* (195 AD2d 1083, 1084 [4th Dept 1993], *appeal dismissed & lv denied* 82 NY2d 821 [1993]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

789.1

CA 23-00411

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

IN THE MATTER OF EDWARD SCHNEIDER, III,
PETITIONER-APPELLANT,

V ORDER

TOWN OF EVANS, RESPONDENT-RESPONDENT.

GUERCIO & GUERCIO, LLP, FARMINGDALE (CORY HALL MORRIS OF COUNSEL), FOR PETITIONER-APPELLANT.

BENNETT, DIFILIPPO, KURTZHALTS, WHITTEMORE & SEIBOLD, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered February 27, 2023, in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

789

CA 22-01969

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

BRANDICE M.C., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF JAC, A MINOR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOYCE M. WILDER, C.N.M., DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E. PATTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

PORTER LAW GROUP, SYRACUSE (MARY E. LANGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 24, 2022. The judgment granted the motion of plaintiff for a declaration that Porter Nordby Howe LLP, should not be disqualified from representing plaintiff, and denied the cross-motion of defendant Joyce M. Wilder, C.N.M., to disqualify that law firm.

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

Memorandum: Plaintiff commenced this medical malpractice action alleging that Joyce M. Wilder, C.N.M. (defendant) was negligent and deviated from the applicable standards of care in, inter alia, failing to manage plaintiff's labor and delivery in a proper and adequate manner. The signatory on the complaint and the CPLR 3012-a certificate of merit was Daniel P. Laraby, Esq., of the law firm Porter Nordby Howe LLP (Porter firm). Shortly after commencement of the action, counsel for defendant, Charles E. Patton, Esq. of the law firm Martin, Ganotis, Brown, Mould & Currie, P.C. (Martin firm), asked Laraby to disqualify himself and the Porter firm from representing plaintiff based on the fact that Laraby had previously represented defendant in another case involving substantially similar allegations during his prior employment with the Martin firm. Another attorney at the Porter firm responded that the firm would not disqualify itself from the case and noted that he took Laraby "off th[e] case." Plaintiff then moved for a judgment declaring that the Porter firm should not be disqualified as counsel for plaintiff, and defendant cross-moved to disqualify the Porter firm from representing plaintiff.

Supreme Court granted the motion and denied the cross-motion, and we now reverse.

"Although [a] party's entitlement to be represented by counsel of [their] choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted . . . , [t]he right to counsel of choice is not absolute and may be overridden where necessary" (*Jozefik v Jozefik*, 89 AD3d 1489, 1490 [4th Dept 2011] [internal quotation marks omitted]). Rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing" (Rule 1.9 [a]). It further provides as relevant here that a lawyer "who has formerly represented a client in a matter . . . shall not thereafter . . . use confidential information of the former client . . . to the disadvantage of the former client . . . ; or . . . reveal confidential information of the former client" (Rule 1.9 [c] [1], [2]).

As the above rule reflects, "[a]ttorneys owe fiduciary duties of both confidentiality and loyalty to their clients" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130 [1996], *rearg denied* 89 NY2d 917 [1996]; *see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 615-616 [1999]). A party seeking to disqualify an attorney or a law firm for a conflict of interest must establish "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc.*, 89 NY2d at 131; *see Kassis*, 93 NY2d at 615-616; *Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]). "[S]uch 'side switching' clearly implicates the policies both of maintaining loyalty to the first client and of protecting that client's confidences" (*Kassis*, 93 NY2d at 616).

"This rule of disqualification fully protects a client's secrets and confidences by preventing even the possibility that they will subsequently be used against the client in related litigation. This prophylactic measure thus frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn, 'fosters the open dialogue between lawyer and client that is deemed essential to effective representation' " (*Tekni-Plex, Inc.*, 89 NY2d at 131). "[A]ny doubts about the existence of a conflict should be resolved in favor of disqualification so as to avoid the appearance of impropriety" (*Severino v DiIorio*, 186 AD2d 178, 180 [2d Dept 1992]; *see McCutchen v 3 Princesses & AP Trust Dated Feb. 3, 2004*, 138 AD3d 1223, 1226 [3d Dept 2016]).

"The party seeking disqualification of a law firm or an attorney bears the burden of making a clear showing that disqualification is warranted" (*HoganWillig, PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1372-1373 [4th Dept 2022] [internal quotation marks omitted];

see Kelleher v Adams, 148 AD3d 692, 692-693 [2d Dept 2017]; *Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]), and "a trial court's decision to disqualify a law firm or an attorney shall be reviewed on appeal for abuse of discretion" (*HoganWillig, PLLC*, 210 AD3d at 1373; *see Goldberg & Connolly v Upgrade Contr. Co., Inc.*, 135 AD3d 703, 704 [2d Dept 2016]; *Jozefik*, 89 AD3d at 1490).

We agree with defendant that she met her initial burden on her cross-motion of establishing all three criteria, thus giving rise to an irrebuttable presumption that Laraby is disqualified from representing plaintiff in this matter (*see generally Tekni-Plex, Inc.*, 89 NY2d at 131; *Solow*, 83 NY2d at 313; *Moray v UFS Indus., Inc.*, 156 AD3d 781, 782 [2d Dept 2017]). There is no dispute that there was a prior attorney-client relationship between Laraby and defendant and that the interests of plaintiff and defendant are materially adverse. The only dispute is whether the matters involved in both representations are substantially related. To meet that requirement, the moving party has " 'to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation or that [counsel] received specific, confidential information substantially related to the present litigation' " (*Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.*, 175 AD3d 887, 888 [4th Dept 2019]; *see NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d 1205, 1206 [3d Dept 2017]; *Gustafson v Dippert*, 68 AD3d 1678, 1679 [4th Dept 2009]; *see also Anonymous v Anonymous*, 262 AD2d 216, 216 [1st Dept 1999]).

We conclude that defendant established that the issues in the present and prior litigation are identical or essentially the same (*see generally Solow*, 83 NY2d at 305, 313). The plaintiff in the prior representation, whose baby had suffered from essentially the same injuries as plaintiff's son here, made many of the same allegations of negligence and malpractice against defendant as plaintiff does in this case. Both cases involved whether defendant properly monitored the patients and the babies and made proper decisions regarding oxytocin administration, and whether defendant made the proper decision to continue with vaginal delivery instead of proceeding with a cesarean section. Alternatively, defendant established that Laraby received specific, confidential information in the prior litigation that is substantially related to the present litigation (*see Clairmont v Kessler*, 269 AD2d 168, 169 [1st Dept 2000]; *Severino*, 186 AD2d at 179-180). In particular, Laraby had access to the litigation strategy to defend defendant against the allegations of malpractice, including speaking with and receiving reports of expert witnesses.

We further agree with defendant that inasmuch as Laraby is disqualified, the Porter firm is also disqualified. Under the general rule, "where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation" (*Kassis*, 93 NY2d at 616). "[T]he rule of imputed disqualification [of the law firm] reinforces an attorney's ethical

obligation to avoid the appearance of impropriety" (*id.*; *see also Tekni-Plex, Inc.*, 89 NY2d at 131). Although there is a presumption that the entire law firm is disqualified, the presumption may be rebutted (*see Kassis*, 93 NY2d at 616-618; *Solow*, 83 NY2d at 313; *Moray*, 156 AD3d at 783). The party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material to the litigation and that the law firm erected an ethical wall around the disqualified attorney (*see Kassis*, 93 NY2d at 617; *Matter of Yeomans v Gaska*, 152 AD3d 1040, 1041 [3d Dept 2017]). Here, plaintiff failed to rebut that presumption of disqualification. Moreover, the Porter firm cannot now erect an ethical wall to separate Laraby from the case (*see generally Moray*, 156 AD3d at 783-784). He has already been involved in the present matter inasmuch as he was the signatory to the complaint and signed the certificate of merit. In addition, the Porter firm is a small law firm, and it did not set forth what measures it was taking in regards to an ethical wall (*see Yeomans*, 152 AD3d at 1042). The attorney now handling the case simply stated that Laraby was "taken . . . off this case."

We therefore conclude that the court abused its discretion in granting the motion and denying the cross-motion for disqualification.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

790

KA 19-00797

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON G. ROACH, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER 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 (Sam L. Valleriani, J.), rendered December 3, 2018. The appeal was held by this Court by order entered February 3, 2023, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (213 AD3d 1274 [4th Dept 2023]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted assault in the second degree and dismissing count one of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of, inter alia, attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and assault in the second degree (§ 120.05 [2]). We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had reserved decision but failed to rule (*People v Roach*, 213 AD3d 1274, 1274 [4th Dept 2023]). Upon remittal, the court denied the motion. Contrary to defendant's contention, we conclude that his conviction on the challenged counts is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

As defendant contends and the People correctly concede, however, as charged here, attempted assault in the second degree is a lesser included offense of attempted assault in the first degree (*see People*

v Argueta, 194 AD3d 857, 860 [2d Dept 2021], *lv denied* 37 NY3d 970 [2021]), and thus should have been considered only in the alternative as a lesser inclusory concurrent count of attempted assault in the first degree (*see* CPL 300.40 [3] [b]; *People v Hamm*, 96 AD3d 1482, 1483-1484 [4th Dept 2012], *affd* 21 NY3d 708 [2013]; *People v Johnson*, 81 AD3d 1428, 1429 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). We therefore modify the judgment accordingly. The sentence is not otherwise unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

791

KA 22-00756

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM SASS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 18, 2022. 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]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

792

KA 20-00761

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. PASCALAR, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered January 28, 2020. The judgment convicted defendant, upon his plea of guilty, of endangering the welfare of a vulnerable elderly person or an incompetent or physically disabled person in the second degree, identity theft in the first degree and criminal possession of a forged instrument 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 endangering the welfare of a vulnerable elderly person or an incompetent or physically disabled person in the second degree (Penal Law § 260.32 [4]), identity theft in the first degree (§ 190.80 [1]), and criminal possession of a forged instrument in the second degree (§ 170.25). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Blackshear*, 208 AD3d 1635, 1636 [4th Dept 2022], *lv denied* 39 NY3d 961 [2022]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

793

KA 20-00414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL NEGRON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered November 7, 2019. The judgment convicted defendant upon his plea of guilty of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]). We affirm. Initially, as defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid because County Court "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 there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]).

By pleading guilty before the court decided his pro se motion—which was not expressly adopted by defense counsel in the omnibus motion—to dismiss the indictment on the ground that the grand jury proceedings were tainted by prosecutorial misconduct, defendant abandoned that claim and is foreclosed from pursuing the merits thereof on appeal (*see People v Johnson*, 195 AD3d 1420, 1422 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Hardy*, 173 AD3d 1649, 1649-1650 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019]; *see generally People v Hansen*, 95 NY2d 227, 230 [2000]).

Defendant contends that he was denied effective assistance of

counsel due to defense counsel's failure to seek dismissal of the indictment on the ground that the grand jury proceedings were infected by prosecutorial misconduct. Defendant's contention does not survive his guilty plea because defendant has not "demonstrate[d] that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Jackson*, 202 AD3d 1447, 1449 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]; *see People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 35 NY3d 1026 [2020]). Defendant failed to show a reasonable probability that, but for defense counsel's alleged error, defendant would not have pleaded guilty and would have insisted on going to trial (*see Coleman*, 178 AD3d at 1378; *People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

794

KA 22-00940

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DAVID SANTIAGO, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (Debra L. Givens, A.J.), dated May 24, 2022. The order granted that part of the omnibus motion of defendant seeking to suppress physical evidence.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: The People appeal from an order granting defendant's omnibus motion insofar as it sought to suppress physical evidence recovered from the upper apartment of a duplex; defendant allegedly resided in the lower apartment of the duplex. We agree with the People that Supreme Court erred in suppressing the physical evidence without determining whether defendant had standing to challenge the search of the upper apartment (*see People v Guice*, 181 AD3d 1209, 1210 [4th Dept 2020]; *People v Sweat*, 148 AD3d 1641, 1642 [4th Dept 2017]; *see also* CPL 710.60 [6]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to rule on that issue (*see Guice*, 181 AD3d at 1210; *Sweat*, 148 AD3d at 1642; *see generally People v Concepcion*, 17 NY3d 192, 194-195 [2011]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

796

KA 21-01079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE J. FINSTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered July 10, 2018. The judgment convicted defendant upon a jury verdict of criminal sexual act in the second degree (four counts) and endangering the welfare of a child.

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 four counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and one count of endangering the welfare of a child (§ 260.10 [1]). The conviction arises from defendant's actions in engaging in oral sexual conduct with a 14-year-old victim, whom defendant supplied with alcohol and marihuana.

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as his motion for a trial order of dismissal was not "specifically directed at" any alleged shortcoming in the evidence now raised on appeal (*People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017] [internal quotation marks omitted]; *see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Simmons*, 133 AD3d 1227, 1227 [4th Dept 2015]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The resolution of issues of credibility and the weight to be accorded to the evidence are primarily questions to be determined by the jury (*see People v Abon*, 132 AD3d 1235, 1236 [4th Dept 2015], *lv denied* 27 NY3d 1127 [2016]). Here, the jury had the opportunity to see and hear the

victim's testimony about the encounters with defendant. It also had an opportunity to hear from defendant through the admission in evidence of an audio recording of a police interview. "Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495; *see People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *People v Gay*, 105 AD3d 1427, 1428 [4th Dept 2013]), and we perceive no basis for disturbing the jury's determination in this case.

We reject defendant's contention that he was deprived of a fair trial by misconduct on the part of the prosecutor during the opening statement. Even assuming, arguendo, that the prosecutor's comments were improper, we conclude that they were "not so egregious as to deprive defendant of a fair trial" (*People v Love*, 134 AD3d 1569, 1570-1571 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]; *see People v Figgins*, 72 AD3d 1599, 1600 [4th Dept 2010], *lv denied* 15 NY3d 893 [2010]; *People v Sweney*, 55 AD3d 1350, 1351 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]), and that County Court's instructions during the jury charge ameliorated any prejudice to defendant (*see People v Morgan*, 148 AD3d 1590, 1591 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *see also People v Warmley*, 179 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

797

KA 22-01169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA R. JORDAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered April 12, 2022. The judgment convicted defendant, upon her plea of guilty, of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). We reject defendant's contention that County Court erred in denying her motion to withdraw her guilty plea. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of discretion unless there is some evidence of innocence, fraud, or mistake in inducing [a] plea" (*People v Floyd*, 210 AD3d 1530, 1530 [4th Dept 2022], *lv denied* 39 NY3d 1072 [2023] [internal quotation marks omitted]; *see People v Alexander*, 203 AD3d 1569, 1570 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]). In support of her motion, defendant submitted an affidavit from a codefendant purporting to absolve her of guilt. We conclude that the court did not abuse its discretion in denying the motion because, among other things, the circumstances rendered the codefendant's affidavit inherently unreliable (*see People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]; *see generally People v Caruso*, 88 AD3d 809, 809-810 [2d Dept 2011], *lv denied* 18 NY3d 923 [2012]; *People v Griffin*, 4 AD3d 674, 675 [3d Dept 2004]).

Defendant contends that the period of incarceration to which she was sentenced is unduly harsh and severe. Where, as here, a defendant receives the minimum term of incarceration authorized by law, that part of the sentence cannot be considered unduly harsh or severe (*see People v Newsome*, 198 AD3d 1357, 1358-1359 [4th Dept 2021], *lv denied*

37 NY3d 1147 [2021]; *People v Griffith*, 181 AD3d 1170, 1172 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

798

CAF 23-00123

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

IN THE MATTER OF NANCY L. NICHOLS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WENDY L. NICHOLS, RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

MICHAEL D. SCHMITT, ROCHESTER, FOR RESPONDENT-APPELLANT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 27, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the second amended petition for visitation with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner, the maternal grandmother of the subject children, visitation with the children. The mother contends that the grandmother failed to demonstrate that she had standing to seek visitation pursuant to Domestic Relations Law § 72 (1). We reject that contention inasmuch as the grandmother established that "conditions exist [in] which equity would see fit to intervene" (*id.*; *see Matter of Panebianco v Panebianco*, 183 AD3d 1239, 1239 [4th Dept 2020], *lv denied* 35 NY3d 911 [2020]; *see generally Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182 [1991]). It is undisputed that the grandmother has a long-standing, extensive, and loving relationship with the children (*see Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433 [4th Dept 2012]; *see also Emanuel S.*, 78 NY2d at 182). Indeed, prior to the deterioration of her relationship with the mother, the children visited the grandmother overnight on a monthly basis and saw her several times a month. Moreover, the record supports Family Court's determination that the mother failed to set forth any basis for the court to determine that equity should not intervene here (*see generally* Domestic Relations Law § 72 [1]; *Panebianco*, 183 AD3d at 1240). Further, we note that the mother did not testify or adduce any

evidence at the factfinding hearing and therefore failed to articulate—let alone substantiate—any legitimate objection to visitation between the children and the grandmother.

Contrary to the mother's further contention, we conclude that the record supports the court's determination that visitation is in the best interests of the children (*see Panebianco*, 183 AD3d at 1240; *Matter of Richardson v Ludwig*, 126 AD3d 1546, 1547 [4th Dept 2015]). Finally, we reject the mother's contention that the court abused its wide discretion in formulating the grandmother's visitation schedule (*see generally Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1755 [4th Dept 2020]; *Matter of Eliza JJ. v Felipe KK.*, 173 AD3d 1285, 1286 [3d Dept 2019]; *Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1672 [4th Dept 2017]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

800

CA 22-00727

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

42ND ASSOCIATES-5407/100 LLC, PLAINTIFF-APPELLANT,

V ORDER

TWIN TREES CAMILLUS, INC., DEFENDANT-RESPONDENT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (ELIZABETH A. GENUNG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 3, 2022. The order granted the motion of defendant to dismiss the complaint.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

801

TP 23-00817

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

IN THE MATTER OF BRIAN SCHMIEGE, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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 order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 4, 2023) 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.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

802

TP 23-00659

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

IN THE MATTER OF KRISTEN JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEAL BOARD, RESPONDENT.

LEONARD CRIMINAL DEFENSE GROUP, PLLC, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM 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, Oneida County [David A. Murad, J.], entered August 25, 2022) to review a determination of respondent. The determination revoked petitioner's license to drive.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking her driver's license based on her refusal to submit to a chemical test following her arrest for driving while ability impaired by drugs. We confirm the determination.

Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Thompson v New York State Dept. of Motor Vehs.*, 170 AD3d 1657, 1657 [4th Dept 2019]). The arresting officer's testimony at the hearing established that he responded to multiple calls that petitioner's vehicle was being driven erratically and across grass lawns and that, upon arrival, he found petitioner unresponsive in the driver's seat of the still-running vehicle. Once petitioner was roused, her speech was very slow and slurred. We conclude that the arresting officer's testimony at the hearing established that the officer had reasonable grounds to believe that petitioner had been operating her vehicle in violation of Vehicle and Traffic Law § 1192 (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]).

We reject petitioner's contention that the arresting officer's testimony was insufficient to establish that the refusal warnings were

given in clear and unequivocal language. The arresting officer testified that he issued the standardized warning following petitioner's arrest (*see Matter of Dennstedt v Appeals Bd. of Admin. Adjudication Bur.*, 206 AD3d 1693, 1694 [4th Dept 2022]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

803

OP 23-00427

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

TOWN OF RUSH, PETITIONER,

V ORDER

NEW YORK STATE OFFICE OF RENEWABLE ENERGY SITING, NEW YORK STATE, AND HORSESHOE SOLAR ENERGY LLC, RESPONDENTS.

WISNIEWSKI LAW PLLC, WEBSTER (BENJAMIN E. WISNIEWSKI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSHUA M. TALLENT OF COUNSEL), FOR RESPONDENTS NEW YORK STATE OFFICE OF RENEWABLE ENERGY SITING, AND NEW YORK STATE.

HODGSON RUSS LLP, ALBANY (JOHN W. DAX OF COUNSEL), FOR RESPONDENT HORSESHOE SOLAR ENERGY LLC.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to Executive Law § 94-c [5] [g]) to annul and vacate determinations of respondent New York State Office of Renewable Energy Siting.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 16, 2023,

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

805

CA 21-01716

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

STEPHANIE DALTON, PLAINTIFF-RESPONDENT,

V ORDER

RICK DALTON, DEFENDANT-APPELLANT.

LAW FIRM OF AARON M. GAVENDA, ESQ., ROCHESTER (AARON M. GAVENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered October 7, 2021. The order, among other things, denied defendant's motion to vacate a prior order dated October 21, 2020 which held defendant in contempt.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

806

CA 23-00220

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

IN THE MATTER OF JOSEPH R., PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

TODD G. MONAHAN, LITTLE FALLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered January 26, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The amended order, inter alia, adjudged that petitioner suffers from a mental abnormality and continued his confinement in a secure treatment facility.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

807

CAF 22-01496

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

IN THE MATTER OF VICTORIA A. PRITTY-PITCHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DELBERT W. HARGIS, JR., RESPONDENT-APPELLANT,
AND NICOLE E. HARGIS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

THE LAW OFFICE OF DONALD A. WHITE, WEBSTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Allison J. Nelson, A.J.), entered August 31, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, found respondent Delbert W. Hargis, Jr., to be in contempt of court.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals in appeal No. 1 from an order that, among other things, found him in contempt of court for failing to comply with a prior order of custody and visitation (prior order) insofar as it granted petitioner, the paternal aunt of the subject child, visitation with the child. In appeal No. 2, the father appeals from an order that, among other things, modified the prior order by awarding petitioner sole legal and physical custody of the child.

In appeal No. 1, the father contends that the prior order was improper insofar as it awarded visitation to a nonparent and that Family Court thus erred in finding him in contempt. "[A]n appeal from a contempt order that is jurisdictionally valid does not bring up for review the prior order" (*Burns v Grandjean*, 210 AD3d 1467, 1475 [4th Dept 2022]; *see Matter of North Tonawanda First v City of N. Tonawanda*, 94 AD3d 1537, 1538 [4th Dept 2012]). "However misguided

and erroneous [the father believed] the court's order . . . [to] have been [he] was not free to disregard it and decide for himself the manner in which to proceed" (*Matter of Balter v Regan*, 63 NY2d 630, 631 [1984], *cert denied* 469 US 934 [1984]; *see Burns*, 210 AD3d at 1475). Inasmuch as the father does not contest the jurisdictional validity of the prior order and does not dispute that he violated the order by refusing to abide by the provisions granting visitation to petitioner, we reject his contention that the court erred in finding him in contempt.

Contrary to the father's contention in appeal No. 2, the court was not required to make a finding of extraordinary circumstances prior to addressing the merits of petitioner's amended modification petition. Although a nonparent generally lacks standing to seek custody, a nonparent may establish standing upon a showing of extraordinary circumstances (*see Matter of Byler v Byler*, 207 AD3d 1072, 1072-1073 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]). Here, the court determined in a prior order in this matter that petitioner established the existence of extraordinary circumstances, and that finding "cannot be revisited in a subsequent proceeding seeking to modify custody" (*Matter of Green v Green*, 139 AD3d 1384, 1385 [4th Dept 2016]; *see Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585 [4th Dept 2014]).

We likewise reject the father's contention that the court erred in determining that it was in the best interests of the child to award sole legal and physical custody to petitioner. In determining whether a requested custody modification is in the best interests of the child, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each [party] to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489, 1490 [4th Dept 2018], *lv denied* 32 NY3d 918 [2019]). The court is "in the best position to evaluate the character and credibility of the witnesses" (*Matter of Nunnery v Nunnery*, 275 AD2d 986, 987 [4th Dept 2000]), and this Court will not set aside a court's determination regarding custody "unless it lacks an evidentiary basis in the record" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [4th Dept 2007]; *see Matter of Nordee v Nordee*, 170 AD3d 1636, 1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]; *Matter of Hill v Rogers*, 213 AD2d 1079, 1079 [4th Dept 1995]). We conclude that the court's custody determination is supported by a sound and substantial basis in the record and should not be disturbed (*see Nordee*, 170 AD3d at 1637). Among other things, the father had absconded with the child to another state and had repeatedly interfered with petitioner's ability to see the child who she raised for the majority of the child's life. Thus, although the father and petitioner both appear on this record to be capable of caring for the child, the court, in making its custody and visitation determination, properly considered, among other factors, the father's contempt of court, his disregard for the child's relationship with a person the

child considers to be her mother, and the child's wishes.

The father's contention that the court erred in granting temporary custody to petitioner during the pendency of these proceedings is moot inasmuch as the order of temporary custody has been superseded by the order in appeal No. 2 (*see Matter of LaBella v Robertaccio*, 191 AD3d 1457, 1458-1459 [4th Dept 2021]; *Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]; *Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696 [4th Dept 2016]).

Respondent mother's challenge to the dismissal with prejudice of her petition seeking modification of an amended custody order is not properly before us inasmuch as the mother did not appeal from the order dismissing her petition (*see Byler*, 207 AD3d at 1076; *Matter of Timothy M.M. v Doreen R.*, 188 AD3d 1711, 1713 [4th Dept 2020]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

808

CAF 22-01497

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

IN THE MATTER OF VICTORIA PRITTY-PITCHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DELBERT HARGIS, RESPONDENT-APPELLANT,
AND NICOLE HARGIS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

THE LAW OFFICE OF DONALD A. WHITE, WEBSTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Allison J. Nelson, A.J.), entered August 31, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of the subject child.

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

Same memorandum as in *Matter of Pritty-Pitcher v Hargis* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

813

KA 20-01088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered January 13, 2020. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the second degree (§ 120.05 [2]). Preliminarily, as defendant contends and as 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]; *People v Benjamin-Foster*, 215 AD3d 1277, 1277 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nonetheless perceive no basis in the record for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

814

KA 22-00405

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL B. BOVEE, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN, FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 28, 2021. The judgment convicted defendant upon his plea of guilty of menacing a police officer or peace officer and possession of an imitation controlled substance with intent to sell it.

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 menacing a police officer or peace officer (Penal Law § 120.18) and possession of an imitation controlled substance with intent to sell it (Public Health Law § 3383 [2]). We affirm.

Defendant did not move to withdraw the plea or to vacate the judgment of conviction, and thus he failed to preserve for our review his challenge to the voluntariness of his plea (*see People v Szymanski*, 217 AD3d 1415, 1415 [4th Dept 2023], *lv denied* 40 NY3d 952 [2023]; *People v Roots*, 201 AD3d 1364, 1365 [4th Dept 2022]; *People v Caldero*, 195 AD3d 1450, 1451 [4th Dept 2021], *lv denied* 37 NY3d 1145 [2021]). Defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to file a motion to dismiss the indictment on speedy trial grounds 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 Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023] [internal quotation marks omitted]; *see People v Henry*, 207 AD3d 1062, 1064 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *see generally People v Parson*, 27 NY3d 1107, 1108 [2016]).

To the extent that defendant's contention survives his plea, we

conclude that it lacks merit. It is well settled that even 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 and prejudicial (*see generally People v McGee*, 20 NY3d 513, 518 [2013]; *People v Turner*, 5 NY3d 476, 480 [2005]). "To rise to that level, the [failure to make a particular argument] 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 failure to advance that argument could not be grounded in legitimate strategy (*McGee*, 20 NY3d at 518; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Here, we conclude that "defendant's speedy trial argument is not 'clear cut,' " and, thus, defense counsel was not ineffective in failing to move to dismiss the indictment on that ground (*People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see People v Brunner*, 16 NY3d 820, 821 [2011]).

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

815

KA 22-00968

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK E. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered May 2, 2022. The judgment convicted defendant upon his plea of guilty of aggravated vehicular homicide.

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 aggravated vehicular homicide (Penal Law § 125.14 [7]), defendant contends that the sentence is unduly harsh and severe. Defendant, however, knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and the valid waiver encompasses his challenge to the severity of the sentence (*see People v Lollie*, 204 AD3d 1430, 1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]). We note that, although the written waiver form executed by defendant incorrectly portrays the waiver as an absolute bar to the taking of an appeal (*see generally People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), County Court's oral colloquy, which followed the appropriate model colloquy, cured that defect (*see People v Jackson*, 198 AD3d 1317, 1318 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

817

KA 21-01067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND F. NEWTON, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MATTHEW J. BELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 30, 2021. The judgment convicted defendant upon a jury verdict of burglary in the second degree and petit larceny.

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 burglary in the second degree (Penal Law § 140.25 [2]) and petit larceny (§ 155.25). Defendant contends that he was denied due process of law when the prosecutor failed to correct a witness's statement that he did not receive a favorable plea deal in an unrelated case as an incentive for his testimony in this case. Defendant failed to preserve that contention for our review (*see People v Golson*, 93 AD3d 1218, 1219-1220 [4th Dept 2012], *lv denied* 19 NY3d 864 [2012]). In any event, his contention is without merit inasmuch as the prosecutor asked additional questions that clarified the witness's equivocal testimony regarding the plea deal (*see People v Rositas*, 187 AD3d 608, 608-609 [1st Dept 2020], *lv denied* 36 NY3d 1053 [2021]; *see generally People v Colon*, 13 NY3d 343, 349 [2009], *rearg denied* 14 NY3d 750 [2010]; *People v Reed*, 151 AD3d 1821, 1823 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]). Moreover, to the extent that the witness's testimony was still unclear, any error was harmless inasmuch as the evidence is overwhelming and there is no reasonable possibility that the error contributed to the conviction (*see Colon*, 13 NY3d at 349; *People v Pressley*, 91 NY2d 825, 827 [1997]). In his summation, the prosecutor noted that the witness was offered a plea deal, and County Court instructed the jury that the witness was offered a plea to a lesser offense in exchange for his testimony (*see Golson*, 93 AD3d at 1220).

Defendant next contends that the conviction of burglary in the

second degree is not supported by legally sufficient evidence that he was the perpetrator. By failing to renew his motion for a trial order of dismissal at the close of his case, defendant failed to preserve that contention for our review (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, his contention is without merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that defendant was the perpetrator of the burglary (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v McKoy*, 213 AD3d 1269, 1269-1270 [4th Dept 2023]; *People v Colon*, 211 AD3d 1613, 1614 [4th Dept 2022], *lv denied* 39 NY3d 1141 [2023]). The victim testified that a window of her house had been broken and several items inside the home were missing, including three distinctive swords and 40 to 50 dolls. Defendant's DNA matched a sample taken from that interior windowsill. Defendant admitted that he was depicted on several surveillance videos walking from the direction of the victim's home carrying items to a shed next door to the victim's home, where he was staying temporarily. In addition, two witnesses testified that they went to the shed on the day of the incident and observed the swords and dolls. Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention that the court erred in granting the People's motion to compel a DNA buccal swab because the application was not supported by probable cause is not preserved for our review inasmuch as defendant did not oppose the motion or move to suppress the results (*see* CPL 470.05 [2]; *People v Easley*, 124 AD3d 1284, 1284 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015]). In any event, his contention is without merit inasmuch as the indictment provided the requisite probable cause (*see People v Hogue*, 133 AD3d 1209, 1212 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *see generally* CPL 245.40 [1] [e]; *Matter of Abe A.*, 56 NY2d 288, 291 [1982]), and we therefore reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to oppose the motion or move to suppress the results (*see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Johnson*, 81 AD3d 1428, 1428-1429 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). Defendant's contention that he was denied due process of law because the People failed to comply with CPL 245.50 is not preserved for our review (*see* CPL 245.50 [4] [a]; 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the court did not abuse its discretion in granting the People's request for an adjournment after the trial had begun. " '[T]he granting of an adjournment for any

purpose is a matter resting within the sound discretion of the trial court' " (*People v Diggins*, 11 NY3d 518, 524 [2008]; *see People v Lashway*, 25 NY3d 478, 484 [2015]). Here, the court granted a short adjournment after the People identified a material witness and demonstrated diligence and good faith for the request, and there was minimal prejudice to defendant based on the short adjournment (*see generally People v Singleton*, 41 NY2d 402, 406 [1977]; *People v Schafer*, 152 AD3d 1228, 1229 [4th Dept 2017], *lv denied* 30 NY3d 1022 [2017]).

Defendant failed to preserve for our review his contention that the court, in determining the sentence to be imposed, penalized him for exercising his right to a jury trial because the sentence imposed is longer than the pretrial plea offer (*see People v Hendricks*, 214 AD3d 1466, 1467 [4th Dept 2023], *lv dismissed* 40 NY3d 929 [2023]; *People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]), as well as his conclusory contention that the sentence constitutes cruel and unusual punishment (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Suprunchik*, 208 AD3d 1058, 1059 [4th Dept 2022]). 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]; *Suprunchik*, 208 AD3d at 1059; *People v Elmore*, 195 AD3d 1575, 1577 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). The sentence is not unduly harsh or severe.

Finally, the certificate of conviction must be amended to reflect that defendant was sentenced as a second violent felony offender (*see McKoy*, 213 AD3d at 1270).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

819

KA 17-01665

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN L. PARNELL, JR., DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

CALVIN L. PARNELL, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered June 12, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts), criminal possession of a controlled substance in the fifth degree, endangering the welfare of a child, criminally using drug paraphernalia in the second degree (three counts) and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), one count of criminal possession of a controlled substance in the fifth degree (§ 220.06 [1]), and one count of endangering the welfare of a child (§ 260.10 [1]). We affirm.

The evidence at trial established that, shortly before midnight on the night in question, a police officer stopped defendant's car after observing defendant make an illegal turn. During the traffic stop, the officer smelled marihuana, which defendant admitted to having smoked before driving. A second officer then arrived and, following a pat frisk and subsequent vehicle search, defendant was found to be in possession of what appeared to be cocaine. Defendant was informed that he was under arrest, and placed in a patrol car. While in the patrol car, defendant told the two officers that his four-year-old daughter was home alone. Concerned, one of the officers contacted dispatch, and two other police officers were sent to the address defendant provided to check on the unattended child. The

responding officers entered defendant's apartment, which was unlocked, and found the child asleep. While in the kitchen of the apartment discussing how to proceed under the circumstances, the officers observed what appeared to be multiple bags of heroin and a number of loose pills on top of the microwave. Shortly thereafter, the officers also noticed a bag of loose ammunition on a shelf above the microwave. The police then obtained and executed a search warrant for the apartment, and recovered two handguns, various ammunition, drugs, and drug paraphernalia.

Preliminarily, we reject the People's assertion that defendant's failure to submit an adequate record requires the appeal to be dismissed or summarily affirmed. Unlike civil appeals (*see e.g. Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 337 [4th Dept 2020], *lv denied* 36 NY3d 963 [2021]; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]), on criminal appeals, this Court has the authority to request and consider any transcript, exhibit, or other document that it deems appropriate, whether included in the record or not (*see* Rules of App Div, 4th Dept [22 NYCRR] § 1000.7 [c]; Rules of App Div, All Depts [22 NYCRR] § 1250.7 [d] [3]). Here, all documents that we deem appropriate for the appeal have been requested and considered.

We reject defendant's contention in his main brief that Supreme Court erred in refusing to suppress his statement to the police that his daughter was home alone. Inasmuch as the record of the suppression hearing establishes that defendant was not being questioned at the time the inculpatory statement was made, "[t]he record supports the court's determination that defendant's statement was genuinely spontaneous and was not the product of interrogation or its functional equivalent" (*People v Tomion*, 174 AD3d 1495, 1496 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *see also People v Dell*, 175 AD3d 1037, 1039 [4th Dept 2019], *lv denied* 34 NY3d 980 [2019]). The fact that defendant made the inculpatory statement immediately after being told that he was under arrest is irrelevant, because "merely informing a defendant that [they are] under arrest does not undermine the spontaneity of a statement" (*Tomion*, 174 AD3d at 1496).

We also reject defendant's contention in his main brief that there was no emergency requiring the police to enter his apartment without a warrant and, thus, that the physical evidence recovered therefrom should have been suppressed. "The emergency doctrine exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*People v Turner*, 175 AD3d 1783, 1783 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019] [internal quotation marks omitted]). Here, the suppression hearing testimony established that, after defendant stated that his four-year-old daughter was home alone shortly before midnight and confirmed the address where he had left her unattended, one of the arresting officers, concerned for the

child's safety, notified dispatch, and two other officers were sent to the residence to locate, and check on, the unattended child. We conclude that the People established through that testimony that "the [police] had a reasonable belief that the child might be in danger or distress and that [their] immediate assistance was required," and that all three elements of the emergency doctrine exception were met (*People v Radcliffe*, 185 AD2d 662, 663 [4th Dept 1992], *lv denied* 80 NY2d 976 [1992]; *see also People v Bruen*, 119 AD2d 685, 685 [2d Dept 1986], *lv denied* 68 NY2d 667 [1986], *reconsideration denied* 68 NY2d 769 [1986]).

Defendant contends in his pro se supplemental brief that the evidence is legally insufficient to support the conviction of the two weapon counts because there was no evidence that the two handguns found in his apartment had been in his possession. We reject that contention. "To meet their burden of proving defendant's constructive possession of the [handguns], the People had to establish that defendant exercised dominion or control over [the handguns] by a sufficient level of control over the area in which [they were] found" (*People v Everson*, 169 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019] [internal quotation marks omitted]). Here, the officers who responded to defendant's apartment testified at trial that the handguns had been hidden in the drop ceiling of the sole bathroom in the apartment, that defendant's DNA was found on one of the handguns, and that ammunition for the other handgun had been left out in the open in the kitchen. Moreover, the People presented admissions made by defendant in recorded jail calls, including one in which defendant stated that, during the search of his apartment, the police had found "both of them," thereby suggesting that he had knowledge of the handguns' hidden location. We conclude that the evidence is legally sufficient to establish the element of constructive possession (*see id.* at 1443; *see also People v Jones*, 149 AD3d 1580, 1580-1581 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). Additionally, viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) and "according great deference to the jury's resolution of credibility issues" (*People v Bassett*, 55 AD3d 1434, 1436 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]), we conclude that, contrary to defendant's contention in his pro se supplemental brief, the verdict with respect to the two weapon counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *Bassett*, 55 AD3d at 1436).

Defendant also contends in his pro se supplemental brief that the jail call recordings and the transcripts thereof were erroneously admitted in evidence without a proper foundation. We reject that contention. Here, the calls were made from central booking at the time of defendant's arrest, the caller identified himself by defendant's first name, and the caller discussed the circumstances of his arrest. Under these circumstances, "[t]he content of the recordings established defendant's identity as the caller, and the testimony of [an individual who maintained] the jail's recording

system established that the recordings were 'complete and accurate reproduction[s] of the conversation[s] and [that they had] not been altered' " (*People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021], quoting *People v Ely*, 68 NY2d 520, 527 [1986]; *see generally People v Devine*, 206 AD3d 1720, 1721 [4th Dept 2022]).

Finally, we have considered defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

820

CAF 22-01641

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

IN THE MATTER OF SANDY B. MARTIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GARY J. MARTIN, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered September 6, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the subject children with leave to relocate to Tennessee.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order entered after a hearing that, inter alia, awarded petitioner mother sole legal and physical custody of the parties' children and granted the mother permission to relocate with the children to Tennessee. We affirm.

Initially, we conclude that the father "waived his challenge to the authority of the Court Attorney Referee to hear and determine the petition[] before him" (*Matter of Sturnick v Hobbs*, 191 AD3d 1375, 1375 [4th Dept 2021]).

Contrary to the further contention of the father, we conclude that the Referee properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that the mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests, and we further conclude that the Referee's determination has " 'a sound and substantial basis in the record' " (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). Here, the mother testified at the hearing that she has been the primary caregiver of the children and that her health has been steadily declining. She further established that the maternal grandmother, who moved to Tennessee in 2021, has provided her with

extensive financial assistance, as well as assistance in caring for herself and the children, and that the maternal grandmother would continue to do so if the mother were to relocate closer to the maternal grandmother (*see Matter of Ramirez v Velazquez*, 74 AD3d 1756, 1757 [4th Dept 2010]). Further, the record establishes that the father has no "accustomed close involvement in the children's everyday life" (*Tropea*, 87 NY2d at 740), and thus we conclude that the need to "give appropriate weight to . . . the feasibility of preserving the relationship between the noncustodial parent and [the] child[ren] through suitable visitation arrangements" does not take precedence over the need to give appropriate weight to the necessity for the relocation (*id*. at 740-741).

We have considered the father's remaining contentions and conclude that none warrants modification or reversal of the order.

All concur except NOWAK, J., who dissents and votes to reverse in accordance with the following memorandum: I agree with the majority that respondent father waived his challenge to the authority of the Court Attorney Referee to hear and determine the petition at issue. Contrary to the majority's conclusion, however, I agree with the father that the Referee erred in determining that petitioner mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests, and thus, in my view, the Referee's determination lacks a sound and substantial basis in the record (*see Matter of Gasdik v Winiarz*, 188 AD3d 1760, 1760-1761 [4th Dept 2020]). I therefore respectfully dissent.

In *Matter of Tropea v Tropea* (87 NY2d 727 [1996]), the Court of Appeals set forth the factors that should be considered in determining an application to relocate and emphasized that "no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" (*id*. at 738). The best interests of the children are the predominant concern and, in making that determination, consideration and appropriate weight must be given to all of the relevant factors (*see Matter of Fleisher v Fleisher*, 151 AD3d 1768, 1769 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]).

In his decision, the Referee recited the relevant *Tropea* factors, but erred in considering and applying those factors to the case at bar. In particular, the Referee gave disproportionate weight to certain factors and largely ignored the impact of the move on the children's future contact with the father despite that factor weighing heavily against relocation, given the distance between Clinton County, New York, where the father resides, and Tennessee (*see Matter of Barlow v Smith*, 94 AD3d 1437, 1438 [4th Dept 2012]; *Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [4th Dept 2006], *lv denied* 6 NY3d 714 [2006]). "[D]enying visitation to a natural parent is a drastic remedy and should only be done where there are compelling reasons" (*Parker v Ford*, 89 AD2d 806, 806-807 [4th Dept 1982]). "[A]n individual's undesirable personal characteristics and habits cannot be relied on to deny visitation, unless there is a specific finding that the parent's conduct will have a detrimental

impact on the child" (*id*. at 807). Here, the Referee made no such finding. Nevertheless, the Referee effectively eliminated the father's access by suspending his right to in-person visitation indefinitely.

Moreover, the mother did not establish that the children's lives will be enhanced economically, emotionally, or educationally by the move, even if the move would not diminish them (*see Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]; *Matter of Seyler v Hasfurter*, 61 AD3d 1437, 1437 [4th Dept 2009]; *cf. Matter of Scialdo v Cook*, 53 AD3d 1090, 1092 [4th Dept 2008]). The mother offered no testimony that the children would receive a better education in Tennessee, and there was no testimony comparing schools in each location (*see generally Gasdik*, 188 AD3d at 1762-1763).

The mother also offered no explanation as to why she and the children would be better cared for in Tennessee by the maternal grandmother—who testified that she works approximately 45 to 50 hours per week at multiple jobs in addition to caring for her son's newborn child—than in New York by the certified caregiver the mother was approved for but has never utilized (*see generally Matter of Hirschman v McFadden*, 137 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]), particularly in light of the mother's unrefuted testimony that her seven-year-old daughter "does most of the taking care of" herself and of her four-year-old brother. Finally, the mother failed to establish that the children's lives would be enhanced economically. Indeed, the mother testified that she would be reliant upon the maternal grandmother to support her financially regardless of whether she moved, and there was no testimony that the mother would be eligible for the same benefits in Tennessee that she is currently receiving through New York State. In light of the foregoing, I do not believe that the mother met her burden, and I would thus reverse the order and dismiss the petition.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

821

CAF 22-01285

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

IN THE MATTER OF TARA J. MELISH,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY J. RINNE,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

TARA J. MELISH, PETITIONER-RESPONDENT-APPELLANT PRO SE.

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered July 18, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the motion of the Attorney for the Children to dismiss the amended modification petition of petitioner-respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of the Attorney for the Child, reinstating the amended petition of petitioner-respondent, and vacating the fourth ordering paragraph, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In these proceedings pursuant to Family Court Act article 6 to modify a prior consent order regarding custody and visitation of the parties' children, petitioner-respondent mother appeals from three orders. Initially, we dismiss the appeals from the orders in appeal Nos. 2 and 3 because those orders are duplicative of the order in appeal No. 1 (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1322-1323 [4th Dept 2016]; *Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

We agree with the mother in appeal No. 1 that Family Court erred in granting the motion of the Attorney for the Children (AFC) to dismiss the mother's amended petition seeking to modify the existing custody and visitation order. To survive a motion to dismiss for facial insufficiency, a petition seeking to modify a prior order of custody and visitation must contain sufficient "factual allegations of a change in circumstances" (*Machado*, 142 AD3d at 1323; *see Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]). On such a motion, the court "must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party

the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory" (*Machado*, 142 AD3d at 1323; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, we conclude that, contrary to the court's determination, the amended petition contains sufficient allegations of a change in circumstances, namely, that since the entry of the existing consent order, the mother and respondent-petitioner father have been unable to successfully parent with respect to, among other things, the children's education and after-school care (*see generally Matter of Little v Little*, 175 AD3d 1070, 1072 [4th Dept 2019]). We therefore modify the order in appeal No. 1 by denying the AFC's motion and reinstating the mother's amended petition. In light of our determination, we further conclude that the court erred in directing that the father's petition seeking to modify the existing consent order is withdrawn based on the father's statements indicating that he would withdraw his petition in the event that the mother's amended petition were withdrawn or dismissed. We therefore further modify the order in appeal No. 1 by vacating the fourth ordering paragraph, and we remit the matter to Family Court for a hearing on the mother's amended petition and the father's petition (*see id.*; *Kriegar*, 162 AD3d at 1561).

Finally, the mother failed to preserve her contention that the court was biased against her inasmuch as she failed to make a motion for the court to recuse itself (*see Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2021]). In any event, contrary to the mother's contention, our review of the record does not indicate the existence of any such bias that would warrant remittal before a different judge (*see id.*; *see also Matter of Dawn M. [Michael M.]*, 151 AD3d 1489, 1493 [3d Dept 2017], *lv denied* 29 NY3d 917 [2017]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

822

CAF 22-01286

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

IN THE MATTER OF TARA J. MELISH,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY J. RINNE,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

TARA J. MELISH, PETITIONER-RESPONDENT-APPELLANT PRO SE.

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered July 18, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the amended modification petition of petitioner-respondent.

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

Same memorandum as in *Matter of Melish v Rinne* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

823

CAF 22-01287

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

IN THE MATTER OF TARA J. MELISH,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY J. RINNE,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 3.)

TARA J. MELISH, PETITIONER-RESPONDENT-APPELLANT PRO SE.

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered July 18, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the modification petition of petitioner-respondent.

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

Same memorandum as in *Matter of Melish v Rinne* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

824

CAF 22-00842

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

IN THE MATTER OF TREVOR D. CASTLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANI M. BARNES, RESPONDENT-APPELLANT.

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

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

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered December 27, 2021, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father filed a petition seeking to modify a prior consent order of custody and visitation. Respondent mother now appeals from an order that, inter alia, awarded sole custody of the subject child to the father with visitation to the mother. We affirm.

Initially, we note that the mother does not dispute that there was a sufficient change in circumstances since the prior order, and thus the issue before us is whether Family Court properly determined that the best interests of the child would be served by a change in the custody and visitation arrangement (*see Matter of Clark v Clark*, 199 AD3d 1455, 1455 [4th Dept 2021]; *Matter of Golda v Radtke*, 112 AD3d 1378, 1378 [4th Dept 2013]). Contrary to the mother's contention, a sound and substantial basis exists in the record for the court's determination to award the father sole custody of the child, rather than to award the parties joint custody (*see Matter of Ballard v Piston*, 178 AD3d 1397, 1398 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]; *Matter of Campbell v Knapp*, 132 AD3d 1420, 1421 [4th Dept 2015], *lv denied* 26 NY3d 917 [2016]). While the record establishes that the mother and the father could sometimes effectively communicate with each other, the majority of their interactions were acrimonious (*see Matter of K.C. v N.C.*, 215 AD3d 1238, 1239-1240 [4th Dept 2023]).

We reject the mother's further contention that the record does not support the court's determination to limit her visitation to alternating weekends and one weekly dinner visit. It is well settled that " '[t]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound and substantial basis in the record' " (*Matter of Robert AA. v Colleen BB.*, 101 AD3d 1396, 1397 [3d Dept 2012], *lv denied* 20 NY3d 860 [2013]; *see Golda*, 112 AD3d at 1378). The record establishes that the mother neglected the child, interfered with the father's relationship with the child, and engaged in domestic violence with the father of her two younger children in the child's presence. We therefore conclude that it was not in the best interests of the child to award additional parenting time with the mother (*see Matter of Kendra E. v Jared T.*, 209 AD3d 606, 607 [1st Dept 2022]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

825

CA 22-01907

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

MIGUEL REYES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EPISCOPAL SENIOR HOUSING GREECE, LLC, EPISCOPAL SENIORLIFE COMMUNITIES AND EPISCOPAL SENIOR LIFE COMMUNITIES, INC., DEFENDANTS-RESPONDENTS.

EPISCOPAL SENIOR HOUSING GREECE, LLC, AND EPISCOPAL SENIORLIFE COMMUNITIES, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

FLOWER CITY MONITOR SERVICES, LTD AND FLOWER CITY MONITORS, INC., THIRD-PARTY DEFENDANTS-RESPONDENTS.

PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW OFFICES OF JORDAN DIPALMA, PLLC, PALMYRA (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeals from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered November 21, 2022. The order and judgment denied the motion of plaintiff for partial summary judgment on the issue of liability on the Labor Law § 240 (1) claim, granted the cross-motion of third-party defendants for summary judgment and dismissed the third-party complaint.

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

Memorandum: Plaintiff, who was employed by third-party defendants on a demolition and abatement project on a building owned by defendant Episcopal SeniorLife Communities, was working alongside his supervisor on a scissor lift to remove a second-story window when, with the metal flashing and caulk having been removed from the window,

the supervisor granted plaintiff permission to use the bathroom and lowered the lift to the ground, after which the window fell and struck plaintiff in the head. Plaintiff commenced this action seeking damages for injuries he sustained as a result of, among other things, an alleged violation of Labor Law § 240 (1). Defendants-third-party plaintiffs (third-party plaintiffs) commenced a third-party action against third-party defendants alleging causes of action for contribution and common-law indemnification. Plaintiff moved for partial summary judgment on the issue of liability on the Labor Law § 240 (1) claim, and third-party defendants cross-moved for summary judgment dismissing the third-party complaint on the ground that plaintiff did not sustain a grave injury as defined by Workers' Compensation Law § 11, and thus that the third-party complaint was not actionable. Supreme Court determined that Labor Law § 240 (1) was violated, but that there was a triable issue of fact whether plaintiff's own conduct was the sole proximate cause of the accident. The court also determined that third-party defendants met their initial burden on the cross-motion by establishing that plaintiff did not suffer a grave injury and that third-party plaintiffs, in opposition, failed to raise an issue of fact. Plaintiff appeals from an order and judgment insofar as it denied the motion, and third-party plaintiffs appeal from the order and judgment insofar as it granted the cross-motion.

We agree with plaintiff that the court erred in denying his motion for partial summary judgment on the issue of liability on the Labor Law § 240 (1) claim. Contrary to the court's determination and defendants' assertion, inasmuch as the record establishes that plaintiff and the supervisor were working together on the scissor lift to remove the window by prying off the metal flashing and removing the caulk, and that the supervisor then granted plaintiff permission to use the bathroom and lowered the lift to the ground while leaving the window unsecured on the second story of the building when the window was susceptible to falling, it cannot be said that plaintiff's conduct was the sole proximate cause of the accident (*see Vicki v City of Niagara Falls*, 215 AD3d 1285, 1288 [4th Dept 2023]; *Allington v Templeton Found.*, 167 AD3d 1437, 1438 [4th Dept 2018]; *Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]). We thus conclude that plaintiff's "conduct during the [window removal] process 'raises, at most, an issue concerning his comparative negligence, which is not an available defense under Labor Law § 240 (1)' " (*Vicki*, 215 AD3d at 1288).

We further agree with third-party plaintiffs that the court erred in granting third-party defendants' cross-motion for summary judgment dismissing the third-party complaint. Even assuming, arguendo, that third-party defendants met their initial burden by establishing that plaintiff did not sustain a grave injury based on an acquired injury to the brain resulting in permanent total disability (*see* Workers' Compensation Law § 11 [1]), we conclude that third-party plaintiffs raised an issue of fact in that regard inasmuch as they submitted competent medical evidence showing that plaintiff may suffer from severe dementia that is causally related to the brain injury sustained during the accident and renders him unemployable in any capacity (*see*

Padilla v Absolute Realty Inc., 195 AD3d 422, 424 [1st Dept 2021]; *Sergeant v Murphy Family Trust*, 292 AD2d 761, 762 [4th Dept 2002]; *see generally Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413, 417 [2004]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

835

KA 22-00335

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARRY E. BROWN, III, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 23, 2021. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated and aggravated unlicensed operation of a motor vehicle 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 aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i] [B]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]; [b]). Defendant contends that County Court erred in imposing an enhanced sentence without holding a hearing or otherwise providing defendant with sufficient time to speak. That contention is not preserved for our review inasmuch as defendant "failed to request such a hearing and did not move to withdraw his plea on that ground" (*People v Scott*, 200 AD3d 1729, 1730 [4th Dept 2021]). In any event, the contention lacks merit. Under the circumstances, the court was not required to conduct a hearing, and it provided "[b]oth defendant and his counsel . . . ample opportunity to refute the court's assertions that defendant had violated the plea terms" (*People v Albergotti*, 17 NY3d 748, 750 [2011]; *see generally People v Semple*, 23 AD3d 1058, 1059-1060 [4th Dept 2005], *lv denied* 6 NY3d 852 [2006]), specifically by his failure to appear at sentencing and failure to appear in court until nearly two years later, when he was apprehended on a bench warrant (*see generally People v Baker*, 204 AD3d 1471, 1472 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Winship*, 26 AD3d 768, 768-769 [4th Dept 2006], *lv denied* 6 NY3d 899 [2006]). Contrary to defendant's further contention, the enhanced sentence is not unduly harsh or severe.

We note, however, that the certificate of disposition, certificate of conviction, and uniform sentence and commitment form must be amended to correct a clerical error (*see People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]). All three forms erroneously state that defendant was convicted of aggravated unlicensed operation of a motor vehicle in the first degree under Vehicle and Traffic Law § 511 (3) (3), and each should be corrected to reflect that he was convicted of that offense under § 511 (3) (a) (i).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

836

KA 21-01423

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES G. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 30, 2021. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Cayuga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his guilty plea of assault in the second degree (Penal Law § 120.05 [2]), defendant contends, and the People correctly concede, that County Court erred in sentencing him as a persistent violent felony offender without granting his request for a hearing.

As relevant here, a persistent violent felony offender is one "who stands convicted of a violent felony offense . . . , after having previously been subjected to two or more predicate violent felony convictions" (Penal Law § 70.08 [1] [a]). The sentences upon the predicate violent felony convictions "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.04 [1] [b] [iv]). "In calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (§ 70.04 [1] [b] [v]).

Although defendant admitted at sentencing that he had been convicted of the prior violent felony offenses alleged in the People's persistent violent felony offender statement, defendant did not concede that he had been sentenced on at least two of those violent

felonies within 10 years prior to the commission of the instant offense, and the People's statement did not set forth the commencement date, termination date, and place of imprisonment for each period of incarceration to be used for tolling of the ten-year limitation as required by CPL 400.15 (2). Moreover, as the People correctly concede, the record does not include a specific finding by the court regarding whether there was sufficient incarceration tolling for defendant's prior violent felony convictions to count as predicate convictions.

We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing following a hearing in which the People will have the burden of proof of establishing the appropriate time computations under Penal Law § 70.04 (1) (b) (v) and, consequently, whether defendant is a persistent violent felony offender (*see People v Vanhooser* [appeal No. 2], 126 AD3d 1531, 1532-1533 [4th Dept 2015]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

837

KA 19-01906

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILAL DINGLE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 14, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

839

KA 18-00690

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. WALKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered January 17, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the supplemental motion to suppress is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that Supreme Court erred in denying his supplemental motion to suppress physical evidence obtained as the result of an unlawful vehicle stop. We agree with defendant.

It is well settled that, although "a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to the burden of going forward to show the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361, 367 [1971] [internal quotation marks and emphasis omitted]; *see People v Walls*, 37 NY3d 987, 988 [2021]; *People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). As relevant here, a vehicle stop is permissible when based on probable cause that the driver has committed a traffic violation (*see People v Hinshaw*, 35 NY3d 427, 430 [2020]).

On February 1, 2017, a police officer in a patrol vehicle stopped the vehicle that defendant was driving. At the suppression hearing, the officer testified that he entered the vehicle's plate number in his computer to "r[u]n a DMV check," and "the vehicle came back

suspended" for an insurance lapse. He testified that the computer screen would have displayed "suspension [– – – –] insurance lapse." Defendant, in support of his supplemental motion to suppress, submitted a verification of insurance form showing that the vehicle in question was insured from October 31, 2016, through April 30, 2017, with "no lapse in coverage during this policy period."

Defendant does not dispute that the police may lawfully run a license plate number through a government database to check for outstanding violations, and information indicating that the registration is in violation of the law, such as a suspended registration for an insurance lapse, may provide probable cause for the officer to stop the vehicle (*see People v Bushey*, 29 NY3d 158, 160 [2017]; *People v Coss*, 189 AD3d 1759, 1762 [3d Dept 2020]). We agree with defendant, however, that the People failed to establish the reliability of the information received by the officer. It is well settled that "[a] police officer is entitled to act on the strength of a radio bulletin or a telephone or teletype alert from a fellow officer or department and to assume its reliability" (*People v Lypka*, 36 NY2d 210, 213 [1975]; *see People v Rosario*, 78 NY2d 583, 588 [1991], *cert denied* 502 US 1109 [1992]). "Officers making arrests based on the transmitted information are justified in doing so because the officer or department furnishing that information presumptively possesses the requisite probable cause which justifies the warrantless [action]. However, where a defendant challenges an arresting officer's warrantless action, the presumption of probable cause disappears and it becomes incumbent upon the People to establish that the officer or agency imparting the information, in fact possessed the probable cause to act" (*Rosario*, 78 NY2d at 588; *see People v Landy*, 59 NY2d 369, 375 [1983]).

Here, defendant's submission of the verification of insurance form in support of his supplemental motion was sufficient to challenge the presumed reliability of the information obtained by the officer that the vehicle's registration was suspended due to an insurance lapse (*cf. People v Bryant*, 187 Misc 2d 259, 263-264 [Crim Ct, NY County 2001]). It was therefore incumbent upon the People to submit proof at the suppression hearing in addition to the officer's testimony to establish the reliability of the information received by the officer, and the People failed to meet that burden (*see generally Dortch*, 186 AD3d at 1115; *People v Searight*, 162 AD3d 1633, 1635 [4th Dept 2018]).

Therefore, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping the vehicle in the first instance, we conclude that the court erred in refusing to suppress the physical evidence obtained as a result of the stop (*see People v Suttles*, 214 AD3d 1313, 1314 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v Reedy*, 211 AD3d 1629, 1630 [4th Dept 2022]). Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see Suttles*, 214 AD3d at 1314; *Reedy*, 211 AD3d at 1630). In light of our

determination, we do not reach defendant's remaining contentions.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

840

KA 22-00118

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEION M. PIERRE, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered January 8, 2020. The judgment convicted defendant after a nonjury trial of arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of arson in the second degree (Penal Law § 150.15). Defendant contends that the evidence is legally insufficient to establish his identity as the person who intentionally set the fire, that he intended to damage the building by setting the fire, and that the building was in fact damaged as a result. Even assuming, arguendo, that defendant's contention is fully preserved for our review, we reject that contention. 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, even if a different verdict would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We also reject defendant's contention that he was denied effective assistance of counsel. "There is nothing in the record to indicate that defendant was deprived of meaningful representation" at any stage of the proceedings (*People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). " 'If defendant can demonstrate facts, not recited in the record, that would raise [a colorable] issue [of ineffective assistance], that issue can be pursued by motion pursuant to CPL 440.10' " (*People v Barbuto*, 126 AD3d 1501, 1504 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). Contrary to defendant's further contention, the sentence in not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the

judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

842

CAF 22-01712

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF WILLIAM J. GEER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE COLLAZO, RESPONDENT-RESPONDENT.

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

WESLEY CLARK & PESHKIN, ROCHESTER (CYNTHIA J. CARROLL OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SARAH L. FIFIELD, FAIRPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered October 5, 2022, in a proceeding pursuant to Family Court Act article 6. The order denied the petition for visitation with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from a decision that denied his petition seeking, inter alia, visitation with the subject child following his release from prison. The father had been imprisoned after pleading guilty to kidnapping in the second degree as a result of his role in the kidnapping of the child's mother.

Initially, although no appeal lies from a mere decision (*see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]), we agree with the father that the paper appealed from "meets the essential requirements of an order" (*Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]) inasmuch as it was filed "with the Court Clerk and . . . [it] resolved the [proceeding] and advised the father that he had a right to appeal" (*Matter of Louka v Shehatou*, 67 AD3d 1476, 1476 [4th Dept 2009]). We therefore treat it as an order.

Contrary to the father's contention, however, Family Court's determination to deny the father's petition has a sound and substantial basis in the record (*see generally Matter of Thurarajah v Manjula*, 184 AD3d 1130, 1131 [4th Dept 2020]*; Matter of Grayson v Lopez*, 178 AD3d 1427, 1428 [4th Dept 2019]; *Matter of Carroll v*

Carroll, 125 AD3d 1485, 1487 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

844

CAF 20-00654

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF JOHLYANNE F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EVANGELISTA A., RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

LYLE T. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered August 25, 2020, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Evangelista A. had abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order entered after a fact-finding hearing that, inter alia, adjudged that the child who is the subject of this proceeding was abused by the mother. As a preliminary matter, we exercise our discretion to treat the mother's notice of appeal from the order following the fact-finding hearing as a valid notice of appeal from the subsequently entered order of fact-finding and disposition (*see* CPLR 5520 [c]; *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1441 [4th Dept 2022]; *Matter of Hunter K. [Robin K.]*, 142 AD3d 1307, 1308 [4th Dept 2016]).

Contrary to the mother's contention, petitioner met its burden of establishing by a preponderance of the evidence that the mother abused the child (*see generally Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]; *Matter of Mya N. [Reginald N.]*, 185 AD3d 1522, 1523-1524 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]). Petitioner presented the testimony of medical providers who examined the 20-month-old child on July 7, 2019 and found that the child had five circular-shaped burns to her legs that appeared to have been sustained at the same time, likely recently, and were in the early stage of healing. One provider testified that in her experience a child would cry out in pain when receiving those burns. The providers also noted that the child had

multiple bruises, including bruising to her ear, which was highly suspicious for nonaccidental trauma. Petitioner presented testimony that the child had been with the mother the morning of July 5 until approximately 3:00 p.m., and thereafter the child had been in the presence of multiple relatives at a public park until the mother picked the child up around midnight. Several of the child's relatives noticed the burn marks on the child around 6:00 p.m., and the mother herself noticed the marks when she picked the child up that night. The other respondents testified at the hearing that, while at the park, the child never cried out in pain, and Family Court made the inference that the child had sustained the burn injuries earlier that day, when she was in the mother's care. The court also relied on the testimony of several members of the mother's family regarding the mother's explosive temper and numerous instances where she struck or screamed at the child. We accord great weight and deference to the court's determinations, "including its drawing of inferences and assessment of credibility," and we will not disturb those determinations where, as here, they are supported by the record (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

We have considered the mother's remaining contention and conclude that it does not warrant reversal or modification of the order.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

845

CA 22-01409

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

STACY A. LAMPACK AND ROBERT LAMPACK,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

RICHARD A. ANDREWS,
DEFENDANT-APPELLANT-RESPONDENT.

RICHARD A. ANDREWS, THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

LEWIS COUNTY, THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

HARDING MAZZOTTI, LLP, ALBANY (PETER P. BALOUSKAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

FITZGERALD MORRIS BAKER FIRTH, P.C., GLENS FALLS (JOSHUA D. LINDY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeals from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered August 2, 2022. The order denied the motion of defendant-third-party plaintiff for summary judgment, granted in part and denied in part the motion of third-party defendant for summary judgment and denied the cross-motion of plaintiffs for partial summary judgment.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

846

CA 22-00401

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

MICHAEL BIALECKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HBO BUILDERS WEST, INC., DEFENDANT-RESPONDENT.

RICHARD G. COLLINS, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (NOLAN M. HALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered March 15, 2022. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained after he attempted to unscrew a reservoir cap on a truck owned by defendant. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint.

The truck, equipped with a front-end snow plow, malfunctioned while plaintiff was driving it to someone who had agreed to purchase it from defendant. Plaintiff's wife and another individual were joint owners of defendant and, at times, plaintiff would provide services to defendant, which included using the truck, three to four times, to plow defendant's parking lot.

As plaintiff was driving the truck to the buyer, "everything" on the dashboard display "turned red," and plaintiff pulled the truck to the side of the road. Plaintiff attempted to investigate the cause of the problem by opening the hood, checking the oil, and looking for signs of overheating, such as smoke and steam. Thereafter, plaintiff attempted to discern whether the reservoir needed more water. As he was turning the plastic reservoir cap, "it exploded," causing plaintiff injuries. Eventually, a New York State Police Trooper came upon the scene and explained to plaintiff that the plow, at its position, was blocking airflow to the engine. The Trooper then obtained water and antifreeze, replenished those liquids in the truck, and followed plaintiff as he completed the delivery to the buyer, who

took possession of the truck after determining that there were no problems with it.

The complaint alleged that defendant's agents or employees were negligent and careless in, inter alia, failing to maintain the truck, failing to install the plow correctly, and failing to train plaintiff on the proper use of the plow. In its answer, defendant denied the material allegations and asserted that plaintiff's conduct was the sole proximate cause of his injuries.

Following discovery, defendant moved for summary judgment, contending that plaintiff's act of unscrewing the reservoir cap was an unforeseeable intervening act breaking any causal nexus to defendant's alleged negligence, that defendant owed no duty of care to plaintiff, and that plaintiff's conduct was the sole proximate cause of his injuries. Supreme Court granted defendant's motion without explanation. We agree with plaintiff that the court erred in granting the motion.

Plaintiff correctly contends that defendant failed to meet its burden of establishing as a matter of law that plaintiff's act of unscrewing the reservoir cap constituted an unforeseeable intervening cause of the accident. As the Court of Appeals has recognized, "[w]hen a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant's negligence" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]). Thus, "[i]t is only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, [that it] may . . . possibly break[ ] the causal nexus" (*id.* [internal quotation marks omitted]; *see Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1267 [4th Dept 2019]).

Typically, the question whether a particular act is extraordinary or foreseeable is a question of fact for the factfinder inasmuch as the determination of "what is foreseeable and what is normal may be the subject of varying inferences" (*Hain*, 28 NY3d at 529 [internal quotation marks omitted]; *see e.g. Sauceda-Ocampo v H&M Hennes & Mauritz LP, H&M*, 177 AD3d 433, 434 [1st Dept 2019]; *Munoz v Kiryat Stockholm, LLC*, 162 AD3d 889, 890 [2d Dept 2018]).

Here, there are triable issues of fact whether plaintiff's conduct was a normal and foreseeable consequence of the truck's mechanical issues (*see generally Calabrese v Smetko*, 244 AD2d 890, 891 [4th Dept 1997]). We thus conclude that defendant failed to meet its initial burden with respect to whether plaintiff's conduct constituted an unforeseeable intervening cause.

Inasmuch as the court did not explain the basis for its determination to grant defendant's motion, we must address the contentions raised by defendant as alternative theories to affirm the order (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]).

In support of its motion and in response to this appeal, defendant has contended that plaintiff's conduct in attempting to open the reservoir cap was the sole proximate cause of his injuries. "Where . . . the sole legal cause of [a] plaintiff's injuries is [their] own reckless conduct, which showed a disregard for an obvious hazard, a defendant is not liable in negligence" (*Brown v Metropolitan Tr. Auth.*, 281 AD2d 159, 160 [4th Dept 2001]; *see Olsen v Town of Richfield*, 81 NY2d 1024, 1026 [1993]). The Court of Appeals has defined "the well-established tort concept of recklessness, . . . as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome" (*Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *see Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). On this record, we conclude that defendant failed to establish as a matter of law that plaintiff's conduct, in investigating the cause of the malfunction and checking the water level in the reservoir, was of an unreasonable character, was done in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, or was done with conscious indifference to the outcome.

In further support of its motion and in response to this appeal, defendant has contended that it did not owe a duty to plaintiff, a permissive driver of defendant's vehicle. "The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is . . . a question of law for the courts" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988], *rearg denied* 72 NY2d 953 [1988]). "Although the existence of a duty is an issue of law for the courts . . . , once the nature of the duty has been determined as a matter of law, whether a particular defendant owes a duty to a particular plaintiff is a question of fact" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). The owner of a vehicle can be liable to permissive guests, users, or occupants if the owner knew or should have known of defects in the vehicle (*see Singleton v Bishop*, 19 AD2d 595, 595 [1st Dept 1963]; *see also Elfeld v Burkham Auto Renting Co.*, 299 NY 336, 346 [1949]; *Higgins v Mason*, 255 NY 104, 109 [1930]; *Bloomfield v General Elec. Co.*, 198 AD2d 655, 657 [3d Dept 1993]; *Brzostowski v Coca-Cola Bottling Co.*, 16 AD2d 196, 202 [4th Dept 1962]; *Knapp v Gould Auto, Inc.*, 252 App Div 430, 433 [4th Dept 1937]). Even assuming, arguendo, that plaintiff was not acting as an agent of defendant while driving the truck for defendant, we conclude that defendant failed to establish as a matter of law that defendant did not know or should not have known of the purported defects in the truck.

We therefore reverse the order, deny defendant's motion, and reinstate the complaint.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

847

TP 23-00737

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

IN THE MATTER OF CHRISTOPHER KROLL, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

DIPASQUALE & CARNEY, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DOUGLAS E. WAGNER 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 order of the Supreme Court, Erie County [Henry J. Nowak, J.], entered April 18, 2023) to review a determination of respondent. The determination revoked petitioner's driver's license.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated (DWI). We confirm the determination. Contrary to petitioner's contention, the determination that petitioner twice refused to submit to a chemical test after receiving the requisite warnings is supported by substantial evidence (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]). The arresting officer's testimony at the hearing, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to a chemical test after he was arrested for DWI and provided with two clear and unequivocal warnings of the consequences of such refusal (*see id.* at 1246; *see generally* Vehicle and Traffic Law § 1194 [2] [b]).

We reject petitioner's contention that his level of incapacitation, which prompted the arresting officer to admit him to a treatment center for emergency services pursuant to Mental Hygiene Law § 22.09 (b) (2), rendered him incapable of providing a chemical test refusal. "Vehicle and Traffic Law § 1194 (2) does not require a knowing refusal by the petitioner" (*Matter of Hickey v New York State Dept. of Motor Vehs.*, 142 AD3d 668, 669 [2d Dept 2016]). Further,

"the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, . . . provide[d] that the police must request the driver's consent [for a chemical test], advise [them] of the consequences of refusal and honor [their] wishes if [they] decide[ ] to refuse, but . . . dispense[d] with [those] requirements when the driver is unconscious or *otherwise incapacitated to the point where [they] pose[ ] no threat*" (*People v Kates*, 53 NY2d 591, 596 [1981] [emphasis added]). Here, inasmuch as the arresting officer deemed petitioner in need of emergency services due to the "likelihood [of] . . . harm to [himself] or to others" (Mental Hygiene Law § 22.09 [b] [2]), it cannot be said that petitioner posed no threat at the time the chemical tests were requested and the refusal warnings were issued. Moreover, petitioner's interpretation of the statute "would lead to the absurd result that the greater the degree of intoxication of an automobile driver, the less the degree of [the driver's] accountability" (*Matter of Carey v Melton*, 64 AD2d 983, 983 [2d Dept 1978]; *see Kates*, 53 NY2d at 596; *Hickey*, 142 AD3d at 669).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

848

CA 22-01883

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

PAUL D. ZYNDA AND SUSAN ZYNDA,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

SCOTT E. WAID, PRO TIRE REPAIR, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW CONNELLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 9, 2022. The order denied the motion of defendants Scott E. Waid and Pro Tire Repair, Inc., for partial summary judgment and denied the cross-motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Paul D. Zynda (plaintiff) when his motor vehicle was struck by a truck operated by defendant Scott E. Waid and owned by defendant Pro Tire Repair, Inc. (collectively, defendants). Defendants moved for summary judgment dismissing the second amended complaint against them, contending, inter alia, that the emergency doctrine applied and Waid's actions were reasonable under the circumstances and that plaintiff's alleged inguinal hernia was not a serious injury causally related to the accident. Plaintiffs cross-moved for, inter alia, partial summary judgment on liability or, in the alternative, partial summary judgment on the issues of negligence and proximate cause. Supreme Court denied both the motion and the cross-motion. Defendants appeal from the order insofar as it denied their motion and plaintiffs cross-appeal from the order insofar as it denied those parts of their cross-motion seeking partial summary judgment. We affirm.

With respect to their appeal, defendants first contend that the court erred in denying their motion insofar as it sought summary judgment dismissing the second amended complaint against them based on

the application of the emergency doctrine. We reject that contention. The emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context . . . , provided the actor has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [internal quotation marks omitted]; *see Fox v McClellan*, 206 AD3d 1677, 1678 [4th Dept 2022]). "The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" (*Dalton v Lucas*, 96 AD3d 1648, 1649 [4th Dept 2012]; *see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]; *Fox*, 206 AD3d at 1678).

Here, we conclude that summary judgment on the basis of the emergency doctrine is not appropriate because defendants' own submissions raised issues of fact with respect to the reasonableness of Waid's conduct "in light of all the circumstances, including the severely inclement weather" (*Sossin v Lewis*, 9 AD3d 849, 851 [4th Dept 2004], *amended on rearg on other grounds* 11 AD3d 1045 [4th Dept 2004]). Similarly, with respect to plaintiffs' cross-appeal, we conclude that the court properly denied the cross-motion insofar as it sought partial summary judgment on negligence. Although plaintiffs established a prima facie case of negligence through evidence that Waid's truck rear-ended plaintiff's stopped vehicle (*see Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790 [4th Dept 2000]), in response, defendants raised issues of fact whether Waid was confronted with an emergency situation not of his own making and reacted reasonably (*cf. Kizis v Nehring*, 27 AD3d 1106, 1108 [4th Dept 2006]; *see generally Zbock v Gietz*, 145 AD3d 1521, 1522 [4th Dept 2016]).

With respect to their appeal, defendants also contend that the court erred in denying their motion insofar as it sought summary judgment dismissing the second amended complaint against them on the basis that plaintiff's injury was not a serious injury causally related to the accident. We reject that contention. Defendants met their initial burden inasmuch as defendants' expert opined that the accident did not cause plaintiff's weakened inguinal canal floor, but, rather, the weakening was the result of "numerous chronic variables" (*see generally Schader v Woyciesjes*, 55 AD3d 1292, 1293 [4th Dept 2008]). However, in response, plaintiffs met their "burden of coming forward with evidence indicating a serious injury causally related to the accident" (*Pommells v Perez*, 4 NY3d 566, 579 [2005]; *see Gilbert v Daniels*, 214 AD3d 1469, 1469 [4th Dept 2023]). Plaintiff's primary care physician examined plaintiff two days after the accident, concluded that he had a left inguinal hernia, and "specifically address[ed] the manner in which plaintiff's physical injur[y] [was] causally related to the accident in light of [his] past medical history" (*Gilbert*, 214 AD3d at 1470 [internal quotation marks omitted]; *cf. Stroh v Kromer*, 207 AD3d 1125, 1126 [4th Dept 2022]).

With respect to plaintiffs' cross-appeal, we conclude, in light of the report of defendants' expert, that the court properly denied the cross-motion insofar as it sought partial summary judgment on the issue whether plaintiff's injury was a serious injury causally related to the accident (*see generally Gilbert*, 214 AD3d at 1470; *Cook v Peterson*, 137 AD3d 1594, 1596 [4th Dept 2016]). Ultimately, this case presents a classic battle of the experts, and "conflicting expert opinions may not be resolved on a motion for summary judgment" (*Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013] [internal quotation marks omitted]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

849

CA 22-01686

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF EFRAIN LOPEZ-CONTRERAS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered September 23, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the determination of the Board of Parole denying his request for release to parole supervision. Petitioner has since been released to parole supervision, thus rendering the appeal moot (*see Matter of DeJesus v Evans*, 111 AD3d 1340, 1340 [4th Dept 2013]; *Matter of Velez v Evans*, 101 AD3d 1642, 1642 [4th Dept 2012]). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply herein (*see DeJesus*, 111 AD3d at 1340; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

850

CAF 22-01107

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF LIL' BRIAN J.Z.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA J., RESPONDENT-APPELLANT.

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

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered June 14, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

We note at the outset that the mother contends that Family Court erred in relying on the testimony of the forensic psychologist who conducted virtual examinations of her because his opinion "was conclusory and lacked necessary information." The mother failed to object to the testimony of the psychologist on that ground, however, and thus failed to preserve her contention for our review (*see Matter of Amyn C. [Chelsea K.]*, 159 AD3d 1421, 1421 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *Matter of Jamiah Sharang C. [Kamila N.]*, 85 AD3d 453, 453 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]; *see also Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]).

Contrary to the mother's further contention, we conclude that petitioner established " 'by clear and convincing evidence that [the mother], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for [the] child[ ]' " (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433,

1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). Testimony from the forensic psychologist established that the child "would be in danger of being neglected if [he] were returned to [the mother's] care at the present time or in the foreseeable future" (*Jason B.*, 160 AD3d at 1434).

Finally, with respect to the mother's contention that the court should have granted her a suspended judgment, we note that " '[t]here is no statutory provision providing for a suspended judgment when parental rights are terminated based on mental illness' " (*Matter of Matilda B. [Gerald B.]*, 187 AD3d 1677, 1679 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]; *see Matter of Jackalyne WW. [Kevin VV.]*, 195 AD3d 1092, 1096 [3d Dept 2021]; *Matter of Ernesto Thomas A.*, 5 AD3d 380, 381 [2d Dept 2004]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

851

CA 22-01700

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

IN THE MATTER OF JENNIFER L. FRIEDMAN,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF DUNKIRK AND ZONING BOARD OF APPEALS
FOR TOWN OF DUNKIRK,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JENNIFER L. FRIEDMAN, PLLC, LANCASTER (JENNIFER L. FRIEDMAN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered October 17, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, insofar as appealed from, dismissed the petition-complaint.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the first cause of action in the petition-complaint is reinstated, the petition-complaint is granted insofar as it sought to annul the determination of respondent-defendant Zoning Board of Appeals for the Town of Dunkirk, and the determination is annulled.

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant Zoning Board of Appeals for the Town of Dunkirk (ZBA) that petitioner's use of her property as a short-term rental was not permitted under the Town of Dunkirk Zoning Ordinance. Supreme Court, inter alia, dismissed the petition-complaint (petition). Petitioner appeals from the judgment insofar as it dismissed the petition, and we reverse the judgment insofar as appealed from.

"[L]ocal zoning boards have broad discretion, and [a] determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence" (*Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1577 [4th Dept 2019] [internal quotation marks omitted]). So long as a zoning board's interpretation of its governing code "is neither

'irrational, unreasonable nor inconsistent with the governing [code],' it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]). However, where, as here, the issue presented "is one of pure legal interpretation of [the code's] terms, deference to the zoning board is not required" (*Fox*, 176 AD3d at 1577 [internal quotation marks omitted]; *see Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]).

Here, the ZBA determined that short-term rentals are not a permitted use in the zoning district where petitioner's property is located inasmuch as "single family dwelling[s]" are the only permissible use in that district, and, according to the ZBA, a group of tenants that is transient or temporary does not meet the code's definition of a family. Where, as here, "the language of a[n ordinance] is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]). Contrary to the ZBA's determination and the interpretation proposed by respondents-defendants, under the Zoning Ordinance, the transient or temporary nature of a group is but one factor that "may" be considered to determine whether four or more persons who are *not* related by blood, marriage, or adoption are the "functional equivalent" of a "traditional family." Indeed, if petitioner rented her property to three or fewer persons, or to four or more persons who are related by blood, marriage, or adoption, those groups would meet the Zoning Ordinance's definition of a "[f]amily" without regard to whether their tenancy was transient or temporary in nature. The ZBA's determination to the contrary lacked a rational basis (*see Fox*, 176 AD3d at 1577), and the court erred in sustaining the determination. We therefore reverse the judgment insofar as appealed from, reinstate the first cause of action in the petition, and grant the petition insofar as it sought to annul the ZBA's determination.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

853

CA 23-00197

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

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905 ACKERMAN AVENUE, LLC, PLAINTIFF-RESPONDENT,

V ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-APPELLANT,
AND EMPOWER FEDERAL CREDIT UNION, DEFENDANT.

HURWITZ FINE, P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (MARTIN A. LYNN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ALEXANDRA L. CONDON OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered January 13, 2023. The order, among other things, denied defendant State Farm Fire and Casualty Company's motion seeking, inter alia, summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 24, 2023,

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

854

KA 22-00420

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN D. LAWRENCE, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 21, 2021. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and criminal trespass in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]) and criminal trespass in the second degree (§ 140.15 [1]). The charges arose from an incident during which defendant, who had previously been in a long-term relationship with the victim, allegedly entered the victim's apartment without permission, attempted to speak with her about emotional and family issues that he was experiencing, and then forcibly raped her after displaying anger when the victim rebuffed his attempts to speak with her. We affirm.

Defendant first contends that he was denied his constitutional right to present a complete defense because the prosecutor, through a discussion with defense counsel and County Court outside the presence of the jury, intimidated two defense witnesses into limiting their testimony by threatening criminal prosecution for, among other things, committing perjury. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Hasan*, 165 AD3d 1606, 1607 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *People v Barry*, 288 AD2d 1, 1 [1st Dept 2001], *lv denied* 97 NY2d 701 [2002]; *see generally People v Lane*, 7 NY3d 888, 889 [2006]; *People v Allen*, 88 NY2d 831, 833 [1996]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Hasan*, 165 AD3d at 1607; *Barry*, 288 AD2d at 1).

Defendant next contends that the court denied him his

constitutional right to present a complete defense and committed an evidentiary error by limiting the testimony of another defense witness about statements allegedly made by the victim. Defendant failed to preserve for our review that part of his contention asserting that he was denied the right to present a defense because he "did not raise th[at] constitutional claim[ ] in the trial court" (*Lane*, 7 NY3d at 889; *see People v Burton*, 126 AD3d 1324, 1325 [4th Dept 2015], *lv denied* 25 NY3d 1199 [2015]), and we decline to exercise our power to review that part of his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to the People's assertion, however, we conclude that defendant's arguments to the court were sufficient to preserve for our review that part of his contention asserting that the entire alleged statement of the victim was admissible to establish her motive to fabricate (*see* CPL 470.05 [2]; *cf. People v Robinson* [appeal No. 1], 267 AD2d 1031, 1031 [4th Dept 1999], *lv denied* 95 NY2d 802 [2000]). Nonetheless, upon "rel[ying] on the record to discern the unarticulated predicate for the trial court's evidentiary ruling" (*People v Nicholson*, 26 NY3d 813, 817 [2016]), we further conclude that the court did not abuse its discretion when it allowed defense counsel to elicit testimony from the defense witness that the victim had expressed a motive to fabricate the allegation of rape in this particular case, i.e., "to get [her] life back," but precluded defense counsel from eliciting testimony that would have required "inquiry into a speculative and remote matter" concerning a purported prior bad act of the victim (*People v Jones*, 184 AD3d 751, 753 [2d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *see People v Poole*, 55 AD3d 1349, 1350 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]; *cf. People v Grant*, 60 AD3d 865, 865 [2d Dept 2009]; *People v McFarley*, 31 AD3d 1166, 1167 [4th Dept 2006]). Even assuming, arguendo, that defendant preserved for our review his related contention that the precluded testimony was admissible as character evidence, we conclude that his contention lacks merit. "Character evidence is strictly limited to testimony concerning the [party's] reputation in the community . . . , and thus a character witness may not testify to specific acts in order to establish character" (*People v Jimmeson*, 101 AD3d 1678, 1679 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013] [internal quotation marks omitted]).

Defendant contends that the court committed reversible error in its *Sandoval* ruling by allowing the prosecutor to ask him on cross-examination whether he had a prior out-of-state conviction because, defendant asserts, the "adjudication withheld" disposition upon his plea of no contest to a robbery offense in Florida did not constitute a conviction as a matter of law and there was no documentation provided by the People that the adjudication was ever considered a conviction under Florida law. Initially, contrary to the People's assertion, defendant's contention is preserved for our review. Defendant "expressly [or impliedly] requested, without success on the ground now advanced on appeal, a ruling that the People not be permitted to cross-examine him regarding the [ostensible] prior conviction, and he 'is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule . . .

accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered' " (*People v Fuller*, 174 AD3d 1335, 1336 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019], quoting CPL 470.05 [2]; *see People v Herman*, 217 AD3d 1469, 1471 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023]; *see generally People v Jackson*, 29 NY3d 18, 23-24 [2017]). Nonetheless, even assuming, arguendo, that the court erred in allowing the challenged question because "a plea nolo contendere with adjudication withheld in Florida . . . does not constitute a conviction under Florida law" (*Matter of Farabell v Town of Macedon*, 62 AD3d 1246, 1247 [4th Dept 2009]), we conclude that the error is harmless inasmuch as "the proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted had the error not occurred" (*People v Grant*, 7 NY3d 421, 424 [2006]; *see People v Rivera*, 132 AD2d 956, 957 [4th Dept 1987]; *People v Grossman*, 125 AD2d 985, 986 [4th Dept 1986], *lv denied* 69 NY2d 881 [1987]).

Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Carlson*, 184 AD3d 1139, 1140 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see Carlson*, 184 AD3d at 1141; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that the sentence is unduly harsh and severe. Finally, we have considered defendant's remaining contention and conclude that it does not warrant any relief.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

855

KA 20-01032

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY C. KEANE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

TIMOTHY C. KEANE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 19, 2019. The judgment convicted defendant upon a jury verdict of unlawful manufacture of methamphetamine in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant was convicted following a jury trial of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]) and, in appeal No. 2, he was convicted following the same jury trial of sexual abuse in the first degree (§ 130.65 [4]), attempted use of a child in a sexual performance (§§ 110.00, 263.05), forcible touching (§ 130.52 [1]), and endangering the welfare of a child (§ 260.10 [1]). The criminal investigation of defendant initially focused on his suspected involvement in a methamphetamine manufacturing operation at a property where he had recently resided. While investigators were searching the vacant property, a neighbor approached one of the detectives and reported his concern about prior contact between defendant and the neighbor’s 11-year-old daughter. The child was subsequently interviewed and reported that defendant had shown her pornographic videos and sexually assaulted her on the front porch of the property under investigation for drug activity. Two indictments were then filed against defendant, one charging him with unlawful manufacture of methamphetamine in the third degree and the other charging him with multiple sex offenses involving the child.

Defendant contends in his main and pro se supplemental briefs that County Court erred in granting the People’s motion to consolidate the indictments. We reject that contention. The indictments were

consolidated for trial pursuant to CPL 200.20, which permits a court to consolidate indictments against a defendant when they charge offenses that involve "different criminal transactions" but "are of such nature that either proof of the first offense [or set of offenses] would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (CPL 200.20 [2] [b]; *see* 200.20 [4]; *People v Bongarzone*, 69 NY2d 892, 895 [1987]). Contrary to defendant's contention, the evidence of the drug offense and the evidence of the sex offenses were each material and admissible to help establish the identity of defendant as the perpetrator of the other offense or set of offenses (*see People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]; *see also People v Nelson*, 233 AD2d 926, 926-927 [4th Dept 1996]). Specifically, inter alia, defendant's recorded interview with a detective inculpated him in both the drug offense and the sex offenses, and the testimony of two detectives, the victim, and the victim's father was necessary to establish that defendant was residing on the property at the time that methamphetamine was being manufactured there and the course of his interactions with the victim at the same property. We reject defendant's contention in his pro se supplemental brief that consolidating the indictments for trial was contrary to *People v Molineux* (168 NY 264 [1901]) and its progeny, inasmuch as *Molineux* applies to prior uncharged crimes and bad acts committed by a defendant, not to charged crimes (*see People v Cass*, 18 NY3d 553, 559 [2012]).

Defendant next contends in his main and pro se supplemental briefs that he was denied effective assistance of counsel. We reject that contention. To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel did not provide "meaningful representation," based upon "the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant's contentions that his counsel was too harsh in cross-examining the victim, inadvertently elicited damaging testimony from a witness on redirect examination, and should not have called two of the defense witnesses but should have called another witness, "involve 'simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial,' and thus are insufficient to establish ineffective assistance of counsel" (*People v Kranz*, 215 AD3d 1253, 1254 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023], quoting *People v Flores*, 84 NY2d 184, 187 [1994]). Defendant's contention regarding his own direct testimony cannot form the basis for an ineffective assistance of counsel claim, because "[t]he fundamental decision whether to testify at trial is reserved to the defendant, not defense counsel" (*People v Cosby*, 82 AD3d 63, 66 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]), and his disagreements with the scope of the questioning itself relate to strategy (*see People v Gibson*, 173 AD3d 1785, 1786 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]). Defense counsel's failure to renew defendant's motion for a trial order of dismissal at the close of the defense case did not amount to ineffective assistance because the court had

reserved decision on the motion and, therefore, the claim of insufficiency was preserved (*see People v Payne*, 3 NY3d 266, 273 [2004], *rearg denied* 3 NY3d 767 [2004]; *People v Nowlin*, 145 AD3d 1447, 1449 [4th Dept 2016], *lv denied* 29 NY3d 1035 [2017]). Contrary to defendant's contention in his pro se supplemental brief, his defense counsel elicited trial testimony in support of the conclusion that defendant did not have constructive possession over methamphetamine manufacturing materials at his former residence. Defendant's contentions in his pro se supplemental brief that his counsel gave him false information, failed to call expert and alibi witnesses, failed to argue that defendant had an alibi, and failed to pursue arguments that defendant was framed all concern matters outside the record, and thus must be raised in a motion pursuant to CPL 440.10 (*see People v Johnson*, 195 AD3d 1420, 1421-1422 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]). To the extent that defendant contends in his pro se supplemental brief that he was denied effective assistance of appellate counsel, that contention is premature and must be raised in an error coram nobis proceeding (*see People v Forsythe*, 105 AD3d 1430, 1431 [4th Dept 2013]).

Defendant also contends in his main brief that the court erred in permitting two detectives to testify regarding defendant's internet search history and text messages involving sexual role-play, arguing that the testimony was so inflammatory that its prejudicial effect exceeded its probative value. Trial courts have broad discretion in deciding whether to admit evidence challenged as unduly prejudicial, and a trial court's decision will be disturbed only where it has "either abused its discretion or exercised none at all" (*People v Walker*, 83 NY2d 455, 459 [1994] [internal quotation marks omitted]). Here, the evidence elicited during the People's direct case regarding defendant's sexual proclivities based upon his internet search history and text messages was admitted for the nonpropensity purpose of corroborating the victim's testimony (*see People v Brewer*, 129 AD3d 1619, 1620 [4th Dept 2015], *affd* 28 NY3d 271 [2016]), and the similar testimony of the detective offered in rebuttal was admitted to contradict defendant's direct testimony (*see generally People v Serrano*, 196 AD3d 1134, 1137 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021], *reconsideration denied* 38 NY3d 930 [2022]). We conclude that in both instances the court properly balanced the probative value of the evidence and the prejudice arising from it (*see generally People v Bullard-Daniel*, 203 AD3d 1630, 1632 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]).

Defendant further contends in his main brief that his offenses were treated as a single criminal transaction at trial and therefore the consecutive sentence imposed in appeal No. 1 was improperly ordered, and, in addition, that the sentences are unduly harsh and severe. We reject those contentions. Although the drug offense indictment was consolidated with the sex offenses indictment for trial pursuant to CPL 200.20, the statutory elements of the drug offense do not overlap with those of the sex offenses, and thus a consecutive sentence was not improper (*see People v Burton*, 83 AD3d 1562, 1563 [4th Dept 2011], *lv denied* 17 NY3d 805 [2011]). We also conclude that

the sentence in each appeal is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that his conviction of unlawful manufacture of methamphetamine in the third degree and attempted use of a child in a sexual performance is not supported by legally sufficient evidence. We may not address that contention, however, because the court did not rule on defendant's motion for a trial order of dismissal (*cf.* CPL 290.10 [1]). The failure of a trial court to rule on a motion for a trial order of dismissal cannot be deemed a denial of that motion, and thus we must hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see People v Johnson*, 192 AD3d 1612, 1616 [4th Dept 2021]; *cf. People v DuBois*, 200 AD3d 1601, 1601 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]). In light of our determination, we do not address defendant's contention that the verdict is against the weight of the evidence.

Finally, we have reviewed the remaining contentions in defendant's main and pro se supplemental briefs and conclude that none warrants modification or reversal of the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

856

KA 20-01033

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY C. KEANE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

TIMOTHY C. KEANE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 19, 2019. The judgment convicted defendant upon a jury verdict of attempted use of a child in a sexual performance, sexual abuse in the first degree, forcible touching, and endangering the welfare of a child.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Jefferson County Court for further proceedings in accordance with the same memorandum as in *People v Keane* ([appeal No. 1] — AD3d — [Nov. 17, 2023] [4th Dept 2023]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

857

KA 20-00480

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO TURNER, SR., DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered November 14, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) arising out of the fatal shooting of defendant's girlfriend.

We reject defendant's contention that County Court erred in denying his challenges for cause with respect to prospective jurors Nos. 7, 13, and 17. "It is well settled that 'a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that [the prospective juror] can be fair and impartial' " (*People v Odum*, 67 AD3d 1465, 1465 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010], r*econsideration denied* 15 NY3d 755 [2010], *cert denied* 562 US 931 [2010], quoting *People v Chambers*, 97 NY2d 417, 419 [2002]). Upon our review of the voir dire transcript "in totality and in context" and giving due deference to the determination of the trial court, we conclude that it was not an abuse of discretion for the court to deny defendant's challenges for cause inasmuch as the statements of prospective jurors Nos. 7, 13, and 17 did not cast serious doubt on their ability to render an impartial verdict (*People v Warrington*, 28 NY3d 1116, 1120 [2016]; *see People v Johnson*, 94 NY2d 600, 615-616 [2000]; *People v Garcia*, 148 AD3d 1559, 1559-1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]; *People v Hagenbuch*, 267 AD2d 948, 948-949 [4th Dept 1999], *lv denied* 95 NY2d 797 [2000]).

Defendant's contention that the court erred in admitting *Molineux* evidence of prior bad acts by defendant pertaining to the victim is partially unpreserved. To the extent that the contention is preserved, we conclude that the court properly admitted the evidence of prior bad acts inasmuch as that evidence was highly relevant to rebut defendant's accident defense (*see People v Simpson*, 173 AD3d 1617, 1619 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]), and the probative value of the evidence outweighed the prejudicial effect (*see id*.).

We reject defendant's further contention that the evidence is legally insufficient to support the conviction because the People failed to prove the element of intent. "It is well established that [i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Torres*, 136 AD3d 1329, 1330 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016], *cert denied* 580 US 1068 [2017] [internal quotation marks omitted]; *see People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). Here, the People presented evidence at trial that defendant shot the victim at close range while the victim was naked and preparing to get into the bathtub and that there were no signs of struggle in the bathroom. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish defendant's intent to kill.

Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

859

KA 20-00410

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL LITTLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 15, 2020. The judgment convicted defendant upon a guilty plea of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as the People concede, and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

860

KA 19-02346

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. REEDER, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered June 11, 2019. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We affirm.

Defendant contends that the verdict is contrary to the weight of the evidence in light of his acquittal of the first count of the indictment charging him with another sale of a controlled substance on a different day, and in light of the jury's apparent acceptance of his agency defense with respect to the first count. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the People disproved the agency defense beyond a reasonable doubt with respect to the second count, of which defendant was convicted, and that the verdict is not contrary to the weight of the evidence (*see People v Walker*, 117 AD3d 1441, 1442 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]; *see also People v Mineccia*, 185 AD3d 1407, 1407-1408 [4th Dept 2020]; *People v Fisher*, 101 AD3d 1786, 1787 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that he was denied effective assistance of counsel. It is well settled that the "failure to 'make a motion or argument that has little or no chance of

success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152 [2005]), and defendant otherwise has failed to show the absence of strategic or other legitimate explanations for his attorney's alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Terborg*, 156 AD3d 1320, 1322 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). Defendant's assertion that defense counsel was ineffective in failing to call an unspecified exculpatory witness is based on matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL 440.10 (*see People v Belton*, 199 AD3d 1373, 1374-1375 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Roman*, 107 AD3d 1441, 1443 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]).

Defendant's contention that he was deprived of a fair trial due to prosecutorial misconduct "is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct" (*People v Pendergraph*, 150 AD3d 1703, 1703 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023]). Defendant's further contention that the prosecutor engaged in misconduct during the grand jury proceedings is raised for the first time in defendant's reply brief and is thus not properly before us (*see People v Ford*, 69 NY2d 775, 777 [1987], *rearg denied* 69 NY2d 985 [1987]; *People v James*, 162 AD3d 1746, 1747 [4th Dept 2018], *lv denied* 32 NY3d 1112 [2018]).

Finally, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

861

KA 22-02000

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LAVELLE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON 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 December 20, 2022. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the second degree (Penal Law § 125.15 [1]). The charge arose from a fatal accident in which defendant's motor vehicle crossed over the double yellow line of a two-lane roadway and struck an individual operating a motorcycle in the opposite lane of travel. Defendant was neither speeding nor intoxicated at the time of the accident. The People introduced eyewitness testimony at trial that, before the accident, defendant was tailgating a sport utility vehicle (SUV), "hitting his fist on the steering wheel[,] and looking a little agitated." The driver and front passenger of the SUV testified that, as they made a left-hand turn, defendant passed their vehicle by driving onto the right shoulder of the two-lane roadway, yelling out that he was "going to get [them]." After defendant passed the SUV, his vehicle sharply turned left, crossed into the opposite lane, and struck the motorcycle.

Defendant contends, inter alia, that the conviction is not supported by legally sufficient evidence. We agree with defendant.

A conviction is supported by legally sufficient evidence "when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a

rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). A defendant is guilty of manslaughter in the second degree under Penal Law § 125.15 (1) when the defendant "recklessly causes the death of another person." A defendant's conduct is reckless with respect to the death of another person when the defendant "is aware of and consciously disregards a substantial and unjustifiable risk" that death will result from it (§ 15.05 [3]). "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (*id.*; *see People v Asaro*, 21 NY3d 677, 684 [2013]; *People v Licitra*, 47 NY2d 554, 558-559 [1979], *rearg denied* 53 NY2d 938 [1981]).

Here, viewing the facts in the light most favorable to the People, the only risk-creating conduct by defendant supporting his conviction of manslaughter in the second degree was his briefly driving on the shoulder of the road to pass a vehicle in front of him that was turning and his subsequently making a sharp left turn and crossing over the double yellow line into the opposite lane. We conclude that that conduct, standing alone, did not exhibit "the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong" necessary to establish recklessness with respect to the death of another (*Asaro*, 21 NY3d at 685 [internal quotation marks omitted]; *cf. generally People v Vazquez*, 211 AD3d 1592, 1592-1594 [4th Dept 2022], *lv denied* 40 NY3d 937 [2023]; *People v Wolz*, 300 AD2d 606, 606 [2d Dept 2002], *lv denied* 1 NY3d 636 [2004]).

In light of our determination, we do not address defendant's remaining contentions.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

862

CAF 22-01595

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF BARRY G., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BARRY G., RESPONDENT-APPELLANT.

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

GABRIELLE GANNON, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JENNIFER M. MCCANN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated August 12, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had neglected the subject child.

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

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

Contrary to the father's contention, we conclude that there is a sound and substantial basis in the record to support Family Court's determination that the father neglected the child (*see generally Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . .

Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011] [internal quotation marks omitted]; *see Matter of Gina R. [Christina R.]*, 211 AD3d 1483, 1484 [4th Dept 2022]).

Here, petitioner met its burden by establishing by a preponderance of the evidence that the father left the child unsupervised at a shelter and made no attempt to contact the shelter or the authorities about the well-being of the child or his own whereabouts for three days, thereby placing the child in imminent risk of harm (*see generally Matter of Leo A.G.-H.B. [Natalie G.]*, 181 AD3d 599, 600-601 [2d Dept 2020]; *Matter of Ashley B. [Lavern B.]*, 137 AD3d 1696, 1697 [4th Dept 2016]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

867

CAF 19-02202

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF SANDRA A. VATALARO, ALSO KNOWN AS SANDRA INGRAM, PETITIONER-RESPONDENT,

V ORDER

CHANTAL BIEN AIME, RESPONDENT-APPELLANT.

IN THE MATTER OF CHANTAL BIEN AIME, PETITIONER-APPELLANT,

V

SANDRA A. VATALARO, RESPONDENT-RESPONDENT.

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

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered November 4, 2019, in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted the modification petition of petitioner-respondent Sandra A. Vatalaro, also known as Sandra Ingram.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

871

CA 22-01939

PRESENT: BANNISTER, J.P., OGDEN, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-PLAINTIFFS-APPELLANTS,

V ORDER

TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, TOWN OF BRIGHTON PLANNING BOARD, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, THE DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, AND TOWN OF BRIGHTON PLANNING BOARD.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, AND THE DANIELE FAMILY COMPANIES.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 9, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment dismissed the petition-complaint.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

873

CA 22-01466

PRESENT: SMITH, J.P., BANNISTER, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF EZRA B., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (ANDREW B. PLEWINSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered August 16, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's confinement to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

At an annual review hearing, the State has the burden to prove, by clear and convincing evidence, that the individual who is the subject of the hearing is currently a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). A person may be found to be a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]).

Contrary to petitioner's contention, Supreme Court's determination that he is a dangerous sex offender requiring confinement is not against the weight of the evidence (*see Matter of Nushawn W. v State of New York*, 215 AD3d 1227, 1229 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023]; *Matter of Ruben M. v State of New York*, 211 AD3d 1590, 1592 [4th Dept 2022]). Both respondent's expert and the independent expert opined that petitioner made insufficient

progress in treatment inasmuch as he failed to address all the incidents of abuse and his sexually deviant behavior. Using two different assessments, the experts determined that petitioner had at least a moderate risk of recidivism, and both experts opined that petitioner could not be safely managed under a regimen of strict and intensive supervision and treatment (*see* Mental Hygiene Law § 10.07 [f]). We perceive no basis to disturb the court's decision to credit the testimony of those experts (*see Matter of State of New York v Robert T.*, 214 AD3d 1405, 1407 [4th Dept 2023]; *Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1328 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

875

CA 23-00230

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE ESTATE OF KATHRYN ESSIG, DECEASED, BY
BARRY C. ESSIG, PLAINTIFF-RESPONDENT,

V ORDER

STEVEN F. ESSIG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES DISTEFANO, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered July 5, 2022. The order, among other things, denied the motion of defendant for an order directing the issuance of a partial satisfaction of judgment.

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

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

876

CA 23-00231

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE ESTATE OF KATHRYN ESSIG, DECEASED, BY
BARRY C. ESSIG, PLAINTIFF-RESPONDENT,

V ORDER

STEVEN F. ESSIG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES G. DISTEFANO, FAYETTEVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered December 20, 2022. The order denied the motion of defendant for leave to reargue a prior motion.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

883

KA 20-00326

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. GANDY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 7, 2020. The judgment convicted defendant, upon a guilty plea, of attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]) and criminal possession of a weapon in the second degree (§ 265.03 [3]).

We agree with defendant that he did not validly waive his right to appeal (*see People v Franklin*, 217 AD3d 1427, 1427 [4th Dept 2023]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we reject defendant's contention that Supreme Court erred in refusing to suppress identification evidence on the ground that the photo array from which a witness identified him was unduly suggestive. Although defendant was the only person depicted in a red shirt in the photo array, the shirt was "not so distinctive as to be conspicuous" (*People v LaCross*, 175 AD3d 1838, 1838 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020]). Nor did slight differences in the background color of the photographs taint the photo array. The mere fact that defendant's photograph "has a slightly [darker] background than [some of] the others does not support the conclusion that the identification procedure was unduly suggestive" (*People v Evans*, 137 AD3d 1683, 1683 [4th Dept 2016], *lv denied* 27 NY3d 1131 [2016]). Finally, contrary to

defendant’s contention, his sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

885

KA 20-00262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY HALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered January 30, 2020. The judgment convicted defendant upon a guilty plea 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]). We affirm. Initially, as defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid because Supreme Court "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 there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jackson*, 207 AD3d 1077, 1077-1078 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]).

To the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (*see People v Smith*, 144 AD3d 1547, 1548 [4th Dept 2016]). Here, " '[d]efendant was sentenced in accordance with the plea agreement, and any alleged deficiencies in defense counsel's representation at sentencing do not constitute ineffective assistance' " (*People v Gregg*, 107 AD3d 1451, 1452 [4th 2013]; *see Smith*, 144 AD3d at 1548; *see generally People v Rivera*, 71 NY2d 705, 708-709 [1988]).

We further conclude that the court did not abuse its discretion in declining to adjudicate defendant a youthful offender, particularly in view of the serious nature of the crime (*see People v Graham*, 218 AD3d 1359, 1360 [4th Dept 2023]; *see generally People v McCall*, 187 AD3d 1682, 1683 [4th Dept 2020], *lv denied* 36 NY3d 930 [2020]; *People v Lester*, 167 AD3d 1559, 1560 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]). In addition, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him that status (*see People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]; *cf. Keith B.J.*, 158 AD3d at 1161). Finally, the sentence is not unduly harsh or severe.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

887

CAF 22-01623

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

IN THE MATTER OF ABIGAIL G.D.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

ANGELA M.L., RESPONDENT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR RESPONDENT-APPELLANT.

KRISTOPHER E. STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

STEVEN G. MUNSON, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered September 8, 2022, in a proceeding pursuant to Family Court Act article 10. The order denied respondent's application pursuant to Family Court Act § 1028.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Nickolas B. [Katherine F.L.]*, 167 AD3d 1538, 1539 [4th Dept 2018]; *Matter of Romeo M. [Nicole R.]*, 94 AD3d 1464, 1465 [4th Dept 2012], *lv denied* 19 NY3d 810 [2012]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

891

CA 22-01166

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

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V ORDER

NATHAN E., RESPONDENT-APPELLANT.

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Douglas A. Randall, A.J.), entered July 18, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that respondent is a detained sex offender who suffers from a mental abnormality.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

892

CA 23-00020

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

IN THE MATTER OF JEFFERSON COUNTY DIRECTOR
OF COMMUNITY SERVICES, PETITIONER-APPELLANT,

V ORDER

TAD M., RESPONDENT-RESPONDENT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (TERENCE M. BRENNEN OF COUNSEL), FOR PETITIONER-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (DAVID A. EGHIGIAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 25, 2022, in a proceeding pursuant to Mental Hygiene Law article 9. The order granted the motion of respondent for an anonymous caption.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

893

CA 22-01928

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

IN THE MATTER OF ALBERT J., PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

TODD G. MONAHAN, LITTLE FALLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Lamendola, J.), entered November 30, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court