SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 17, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED JUNE 17, 2021

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

968

CA 20-00431

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

JAMES C. LOWES, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF SUSAN R. LOWES, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDROS ANAS AND TINA COLAIZZO-ANAS, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROCHELLE LAWLESS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered September 17, 2019. The order granted the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff, individually and as the administrator of the estate of Susan R. Lowes (decedent), commenced this personal injury and wrongful death action, arising from an incident in which decedent was struck and knocked down, then run over, by a vehicle operated by Tina Colaizzo-Anas (defendant) and owned by Alexandros Anas (collectively, defendants), as decedent walked across Maple Road at an intersection in the Town of Amherst. In appeal No. 1, defendants appeal from an order granting plaintiff's motion for partial summary judgment on the issue of liability. In appeal No. 2, defendants appeal from a subsequent order insofar as it denied that part of their motion seeking leave to renew their opposition to plaintiff's motion for partial summary judgment. We affirm in each appeal.

With respect to appeal No. 1, we reject defendants' initial contention that further discovery was necessary and that Supreme Court thus should have denied plaintiff's motion as premature. "[A] party opposing summary judgment on the ground that additional discovery is needed must 'demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the

motion were exclusively within the knowledge and control of the movant' " (*Bratge v Simons*, 173 AD3d 1623, 1624 [4th Dept 2019]; *see* CPLR 3212 [f]; *Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018]; *see generally Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014]). The motion will not be denied based on "mere speculation or conjecture" that discovery would assist in raising a triable issue of fact (*Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1493 [4th Dept 2019]; *see Resetarits Constr. Corp.*, 118 AD3d at 1456). Here, we conclude that defendants presented no more than the " 'mere hope' that further [discovery] would disclose evidence" essential to oppose the motion (*Boyle v Caledonia-Mumford Cent. Sch.*, 140 AD3d 1619, 1621 [4th Dept 2016], *lv denied* 28 NY3d 905 [2016]; *see Bratge*, 173 AD3d at 1624), and thus they failed to demonstrate that the motion should have been denied on that basis.

We reject the further contention of defendants in appeal No. 1 that the court erred in applying the doctrine of collateral estoppel in granting plaintiff's motion. Before plaintiff commenced this action, a Department of Motor Vehicles (DMV) fatality hearing (DMV hearing) was held before an administrative law judge (ALJ). Defendant appeared at the DMV hearing with counsel, who cross-examined all of the testifying witnesses, but defendant did not testify and a negative inference was drawn against her (*see* 15 NYCRR 127.5 [b]). At the conclusion of the DMV hearing, the ALJ determined that defendant violated Vehicle and Traffic Law § 1146 (a), which requires drivers to " 'exercise due care to avoid colliding with any . . . pedestrian,' " and directed the DMV to suspend her license.

"Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits . . . Collateral estoppel is equally applicable to confer conclusive effect to the quasi-judicial determination of an administrative agency . . . While the proponent of collateral estoppel has the burden of demonstrating that the issue in question is identical and decisive, it is the opponent's burden to show the absence of a full and fair opportunity to litigate the issue in the prior determination" (*Alamo v McDaniel*, 44 AD3d 149, 153-154 [1st Dept 2007]). Under the circumstances presented, plaintiff was required to establish that the issue whether defendant was negligent, i.e., whether she violated a driver's well-settled "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Byrne v Calogero*, 96 AD3d 704, 705 [2d Dept 2012]; *see Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015]), was identical to the issue at the DMV hearing, i.e., whether defendant violated Vehicle and Traffic Law § 1146 (a) by failing to "exercise due care to avoid" the collision (*id.*). We agree with plaintiff that he met that burden (*see generally Jeffreys v Griffin*, 1 NY3d 34, 41 [2003]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 350 [1999]). Plaintiff also established that defendant litigated that issue, that the ALJ determined that defendant violated the statute,

and that the ALJ's conclusion was necessary to his final determination at the DMV hearing (*see Alamo*, 44 AD3d at 154). In opposition, defendants failed to show the absence of a full and fair opportunity to litigate this issue. Defendant was represented at the DMV hearing by counsel, who thoroughly cross-examined all of the witnesses. The ALJ took testimony from several eye witnesses and from a Town of Amherst Police Investigator who responded to and investigated the accident. Defense counsel was also given the opportunity to call witnesses and was permitted to submit a written closing statement. Defense counsel "never noted any objections on the record as to any failure to receive . . . a full and fair opportunity to ask any questions" or otherwise participate in the DMV hearing (*id.*). Consequently, we conclude that defendants are collaterally estopped from relitigating the issue of whether defendant violated Vehicle and Traffic Law § 1146 (a) (*see Alamo*, 44 AD3d at 154; *cf. Curtin v Curtin*, 244 AD2d 927, 927-928 [4th Dept 1997]).

We similarly reject defendants' related contention in appeal No. 1 that the court erred in determining that defendant was negligent as a matter of law. "[A] defendant's unexcused violation of the Vehicle and Traffic Law constitutes negligence per se" (*Koziol v Wright*, 26 AD3d 793, 794 [4th Dept 2006] [internal quotation marks omitted]), and here, plaintiff met his initial burden on the motion by submitting evidence of an unexcused statutory violation. Contrary to defendants' contention, the evidence they submitted in opposition to the motion failed to raise a triable issue of fact with respect to defendant's negligence (*see Kowalyk v Wal-Mart Stores, Inc.*, 187 AD3d 1539, 1540 [4th Dept 2020]; *Amerman v Reeves*, 148 AD3d 1632, 1633 [4th Dept 2017]). We note in particular that defendant did not submit an affidavit setting forth her version of how the accident occurred (*see Cavitch v Mateo*, 58 AD3d 592, 593 [2d Dept 2009]), nor did defendants submit any other admissible evidence that would provide a nonnegligent explanation for the impact (*see Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 737 [2d Dept 2007]).

We reject defendants' final contention in appeal No. 1 that the court erred insofar as it concluded that plaintiff met his initial burden on the motion of establishing that defendant's negligence was a proximate cause of decedent's injuries. In support of his motion, plaintiff submitted evidence, including the ALJ's finding discussed above, witness statements, and a police accident report that included the summary and conclusions of the accident reconstruction. That evidence established that defendant initially struck decedent with the middle of the front of defendants' SUV as decedent crossed the street at a green light—albeit not in a marked crosswalk, as the dissent notes—then ran over decedent with the vehicle's front and back wheels before stopping a short distance further down the road. Based on that evidence, plaintiff sought partial summary judgment on the issue of liability.

We respectfully disagree with the dissent that the evidence submitted by plaintiff failed to establish proximate causation. The only facts that defendants cite for the proposition that plaintiff failed to meet his burden arise from decedent's actions, i.e.,

crossing outside a marked crosswalk and wearing dark clothing as daylight faded. The Court of Appeals has made clear, however, "that a plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages" (*Rodriguez v City of New York*, 31 NY3d 312, 321 [2018]). Thus, "to obtain partial summary judgment on defendant's liability[, a plaintiff] does not have to demonstrate the absence of his [or her] own comparative fault" (*id.* at 323; *see Dunn v Covanta Niagara I, LLC* [appeal No. 1], 181 AD3d 1340, 1340 [4th Dept 2020]).

In accordance with *Rodriguez*, plaintiff was therefore not required to establish that decedent was not negligent, rather he was required to demonstrate that defendant was negligent and that such negligence was a proximate cause of decedent's injuries (*see Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1014 [2d Dept 2020]; *Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]). Here, we conclude that, in addition to demonstrating that defendants are collaterally estopped from contending that defendant was not negligent, "plaintiff[] established [his] prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence that the defendant driver never saw [decedent] before striking her" (*Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 790 [2d Dept 2019]; *see Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1009-1010 [2d Dept 2019]; *cf. Carnevale v Bommer*, 175 AD3d 881, 881-882 [4th Dept 2019]). Consequently, we respectfully disagree with the dissent's assertion that plaintiff's failure to spend any significant time arguing proximate causation requires denial of his motion. By submitting the evidence described above, which is sufficient to establish proximate cause (*see e.g. Higashi*, 176 AD3d at 789-790; *Outar v Sumner*, 164 AD3d 1356, 1357 [2d Dept 2018]), plaintiff met his burden regardless of the amount of detail contained in his argument in support of his motion.

Further, we note that the Vehicle and Traffic Law provides that, when a driver causes serious physical injury while failing to exercise due care to avoid colliding with a pedestrian in violation of section 1146 (a), "then there shall be a rebuttable presumption that, as a result of such failure to exercise due care, such person operated the motor vehicle in a manner that caused such serious physical injury" (§ 1146 [c] [2]). Here, however, that subdivision was not "raised by [plaintiff] in the[ ] motion [or] briefed by the parties" (*Wright v Meyers & Spencer, LLP*, 46 AD3d 805, 805 [2d Dept 2007]), and we decline to affirm the order on a ground that was neither raised below nor pursued on appeal (*see generally McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]).

Contrary to defendants' contention in appeal No. 2, we conclude that the court did not abuse its discretion in denying that part of their motion for leave to renew their opposition to plaintiff's motion (*see Ives Hill Country Club, Inc. v City of Watertown*, 185 AD3d 1494, 1497 [4th Dept 2020]; *Hamilton Equity Group, LLC v Hector A. Marichal, P.C.*, 174 AD3d 1517, 1518 [4th Dept 2019], *lv dismissed in part and denied in part* 35 NY3d 999 [2020]).

All concur except DeJoseph, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent insofar as the majority concludes in appeal No. 1 that Supreme Court properly granted that part of plaintiff's motion seeking partial summary judgment on the issue of proximate cause.

Negligence and proximate cause are separate elements of liability (*see Koziol v Wright*, 26 AD3d 793, 794 [4th Dept 2006]), and a finding of negligence does not necessarily lead to the conclusion that the actions of the negligent party were a proximate cause of the accident (*see Burghardt v Cmaylo*, 40 AD3d 568, 569 [2d Dept 2007]). Here, in moving for partial summary judgment on the issue of liability, plaintiff addressed the element of negligence but did not address the separate and distinct element of proximate cause, and therefore I must conclude that plaintiff failed to meet his initial burden on the motion with respect to that element (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Notably, plaintiff made no mention of the phrase proximate cause in his moving papers. Inasmuch as plaintiff failed to meet his initial burden on the motion with respect to proximate cause, there should be no need to consider the sufficiency of defendants' opposing papers on that issue (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Even assuming, arguendo, that the majority is correct that the issue of proximate cause was raised by plaintiff and that plaintiff met his burden with respect to that element, I conclude that defendants raised a triable issue of fact in opposition. Defendants presented evidence that plaintiff's decedent was crossing Maple Road outside of a designated crosswalk, at dusk, with headphones and dark clothing on and without looking for oncoming traffic. On those facts, defendants contend that decedent violated Vehicle and Traffic Law § 1152 (a). Consequently, even though defendants were negligent as a matter of law based on an unexcused violation of Vehicle and Traffic Law § 1146 (a), on this record, a jury could find that decedent's actions were the sole proximate cause of the accident (*see Balliet v North Amityville Fire Dept.*, 133 AD3d 559, 560 [2d Dept 2015]; *Amorosi v Hubbard*, 124 AD3d 1354, 1356 [4th Dept 2015]; *Briccio v Disbrow*, 212 AD2d 565, 566 [2d Dept 1995]; *see generally Carnevale v Bommer*, 175 AD3d 881, 881-882 [4th Dept 2019]; *Amerman v Reeves*, 148 AD3d 1632, 1633-1634 [4th Dept 2017]).

My conclusion does not run afoul of *Rodriguez v City of New York* (31 NY3d 312 [2018]), which clearly held that a plaintiff does not have the "double burden" to demonstrate the absence of his or her own comparative fault (*id.* at 324). But *Rodriguez* did not eliminate a defendant's sole proximate cause contention. In reaching its conclusion, the Court stated that "comparative negligence is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence, and as CPLR 1411 plainly states, is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages" (*id. at* 320). Sole proximate cause, however, is a defense to an essential element of negligence, i.e., causation. In *Rodriguez*, the Court of Appeals did not alter the well settled

principle that, "[t]hough negligence and proximate cause frequently overlap in the proof and theory which support each of them, they are not the same conceptually. Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint . . . Furthermore, proximate cause is no less essential an element of liability because the negligence charged is premised in part or in whole on a claim that a statute or ordinance, here a traffic regulation, has been violated" (*Sheehan v City of New York*, 40 NY2d 496, 501 [1976]).

Finally, my failure to address the majority's advisory analysis under Vehicle and Traffic Law § 1146 (c) (2) should not be taken as acceptance of that analysis. Vehicle and Traffic Law § 1146 (c) (2) was not raised below or on appeal and therefore should not be addressed by this Court (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984-985 [4th Dept 1994]).

In view of the foregoing, I would modify the order in appeal No. 1 by denying plaintiff's motion insofar as it sought partial summary judgment on the issue of proximate cause and would otherwise affirm.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

969

CA 20-00432

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

JAMES C. LOWES, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF SUSAN R. LOWES, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDROS ANAS AND TINA COLAIZZO-ANAS, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROCHELLE LAWLESS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 26, 2019. The order, insofar as appealed from, denied that part of the motion of defendants seeking leave to renew their opposition to plaintiff's motion for partial summary judgment.

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

Same memorandum as in *Lowes v Anas* ([appeal No. 1] — AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

997

KA 18-02412

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 23, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second 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 relating to the first, second, fourth and fifth counts of the indictment is granted, the first, second, fourth and fifth counts of the indictment are dismissed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and criminal possession of a weapon in the second degree (§ 265.03) in satisfaction of a five-count indictment, defendant contends that County Court erred in refusing to suppress physical evidence obtained by the police from stairs leading to an attic during the execution of a search warrant. We agree.

The Federal and State Constitutions provide that warrants shall not be issued except "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized" (US Const 4th Amend; NY Const, art I, § 12; *see People v Cook*, 108 AD3d 1107, 1108 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013]). "Although '[p]articularity is required in order that the executing officer can reasonably ascertain and identify . . . the persons or places authorized to be searched and the things authorized to be seized[,] . . . hypertechnical accuracy and completeness of description' in the warrant is not required" (*People v Madigan*, 169 AD3d 1467, 1468 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019],

quoting *People v Nieves*, 36 NY2d 396, 401 [1975]). "One of the most fundamental characteristics of a search warrant is that '[t]he authority to search is limited to the place described in the warrant and does not include additional or different places' " (*People v Caruso*, 174 AD2d 1051, 1051 [4th Dept 1991]). "In order to protect the Constitutional right of privacy . . . from arbitrary police intrusion, 'nothing should be left to the discretion of the searcher in executing the warrant' " (*id.*, quoting *Nieves*, 36 NY2d at 401).

Here, the warrant at issue authorized a search of "865 WOODLAWN UPPER APT. BUFFALO, N.Y. 2 ½ STORY WOOD FRAME HOUSE WHITE WITH WHITE TRIM. ATTACHED GARAGE AND COMMON AREAS," and drugs and drug packaging materials were found by the police behind a doorway on stairs leading to the attic. The doorway to the attic was in a hallway outside of the upper apartment and, as a result, the attic cannot be considered a part of the upper apartment itself (*see People v Haynes*, 258 AD2d 971, 971 [4th Dept 1999], *lv denied* 93 NY2d 1044 [1999]; *People v Haynes*, 256 AD2d 1193, 1194 [4th Dept 1998], *lv dismissed* 93 NY2d 853 [1999]; *cf. People v Brito*, 11 AD3d 933, 935 [4th Dept 2004], *appeal dismissed* 5 NY3d 825 [2005]; *People v Watson*, 254 AD2d 701, 701 [4th Dept 1998], *lv denied* 92 NY2d 1055 [1999]).

The question thus becomes whether the area where the drugs and packaging materials were found constitutes a common area. Common areas of multi-unit buildings are those areas " 'accessible to all tenants and their invitees' " (*People v Espinal*, 161 AD3d 556, 557 [1st Dept 2018], *lv denied* 32 NY3d 1064 [2018]; *see People v Murray*, 233 AD2d 956, 956 [4th Dept 1996], *lv denied* 89 NY2d 927 [1996]; *see generally People v Powell*, 54 NY2d 524, 530 [1981]). Here, the contraband was found by the police on the stairs leading to the attic, and a police officer testified at the suppression hearing that there was a closed door leading to the attic from the second floor common area. The officer in question was not present when the door was opened by other officers who executed the warrant, and he did not know whether the door had been locked. When asked whether "the door could have been locked and needed to be breached," the officer answered, "That is entirely possible." The People did not call any of the officers who were present when the door to the attic was opened, forcibly or otherwise, nor did they call the landlord or anyone who resided at the property.

Defendant testified that the door to the attic was closed and locked, and that, during the execution of the warrant, the door was broken down by the police. If the door was indeed locked, it cannot be said that the attic was accessible to all tenants and their invitees.

Under the circumstances, we conclude that the People failed to meet their initial burden of establishing the legality of the police conduct (*see People v Wise*, 46 NY2d 321, 329 [1978]; *People v Baldwin*, 25 NY2d 66, 70-71 [1969]), and that the court therefore erred in denying that part of defendant's omnibus motion seeking suppression of the contraband found on the stairs leading to the attic. There is no basis in the record to suppress evidence found by the police in the

second floor apartment, including a loaded firearm. We therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking to suppress physical evidence relating to the first, second, fourth, and fifth counts of the indictment, dismiss those counts of the indictment, and remit the matter to County Court for further proceedings on the remaining count.

We have reviewed defendant's remaining contentions and conclude that they lack merit, or are academic in light of our determination.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1071

CA 19-02088

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

MICHAEL SEDDON AND JOSEPHINE SEDDON,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

AMY POSTIGO, DEFENDANT-APPELLANT.
(ACTION NO. 1.)

MICHAEL SEDDON AND JOSEPHINE SEDDON,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

WOODSTONE EARTH CONSTRUCTION, INC.,
DEFENDANT-RESPONDENT,
IW CONSTRUCTION INC.,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.
(ACTION NO. 2.)

LAW OFFICE OF JOHN WALLACE, HARTFORD (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BURGIO, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

OSBORN REED & BURKE LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered October 22, 2019. The order, inter alia, granted the motion of plaintiffs to compel discovery, granted the motion of defendant Woodstone Earth Construction, Inc. to dismiss the complaint against it and denied in part the motion of defendant IW Construction, Inc., to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiffs' motion in action No. 1 seeking to compel production of computers, hard drives, electronic devices and data storage systems and denying

without prejudice that part of plaintiffs' motion in action No. 1 seeking to compel the continuation of the deposition of defendant Amy Postigo, and denying in part the motion of defendant Woodstone Earth Construction, Inc. in action No. 2 and reinstating the second cause of action against it, and as modified the order is affirmed without costs.

Memorandum: These actions arise out of damages allegedly sustained to plaintiffs' property, which sits along the shore of Lake Ontario, as a result of construction projects performed on neighboring property owned by Amy Postigo, who is the defendant in action No. 1. Woodstone Earth Construction, Inc. (Woodstone) and IW Construction Inc. (IWC), who are defendants in action No. 2, are contractors who Postigo hired to perform work in an effort to combat erosion on Postigo's property. Woodstone was hired to engineer and construct a gabion basket structure on the shoreline of Postigo's property. Postigo later hired IWC to install a sheet-piling bulkhead, or wall, along the shoreline of Postigo's property after it had been determined that the gabion basket structure was failing. A few years later, over 1,000 tons of dirt and rock, amounting to over 50 feet of shoreline, broke off from plaintiffs' property and fell into Lake Ontario.

Plaintiffs commenced action No. 1 against Postigo, and plaintiffs subsequently commenced action No. 2 against, inter alia, Woodstone and IWC. In action No. 1, plaintiffs moved pursuant to CPLR 3124 to compel Postigo to comply with discovery demands, including the production of certain electronic devices. In action No. 2, Woodstone and IWC moved separately to dismiss the complaint against them pursuant to CPLR 3211 (a) (5) on the ground that the statute of limitations had expired. Now, Postigo and IWC appeal, and plaintiffs cross-appeal, from an order that granted plaintiffs' and Woodstone's motions, and granted IWC's motion with respect to the first cause of action but denied IWC's motion with respect to the second cause of action.

In action No. 1, we agree with Postigo that Supreme Court erred in granting that part of plaintiffs' motion seeking to compel Postigo to provide access to computers, hard drives, electronic devices, and other data storage systems for the purpose of retrieving emails and messages relating to the action, and we therefore modify the order accordingly. Those items are the property of a nonparty, specifically a company owned by Postigo's husband, and therefore Postigo cannot be compelled to produce them (*see generally Orzech v Smith*, 12 AD3d 1150, 1151 [4th Dept 2004]; *Hawley v Hasgo Power Equip. Sales*, 269 AD2d 804, 804 [4th Dept 2000]). We note that a party may seek to compel the disclosure of materials necessary in the prosecution or defense of an action that belong to a nonparty, however, through the issuance of a subpoena (*see Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 109 [1st Dept 2006]; *see generally* CPLR 3101 [a] [4]).

Because plaintiffs' request for a second or continued deposition of Postigo was for the purpose of reviewing documents from the computers, hard drives, electronic devices and other data storage systems, that request should have been denied without prejudice

subject to the resolution of the issue of disclosure from the nonparty. We therefore further modify the order accordingly.

We have reviewed Postigo's remaining contention with respect to plaintiffs' motion to compel and conclude that it is without merit.

In action No. 2, we agree with plaintiffs that the court erred in granting that part of Woodstone's motion seeking to dismiss the second cause of action against it as untimely, and we therefore further modify the order accordingly. We likewise conclude that, contrary to IWC's contention, the court properly denied that part of IWC's motion seeking to dismiss the second cause of action against it as untimely. " 'In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance' " (*Dreamco Dev. Corp. v Empire State Dev. Corp.*, 191 AD3d 1444, 1446 [4th Dept 2021]). Here, affording a liberal construction to plaintiffs' complaint (*see* CPLR 3026; *Bouley v Bouley*, 19 AD3d 1049, 1050 [4th Dept 2005]) as supplemented by the affidavits of plaintiffs and their expert submitted in opposition to the motions (*see Payano v Patel*, 130 AD3d 896, 897 [2d Dept 2015]; *Bouley*, 19 AD3d at 1050), we conclude that plaintiffs' second causes of action against Woodstone and IWC sufficiently allege violations of ECL 15-0701, which statute plaintiffs expressly referenced in those causes of action. With respect to Woodstone, plaintiffs alleged that the collapse of the shoreline and 1,000 tons of debris into the lake, which was effected by changes to the bank due to the installation and failure of the gabion baskets, constituted an alteration in the quality or condition of the lake that caused plaintiffs harm by interfering with their use of the water and their enjoyment of the riparian land and by decreasing the market value of their interest in the riparian land (*see* ECL 15-0701 [1]-[3]). With respect to IWC, plaintiffs alleged that the installation of the sheet-piling bulkhead on the banks altered the flow of the lake water by redirecting waves from Postigo's property to plaintiffs' property, and that such alteration caused plaintiffs harm by eroding their property, thereby interfering with their enjoyment of the riparian land and decreasing the market value of their interest in the riparian land (*see id.*). Thus, even assuming, arguendo, that the three-year statute of limitations applies (*see* CPLR 214 [4]; *see generally Hoffman v Appleman*, 120 AD2d 493, 493 [2d Dept 1986]) and that plaintiffs' causes of action would be untimely in the absence of any tolling, we conclude that the tolling provision of ECL 15-0701 (8) applies and that the causes of action are timely.

With respect to plaintiffs' first causes of action against Woodstone and IWC alleging trespass in action No. 2, we agree with the court that these causes of action do not get the benefit of the tolling provisions under ECL 15-0701. Plaintiffs have also abandoned any contention on their cross appeal that a theory of continuing trespass extended the statute of limitations (*see generally Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143,

1143-1144 [4th Dept 2014]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1132

KA 19-00511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELLIOTT L. RIVERA, ALSO KNOWN AS LITTLE,
DEFENDANT-APPELLANT.

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

ELLIOTT L. RIVERA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 23, 2016. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of kidnapping in the second degree (Penal Law § 135.20). Initially, we note that, even assuming, arguendo, that defendant correctly contends in his main brief that his waiver of the right to appeal is invalid (*see People v Castro-Ubiles*, 187 AD3d 1598, 1598 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]), his further contention in his main brief that he was denied effective assistance of counsel survives his 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 Miller*, 161 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018] [internal quotation marks omitted]). Here, however, defendant's contention involves matters outside of the record on appeal, including his conversations with his attorney and the content of off-the-record plea negotiations and, thus, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Graham*, 171 AD3d 1559, 1560 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]; *People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it is without merit (*see generally People v Baldi*, 54 NY2d 137,

147 [1981]; *People v Kosmetatos*, 178 AD3d 1433, 1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). Indeed, defense counsel secured an advantageous plea offer on defendant's behalf, and nothing in the record before us casts doubt on defense counsel's performance (*see People v Goodwin*, 159 AD3d 1433, 1434-1435 [4th Dept 2018]).

We reject defendant's contention in his main brief that Supreme Court abused its discretion in denying his motion to withdraw his guilty plea without conducting an evidentiary hearing or making a further inquiry into his allegations. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010]; *see People v Walker*, 114 AD3d 1257, 1258 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]). Here, the record establishes that defendant was afforded "a reasonable opportunity to advance his claims, and the court did not abuse its discretion in denying the motion without further inquiry or a hearing" (*People v Shorter*, 179 AD3d 1445, 1446 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]).

We also reject the contention of defendant in his pro se supplemental brief that the sentence is illegal. The imposition of consecutive sentences is not improper where, as here, the kidnapping of two separate victims constitutes two separate acts that arise from the same set of circumstances (*see People v Brown*, 5 AD3d 789, 790 [2d Dept 2004], *lv denied* 4 NY3d 852 [2005]; *see also People v Chao Wang Lin*, 266 AD2d 467, 467 [2d Dept 1999], *lv denied* 94 NY2d 878 [2000]).

Finally, we have reviewed the remaining contention raised in defendant's main brief and conclude that it does not warrant modification or reversal of the judgment.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1162

CA 20-00614

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

PAUL MICHAEL LEEDER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID P. ANTONUCCI, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

NEIL M. GINGOLD, FAYETTEVILLE, FOR PLAINTIFF-APPELLANT.

ANTONUCCI LAW FIRM LLP, WATERTOWN (DAVID P. ANTONUCCI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Jefferson County (James P. Murphy, J.), entered October 25, 2019. The order and judgment granted the cross motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for alleged legal malpractice arising from defendant's representation of plaintiff in two separate matters. On a prior appeal from an order and judgment granting defendant's cross motion for summary judgment dismissing the complaint, this Court modified the order and judgment by denying the cross motion in part and reinstating plaintiff's second cause of action (estate cause of action)—which alleged malpractice in defendant's handling of an estate accounting proceeding—on the ground that plaintiff raised a triable issue of fact whether that cause of action was untimely (*Leeder v Antonucci*, 174 AD3d 1469, 1470-1471 [4th Dept 2019]). This Court then remitted the matter to Supreme Court to address that part of the cross motion seeking summary judgment dismissing the estate cause of action on the ground that plaintiff failed to sufficiently allege damages on that cause of action (*id.* at 1471).

Upon remittal, the court granted that part of the cross motion seeking summary judgment dismissing the estate cause of action, concluding that defendant established that plaintiff's damages claim was speculative and that plaintiff failed to raise a triable issue of fact in opposition. In appeal No. 1, plaintiff appeals from an order and judgment granting the cross motion to that extent and dismissing the remainder of the complaint. In appeal No. 2, plaintiff appeals from an order denying his motion for leave to reargue and renew his

opposition to defendant's cross motion with respect to the estate cause of action.

Addressing appeal No. 1, we conclude that the court properly granted the cross motion. "[A] necessary element of a cause of action for legal malpractice is that the attorney's negligence caused a loss that resulted in actual and ascertainable damages" (*New Kayak Pool Corp. v Kavinoky Cook LLP*, 125 AD3d 1346, 1348 [4th Dept 2015] [internal quotation marks omitted]; *see Leeder*, 174 AD3d at 1469). Furthermore, "[c]onclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action" (*New Kayak Pool Corp.*, 125 AD3d at 1348 [internal quotation marks omitted]). Here, defendant met his initial burden on the cross motion by establishing that plaintiff's allegations of damages with respect to the estate cause of action are speculative (*see id.*; *Lincoln Trust v Spaziano*, 118 AD3d 1399, 1401-1402 [4th Dept 2014]). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). With respect to plaintiff's opposition, we perceive no error in the court's rejection of the estate account summary that plaintiff submitted, which was purportedly prepared by a retained expert. Plaintiff did not submit the summary until nearly a month after the original oral argument on defendant's cross motion (*see Kopeloff v Arctic Cat, Inc.*, 84 AD3d 890, 890-891 [2d Dept 2011]). Contrary to plaintiff's contention, the submission was untimely. The fact that the deadline in the court's scheduling order for disclosure of expert witnesses had not yet passed did not relieve plaintiff of his burden to "lay bare his proof and show that a genuine question of fact exists" in opposition to the cross motion for summary judgment (*Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 71 [4th Dept 1998]; *see also* CPLR 3212 [f]). In any event, the estate account summary is conclusory, speculative, and insufficient to raise a triable issue of fact (*see generally Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1099 [4th Dept 2018]).

Addressing appeal No. 2, insofar as the order denied that part of plaintiff's motion seeking leave to reargue, it is not appealable, and we therefore dismiss the appeal to that extent (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Insofar as plaintiff sought leave to renew, we conclude that the court properly denied the motion. Contrary to plaintiff's contention, he failed to articulate a reasonable justification for his failure to timely provide the estate account summary (*see* CPLR 2221 [e] [3]; *Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1598 [4th Dept 2019]; *Matter of Rochester Genesee Regional Transp. Auth. v Stensrud*, 162 AD3d 1495, 1495 [4th Dept 2018], *lv dismissed* 35 NY3d 950 [2020]). Moreover, as discussed above, even if plaintiff had provided a reasonable justification, the estate account summary would not have changed the prior determination (*see* CPLR 2221 [e] [2]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1163

CA 20-00681

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

PAUL MICHAEL LEEDER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID P. ANTONUCCI, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

NEIL M. GINGOLD, FAYETTEVILLE, FOR PLAINTIFF-APPELLANT.

ANTONUCCI LAW FIRM LLP, WATERTOWN (DAVID P. ANTONUCCI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. Murphy, J.), entered April 27, 2020. The order denied plaintiff's motion for leave to reargue and renew a prior decision of the court.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed, and the order is affirmed without costs.

Same memorandum as in *Leeder v Antonucci* ([appeal No. 1] — AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1165

CA 20-00182

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

MICHELLE E. BOOTH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JUDY M. CARLSON, DEFENDANT-APPELLANT.

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

CELLINO & BARNES, P.C., BUFFALO (JEANNA M. CELLINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered January 7, 2020. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the permanent loss of use category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint, as amplified by the bill of particulars, to that extent, and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for injuries allegedly sustained in an automobile accident, defendant appeals from an order that, inter alia, denied those parts of her motion for summary judgment that sought to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent loss of use, significant disfigurement, significant limitation of use, or permanent consequential limitation of use categories. We agree with defendant that Supreme Court erred with respect to the permanent loss of use category (*see Swift v New York Tr. Auth.*, 115 AD3d 507, 509 [1st Dept 2014]; *Vitez v Shelton*, 6 AD3d 1180, 1181 [4th Dept 2004]). We therefore modify the order accordingly. We reject defendant's remaining contentions.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1180

KA 16-02366

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TINA L. WAGONER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

TINA L. WAGONER, DEFENDANT-APPELLANT PRO SE.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered August 3, 2016. The judgment convicted defendant upon a jury verdict of rape in the first degree, attempted rape in the first degree and promoting prostitution in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and as a matter of discretion in the interest of justice by reversing those parts convicting defendant of rape in the first degree under count one of the indictment and promoting prostitution in the second degree under count two of the indictment and dismissing those counts of the indictment, and by reducing the sentence imposed for attempted rape in the first degree under count five of the indictment to a determinate term of incarceration of 12 years with a five-year period of postrelease supervision, reducing the sentence imposed for promoting prostitution in the second degree under count six (mislabeled “second count”) of the indictment to an indeterminate term of incarceration of 3 to 12 years, and directing that those sentences run concurrently with one another, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of rape in the first degree (Penal Law § 130.35 [4]), attempted rape in the first degree (§§ 110.00, 130.35 [4]), and two counts of promoting prostitution in the second degree (§ 230.30 [2]) related to allegations that she aided and abetted two men in the rape and attempted rape of a female under the age of 13 in exchange for alcohol and drugs. Although the offenses occurred in 2012 or before, defendant was not indicted until February 2015. Contrary to defendant’s contention in her main brief, she was not denied due process by the preindictment delay. To determine whether there has

been undue delay in prosecution, courts will consider "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445 [1975]; *see People v Decker*, 13 NY3d 12, 15 [2009]). " '[A] determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant' " (*Decker*, 13 NY3d at 14).

Here, although the charges were serious, defendant was not incarcerated pending trial, and the delay was occasioned by circumstances related to the vulnerable victim. The victim was only 12 years old at the time of the last offense, yet she had never attended school. She had significant educational delays and did not initially disclose defendant's involvement in the underlying sexual offenses (*see People v McNeill*, 204 AD2d 975, 975-976 [4th Dept 1994], *lv denied* 84 NY2d 829 [1994]). Although defendant points to the death of two material witnesses as a source of prejudice, she did not make that argument before County Court and, as a result, that contention is not preserved for our review (*see People v Pacheco*, 38 AD3d 686, 687 [2d Dept 2007], *lv denied* 9 NY3d 849 [2007]; *see generally* CPL 470.05 [2]). In any event, the resulting prejudice was minimal and does not outweigh the good-faith determination to delay prosecution (*see People v Fleming*, 141 AD3d 408, 409 [1st Dept 2016], *lv denied* 28 NY3d 1027 [2016], *reconsideration denied* 28 NY3d 1124 [2016]; *People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]; *see generally People v Johnson*, 134 AD3d 1388, 1390 [4th Dept 2015], *affd* 28 NY3d 1048 [2016]).

Defendant further contends in her main brief that she was denied due process because she was not present during conferences where CPL article 730 competency proceedings were discussed. We reject that contention inasmuch as such conferences are not material stages of the trial where, as here, the conferences do not "entail a hearing or any significant factual inquiry" (*People v Kimes*, 37 AD3d 1, 31 [1st Dept 2006], *lv denied* 8 NY3d 881 [2007], *reconsideration denied* 9 NY3d 846 [2007]; *see People v Chisolm*, 85 NY2d 945, 948 [1995]). We further conclude, contrary to defendant's contention, that she was not denied due process by the absence of those proceedings from the record. The reports prepared by two psychiatric examiners, which were provided to this Court, conclude that defendant was not incapacitated (*see* CPL 730.30 [2]) and, in light of those reports, the court did not abuse its discretion in failing to order a hearing on its own motion (*see People v Singleton*, 78 AD3d 1490, 1490 [4th Dept 2010], *lv denied* 16 NY3d 837 [2011]; *People v Horan*, 290 AD2d 880, 882-883 [3d Dept 2002], *lv denied* 98 NY2d 638 [2002]; *see generally People v Armlin*, 37 NY2d 167, 171 [1975]). With respect to defendant's final contention related to CPL article 730, we conclude that the psychiatric examiners' reports complied with the statute by including the examiners' opinions that defendant was not an incapacitated person and was able to participate in her defense and by stating the nature and

extent of the examination that was conducted (*see* CPL 730.10 [8]; *People v Vega*, 167 AD3d 1468, 1469 [4th Dept 2018], *lv denied* 33 NY3d 955 [2019]; *cf. People v Meurer*, 184 AD2d 1067, 1068 [4th Dept 1992], *lv dismissed* 80 NY2d 835 [1992], *lv denied* 80 NY2d 907 [1992]).

Before trial, defendant expressed a desire to represent herself. She now contends in her main brief that her decision to represent herself was not made knowingly, intelligently or voluntarily, and that she was denied due process because her self-representation resulted in a travesty of justice. In her pro se supplemental brief, defendant further contends that she was forced to represent herself due to the court's failure to inquire into her many complaints against defense counsel. We reject those contentions. Addressing first the contentions in her main brief, we conclude that the court "undertook the requisite searching inquiry into defendant's age, education and familiarity with the legal system before accepting defendant's decision to proceed pro se[, and] the court and defense counsel warned defendant of the risks associated with proceeding pro se" (*People v Clark*, 42 AD3d 957, 957-958 [4th Dept 2007], *lv denied* 9 NY3d 960 [2007]; *see People v Providence*, 2 NY3d 579, 582-583 [2004]). The court thus ensured that defendant's decision was made knowingly, voluntarily and intelligently. Moreover, although there were deficiencies in defendant's performance, we do not believe that "the proceedings resulted in a 'travesty of justice' such that [defendant] was denied [her] right to due process" (*People v Herman*, 78 AD3d 1686, 1687 [4th Dept 2010], *lv denied* 16 NY3d 831 [2011]; *see generally People v McIntyre*, 36 NY2d 10, 18 [1974]).

Addressing next the contention raised in the pro se supplemental brief, we conclude that the court did not abuse its discretion in allowing defendant to represent herself despite her issues with defense counsel. Contrary to defendant's contention, the court "afforded defendant the opportunity to express [her] objections concerning defense counsel, and . . . thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]; *see People v Spencer*, 185 AD3d 1440, 1441 [4th Dept 2020]; *see generally People v Porto*, 16 NY3d 93, 99-100 [2010]).

Defendant contends in her main brief that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. Assuming, arguendo, that defendant preserved her challenge to the sufficiency of the evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we reject her contention. Defendant admitted "selling [the victim]" to the men named in the indictment, as well as to numerous other people. The victim testified that the two men named in the counts of the indictment of which defendant was convicted committed the alleged sexual offenses against her in defendant's home, where the victim was then residing, after they brought defendant alcohol or drugs. Moreover, both men pleaded guilty to offenses related to their interactions with the victim. We thus conclude, contrary to

defendant's contention in her pro se supplemental brief, that her confession was sufficiently corroborated (*see* CPL 60.50; *People v Daniels*, 37 NY2d 624, 629 [1975]), as was the testimony of the men implicated in the crimes (*see* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 192 [2010]). Upon viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we further conclude that the evidence is legally sufficient to support the conviction of each offense (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reach a different conclusion on the weight of the evidence insofar as it concerns counts one and two of the indictment, which charged defendant with rape in the first degree and promoting prostitution in the second degree. The man at issue in those counts testified for the prosecution and denied having sexual contact with the victim. He further testified that, on the night of the alleged incident, he provided marihuana to defendant, who then left the residence while he remained there to play video games. Despite any conduct that may have occurred between him and the victim, that man testified on cross-examination that defendant "never sold [the victim] to him." The victim also testified several times that she did not believe that defendant knew what that man was doing to her on the night he raped her.

The victim testified that the man at issue in counts one and two of the indictment gave defendant alcohol, "knowing that she won't [sic] know what's going on, so he could take advantage of me." Although that man was named in defendant's "confession," that confession is of questionable value inasmuch as it also names the female who called the police to report the crimes at issue in counts five and six. Viewing the evidence in light of the elements of count one and count two as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those two counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We therefore modify the judgment by reversing the parts convicting defendant of rape in the first degree under count one of the indictment and promoting prostitution in the second degree under count two of the indictment and dismissing those counts of the indictment.

We reach a different conclusion with respect to counts five and six of the indictment, which charged defendant with attempted rape in the first degree and promoting prostitution in the second degree. In contrast to her testimony related to counts one and two, the victim specifically testified that the man at issue in those counts gave defendant alcohol, in part, "to have sex with [the victim]." Due to his own intoxication, that man was unable to commit the actual rape. In addition, the victim testified that the man's then-girlfriend came to defendant's home on the night in question and, when defendant answered the door, she indicated that the man was in the bedroom with the victim. The girlfriend entered the bedroom and observed the man, naked from the waist down, in bed with the victim, who was wearing only a nightgown. That man testified for the defense and, although he

denied all of the allegations and contended that he was in the bed sleeping due to his intoxication, he nevertheless admitted that he pleaded guilty to endangering the welfare of a child in relation to the allegations. Viewing the much more damaging evidence related to counts five and six in light of the elements of those two crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict on those two counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention in her main brief that she was denied a fair trial due to prosecutorial misconduct on summation is not preserved for our review (*see People v Green*, 141 AD3d 1036, 1042 [3d Dept 2016], *lv denied* 28 NY3d 1072 [2016]). In any event, in our view, most of the alleged instances of misconduct were fair comment on the evidence and fair response to defense counsel's summation (*see People v Young*, 153 AD3d 1618, 1620 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017], *reconsideration denied* 31 NY3d 1123 [2018], *cert denied* — US —, 139 S Ct 84 [2018]) and, to the extent that the prosecutor made inappropriate remarks, we conclude that they were "not so pervasive or egregious as to deny defendant a fair trial" (*id.*; *see People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]).

Defendant's final contention in her main brief is that the sentence is unduly harsh and severe. Upon her conviction of all four counts, defendant was sentenced to concurrent and consecutive terms of incarceration that aggregated to a determinate term of 35 years. Based on our determination to dismiss counts one and two of the indictment as against the weight of the evidence, the sentence would be reduced to a determinate term of incarceration of 15 years on count five, for attempted rape in the first degree, with a concurrent indeterminate term of incarceration of 5 to 15 years on count six, for promoting prostitution in the second degree. Even as reduced by our determination to modify the judgment by reversing those parts convicting defendant under counts one and two of the indictment, we conclude, after considering the sentences imposed on the men involved in the charged crimes, that the sentence is unduly harsh and severe, and we therefore exercise our discretion to further modify the judgment by reducing the sentence imposed on count five to a determinate term of incarceration of 12 years with five years of postrelease supervision, reducing the sentence imposed on count six to an indeterminate term of incarceration of 3 to 12 years, and directing that those sentences run concurrently with each other (*see generally* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]).

We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that they do not warrant reversal or further modification of the judgment.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1192

KA 18-01203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE L. MACK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Christopher S. Ciaccio, J.), dated May 11, 2018. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Monroe County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals, by permission of this Court, from an order that denied his CPL 440.10 motion to vacate the judgment convicting him, following a jury trial, of gang assault in the first degree (Penal Law § 120.07). We previously affirmed that judgment of conviction upon remittitur from the Court of Appeals (*People v Mack*, 142 AD3d 755 [4th Dept 2016]).

We agree with defendant that County Court erred in limiting the scope of the hearing regarding his claim of ineffective assistance of counsel to only those alleged errors of defense counsel that could not have been raised on direct appeal (*cf.* CPL 440.10 [2] [a], [b]). A "claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested . . . [Such] a claim . . . 'is ultimately concerned with the fairness of the process as a whole' " (*People v Maxwell*, 89 AD3d 1108, 1109 [2d Dept 2011], quoting *People v Benevento*, 91 NY2d 708, 714 [1998]) and must be " 'viewed in totality' " (*Benevento*, 91 NY2d at 712). Although "[a] single error may qualify as ineffective assistance . . . when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]), a defendant may also establish that he or she received ineffective assistance of counsel by arguing that the cumulative effect of multiple errors rendered defense counsel's performance ineffective,

even if those errors, "considered separately, may not have constituted ineffective assistance" (*People v Lindo*, 167 AD2d 558, 559 [2d Dept 1990]; *see generally People v Barnes*, 156 AD3d 1417, 1420 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]). Where, as here, a defendant alleges errors of defense counsel based on both matters appearing in the record and matters dehors the record, i.e., a " 'mixed claim,' " a "CPL 440.10 proceeding is the appropriate forum for reviewing the claim of ineffectiveness *in its entirety*" (*Maxwell*, 89 AD3d at 1109 [emphasis added]; *see People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]). "That is because each alleged shortcoming or failure by defense counsel should not be viewed as a separate ground or issue raised upon the motion . . . Rather, a defendant's claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested . . . In other words, such a claim constitutes a single, unified claim that must be assessed in totality" (*Wilson*, 162 AD3d at 1592 [internal quotation marks omitted]). We thus conclude that the court erred in limiting the scope of the hearing on defendant's claim of ineffective assistance of counsel, and we reverse the order and remit the matter to County Court for a hearing on defendant's respective claims of ineffective assistance of counsel in their entirety.

We have reviewed the other contentions raised by defendant and conclude that they are without merit.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1194

KA 18-01063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CROSBY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered October 13, 2017. The judgment convicted defendant upon a plea of guilty of assault in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (§§ 110.00, 120.05 [7]), and in appeal No. 3, he appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (§ 120.05 [2]). We affirm in each appeal.

At the outset, although defendant purportedly waived his right to appeal in all three appeals, we conclude that there is no reason for us to address his contention that the waiver is invalid inasmuch as defendant's substantive contentions would survive even a valid waiver of the right to appeal or are forfeited by the plea (*see People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]).

Defendant contends in all three appeals that County Court abused its discretion in denying his pro se motion to withdraw his guilty pleas. That motion was premised on defendant's allegations that the pleas were not knowing, intelligent, and voluntary inasmuch as defendant was coerced by defense counsel to enter the pleas. Although defendant preserved that contention for our review by moving to withdraw the pleas (*see People v Long*, 183 AD3d 1275, 1276 [4th Dept

2020], *lv denied* 35 NY3d 1046 [2020], *reconsideration denied* 35 NY3d 1095 [2020]; *People v Green*, 122 AD3d 1342, 1343 [4th Dept 2014]), we nevertheless reject defendant's contention on the merits. "[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 that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]; *see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). Furthermore, " 'a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding' " (*People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *see generally People v Said*, 105 AD3d 1392, 1393 [4th Dept 2013], *lv denied* 21 NY3d 1019 [2013]).

Here, with respect to defendant's claim that he was coerced by defense counsel into pleading guilty, we conclude that "[t]he court was presented with a credibility determination . . . , and it did not abuse its discretion in discrediting th[at] claim[]" (*People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]; *see People v Zimmerman*, 100 AD3d 1360, 1361-1362 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). "Far from being coercive, defense counsel's advice . . . that the case could not be won," and his realistic explanation to defendant of the benefits of accepting the People's plea offer under the circumstances, "fulfilled defense counsel's duty to warn his client of the risks of going to trial" (*People v Spinks*, 227 AD2d 310, 310 [1st Dept 1996], *lv denied* 88 NY2d 995 [1996]; *see People v Nichols*, 21 AD3d 1273, 1274 [4th Dept 2005], *lv denied* 6 NY3d 757 [2005]). Additionally, defendant's allegations of coercion are belied by his statements during the plea colloquy indicating that he discussed the decision with defense counsel, that he understood the nature of the trial rights he was forfeiting by pleading guilty, that he understood the terms of the plea, and that he was pleading guilty voluntarily (*see People v Ivey*, 98 AD3d 1230, 1231 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]; *People v Williams*, 90 AD3d 1546, 1547 [4th Dept 2011], *lv denied* 19 NY3d 978 [2012]).

Defendant also contends in all three appeals that the court erred in denying his pro se motion made in April 2017 seeking substitution of counsel. Initially, we note that his contention " 'is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea' " (*Morris*, 94 AD3d at 1451). Regardless, we conclude that defendant abandoned his request for new counsel "when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*People v Wellington*, 169 AD3d 1440, 1441 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019]; *see People v Barr*, 169 AD3d 1427, 1427-1428 [4th Dept 2019], *lv denied* 33 NY3d 1028 [2019]). At the plea colloquy, defendant made no statements expressing dissatisfaction with counsel, and we note that at no time did the court issue an ultimatum to defendant to either "plead guilty with present counsel or proceed to trial with present counsel" (*People*

v Jones, 173 AD3d 1628, 1630 [4th Dept 2019]).

Finally, in appeal Nos. 1 and 3, the People correctly concede that the certificates of conviction fail to reflect that defendant was sentenced to five-year periods of postrelease supervision, and they must therefore be amended to reflect those facts (*see People v Brooks*, 183 AD3d 1231, 1233 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]; *People v Kemp*, 112 AD3d 1376, 1377 [4th Dept 2013]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1195

KA 18-01065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CROSBY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered October 13, 2017. The judgment convicted defendant upon a plea of guilty of attempted assault in the second degree.

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

Same memorandum as in *People v Crosby* ([appeal No. 1] — AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

1196

KA 18-01066

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CROSBY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered October 13, 2017. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Same memorandum as in *People v Crosby* ([appeal No. 1] — AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 12-01720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. TERBORG, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN 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 16, 2012. The judgment convicted defendant upon a jury verdict of unauthorized use of a vehicle in the second degree and two traffic infractions.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, unauthorized use of a vehicle in the second degree (Penal Law § 165.06), defendant contends, as he did in two prior appeals, that Supreme Court (Doyle, J.) erred in disqualifying the Public Defender's Office from representing him. We reject that contention, as we did in the prior appeals (*People v Terborg*, 162 AD3d 1468, 1468-1469 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018], *lv dismissed* 32 NY3d 1178 [2019]; *People v Terborg*, 156 AD3d 1320, 1320 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). To the extent that defendant also challenges a subsequent ruling of the court (Renzi, J.) adhering to the initial disqualification ruling, we conclude, as we did in the more recent prior appeal (*Terborg*, 162 AD3d at 1468), that the subsequent ruling was not an abuse of discretion (*see People v Beauchamp*, 84 AD3d 507, 508 [1st Dept 2011], *lv denied* 17 NY3d 813 [2011]; *see generally People v Evans*, 94 NY2d 499, 506 [2000], *rearg denied* 96 NY2d 755 [2001]).

Defendant further contends that the court erred in conducting a second felony offender hearing without notice to him. Contrary to defendant's contention, the court conducted a hearing on notice to defendant, and he was given an opportunity to be heard. Even assuming, arguendo, that defendant correctly contends that he did not receive a copy of the second felony offender statement (*see* CPL 400.21 [2], [3], [6]), we conclude that the record establishes that he

received notice of the second felony offender allegations more than two days before the hearing and that, under the circumstances of this case, any technical failure to comply with the procedure set out in CPL 400.21 "was harmless, and [remitting] for filing and resentencing would be futile and pointless" (*People v Bouyea*, 64 NY2d 1140, 1142 [1985]; *see People v Harris*, 61 NY2d 9, 20 [1983]; *see also People v Brown*, 74 AD3d 1637, 1638 [3d Dept 2010], *lv denied* 15 NY3d 850 [2010]).

Defendant also contends that the conviction is not supported by legally sufficient evidence because the People failed to prove that he knew he was operating the vehicle without permission. We reject that contention. Viewing the evidence in the light most favorable to the People (*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 factfinder could have found that defendant knew that he was operating the vehicle without the permission of the owner (*see People v Waterford*, 124 AD3d 1246, 1246-1247 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *People v Darrisaw*, 70 AD3d 1387, 1387-1388 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel due to defense counsel's failure to request that the court either not instruct the jury on the statutory presumption in Penal Law § 165.05 or instruct the jury that the presumption is permissive and not mandatory. It is well settled that the "failure to 'make a motion or argument that has little or no chance of success' " does not constitute a denial of effective assistance of counsel (*People v Caban*, 5 NY3d 143, 152 [2005]). Here, the court's instructions to the jury followed the statutory definition of the offense in question (*see* Penal Law § 165.06; *see also* § 165.05) and mirrored the pattern Criminal Jury Instructions (*see* CJI2d[NY] Penal Law § 165.06). The court also properly instructed the jury that the presumption is permissive and not mandatory (*see People v Thompkins*, 133 AD3d 899, 900 [3d Dept 2015]; *see generally People v Bombard*, 187 AD3d 1417, 1420 [3d Dept 2020]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

32

KA 18-01625

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL HARLOW, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered June 4, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and reckless endangerment 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and reckless endangerment in the second degree (§ 120.20), arising from an incident in which a gun was fired from a moving vehicle. We affirm.

Defendant contends that the search warrant for his vehicle was not supported by probable cause connecting defendant to the shooting and that, therefore, Supreme Court erred in refusing to suppress the evidence seized as a result of that search. We reject that contention. "[A] search warrant 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]). "[P]robable cause may be supplied, in whole or in part, [by] hearsay information, provided [that] it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Flowers*, 59 AD3d 1141, 1142 [4th Dept 2009] [internal quotation marks omitted]).

Here, the search warrant application relied on information provided by several anonymous informants. Defendant challenges the

anonymous informants' hearsay information only on the ground that the anonymous informants' reliability or the basis of their knowledge was not adequately established. We conclude, however, that the anonymous informants' reliability and the basis for their knowledge was established by corroborating evidence they provided regarding details of the incident and by the description they provided of the vehicle and the individual seen fleeing the scene (*see generally People v Myhand*, 120 AD3d 970, 973-976 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]; *People v Monroe*, 82 AD3d 1674, 1675 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]; *Flowers*, 59 AD3d at 1142-1143) and that the search warrant was supported by probable cause.

We also reject defendant's contention that the police lacked probable cause to seize his vehicle and the sweatshirt he was wearing when he arrived at the police station. Specifically, we conclude that the court properly determined that the police had probable cause to arrest defendant once they corroborated the accounts of the incident provided by the anonymous informants, which indicated that defendant was involved in the shooting (*see generally People v DiFalco*, 80 NY2d 693, 696-697 [1993]; *People v Griswold*, 155 AD3d 1658, 1659 [4th Dept 2017], *lv denied* 31 NY3d 984 [2018]; *People v McLean*, 72 AD2d 588, 588 [2d Dept 1979]). Because the police had probable cause to arrest defendant, we further conclude that the court properly refused to suppress the vehicle and sweatshirt seized incident to the lawful arrest (*see People v Fuqua*, 184 AD3d 1093, 1094 [4th Dept 2020], *lv denied* 35 NY3d 1065 [2020]; *People v Lewis*, 89 AD3d 1485, 1485 [4th Dept 2011]; *People v Beach*, 187 AD2d 943, 944 [4th Dept 1992]).

We agree with defendant that, at trial, the court improperly allowed a police officer to identify him in a surveillance video. "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury" (*People v Graham*, 174 AD3d 1486, 1487-1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019] [internal quotation marks omitted]; *see People v Russell*, 165 AD2d 327, 333 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]). Here, "there was no basis for concluding that the [officer] was more likely than the jury to correctly determine whether . . . defendant was depicted in the video" (*People v Reddick*, 164 AD3d 526, 527 [2d Dept 2018], *lv denied* 32 NY3d 1114 [2018]; *see People v Oquendo*, 152 AD3d 1220, 1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). The officer was not familiar with defendant, and there was no evidence showing that defendant had changed his appearance before trial (*see Reddick*, 164 AD3d at 527; *cf. People v Sanchez*, 21 NY3d 216, 225 [2013]; *People v Jones*, 161 AD3d 1103, 1103 [2d Dept 2018], *lv denied* 32 NY3d 938 [2018]).

We also agree with defendant that the court erred in permitting the People to elicit testimony from police officers regarding what they learned from others about defendant's involvement in the shooting. The challenged testimony was hearsay that was not admissible under any cognizable exception to the hearsay rule. The

People essentially argue that this testimony was admissible under *People v Molineux* (168 NY 264 [1901]) to complete the narrative with background information. We reject that argument and reiterate that "there is no *Molineux* exception to the rule against hearsay" (*People v Meadow*, 140 AD3d 1596, 1599 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016], *reconsideration denied* 28 NY3d 972 [2016]). There is also no general exception to the hearsay rule for testimony relating to background conduct, information, or explanation of a subject matter or event (*see id.* at 1600; *see generally* Guide to NY Evid rule 8.01, Admissibility of Hearsay).

Nevertheless, we conclude that any error in admitting the challenged testimony was harmless in light of the otherwise overwhelming evidence of defendant's guilt and because there was no significant probability that the error in admitting the testimony contributed to the conviction (*see Reddick*, 164 AD3d at 527; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's further contention, we conclude that the People established a sufficient foundation for the admission in evidence of recordings of telephone calls made by defendant while he was incarcerated (*see generally People v Ely*, 68 NY2d 520, 527-528 [1986]; *People v Sostre*, 172 AD3d 1623, 1625 [3d Dept 2019], *lv denied* 34 NY3d 938 [2019]; *People v Bell*, 5 AD3d 858, 861 [3d Dept 2004]; *People v Rendon*, 273 AD2d 616, 618 [3d Dept 2000], *lv denied* 95 NY2d 968 [2000]). The content of the recordings established defendant's identity as the caller, and the testimony of the individual in charge of maintaining 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" (*Ely*, 68 NY2d at 527).

To the extent defendant contends that the evidence adduced by the People at trial created the possibility that he was convicted of the crime of criminal possession of a weapon in the second degree on a theory different from that charged in the indictment or that the evidence created an issue of nonfacial duplicity, those contentions are not preserved for our review (*see People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021]; *People v Lynch*, 191 AD3d 1476, 1477 [4th Dept 2021]; *see generally People v Allen*, 24 NY3d 441, 449-450 [2014]), 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]). We further conclude that, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). On the record before us, the testimony adduced at trial, and any inconsistencies presented therein, merely "presented issues of credibility for the factfinder to resolve" (*People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *see People v Withrow*, 170 AD3d 1578, 1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]), and we see no reason to disturb the jury's credibility determinations here.

We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see People v Benevento*, 91 NY2d 708, 712 [1998]). "[T]rial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness" (*People v Baldi*, 54 NY2d 137, 146 [1981]). Moreover, notwithstanding defense counsel's failure to lodge certain objections, our review of the record discloses that defense counsel appropriately sought to preclude evidence before trial, made compelling opening and closing statements, and effectively cross-examined the People's witnesses. Thus, viewing the evidence, the law, and the circumstances of the case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Tetro*, 175 AD3d 1784, 1786 [4th Dept 2019]; *People v Withrow*, 170 AD3d 1578, 1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]; *see generally Baldi*, 54 NY2d at 147).

Defendant also contends that the court improperly imposed an increased sentence based on the prosecutor's statements at sentencing regarding defendant's lack of remorse, his refusal to participate in an interview with the Department of Probation, and his absence from court when the verdict was read. Defendant argues that those statements violated his right to remain silent. We reject that contention because a sentencing court must consider all circumstances related to the crime and the defendant when imposing a sentence following conviction (*see People v Lipford*, 129 AD3d 1528, 1531 [4th Dept 2015], *lv denied* 26 NY3d 1041 [2015]; *People v Cox*, 78 AD3d 1571, 1572 [4th Dept 2010], *lv denied* 16 NY3d 742 [2011]). We note that the court is permitted to rely on the type of information that defendant now objects to when considering the sentence to impose (*see e.g. People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]; *People v Tromans*, 177 AD3d 1103, 1107 [3d Dept 2019]; *People v Eberling*, 256 AD2d 1217, 1218 [4th Dept 1998], *lv denied* 93 NY2d 852 [1999]), and the record contains no indication that the court relied on improper information in rendering the sentence.

Finally, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

78

KA 18-02102

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHANI JOHNSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 10, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), attempted robbery in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [2]). Defendant contends that the verdict is against the weight of the evidence with respect to the element of "intent to cause the death of another" under Penal Law § 125.25 (1). We reject that contention. " 'The testimony established that . . . defendant shot [the murder] victim[] in the [torso] at close range when that victim tried to . . . thwart . . . defendant's robbery attempt' and, thus, '[t]he jury was justified in inferring, based on these facts, an intent on the part of . . . defendant to kill' " (*People v Williams*, 154 AD3d 1290, 1291 [4th Dept 2017], *lv denied* 30 NY3d 1110 [2018]). We also reject defendant's contention that the verdict on the remaining counts is against the weight of the evidence with respect to the issue of identity (*see People v Alston*, 174 AD3d 1349, 1349 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019], *reconsideration denied* 34 NY3d 1014 [2019]). Among other things, the People presented the testimony of an eyewitness who was acquainted with defendant and positively identified him at trial as the perpetrator. 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]).

Defendant contends that County Court erred in rejecting his *Batson* challenge with respect to the People's exercise of peremptory strikes on two prospective jurors. We reject that contention. "*Batson* outlines a three-step protocol to be applied when a defendant challenges the use of peremptory strikes during voir dire to exclude potential jurors for pretextual reasons" (*People v Bridgeforth*, 28 NY3d 567, 571 [2016]). "At step one [of a *Batson* challenge], the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*id.*; *see People v Hecker*, 15 NY3d 625, 634-635 [2010]; *People v Pescara*, 162 AD3d 1772, 1772-1773 [4th Dept 2018]). "The burden at step two is minimal, and the explanation must be upheld if it is based on something other than the juror's race, gender, or other protected characteristic" (*People v Smouse*, 160 AD3d 1353, 1355 [4th Dept 2018]; *see People v Payne*, 88 NY2d 172, 183 [1996]). "To satisfy its step two burden, the nonmovant need not offer a persuasive or even a plausible explanation but may offer *any facially neutral reason* for the challenge—even if that reason is ill-founded—so long as the reason does not violate equal protection" (*Smouse*, 160 AD3d at 1355 [internal quotation marks omitted]; *see Payne*, 88 NY2d at 183).

Contrary to defendant's contention, we conclude that the court properly determined that the People met their burden at step two by offering a facially race-neutral explanation for each challenge (*see generally People v Escobar*, 181 AD3d 1194, 1195-1196 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]). With respect to the first prospective juror, the prosecutor explained that he exercised that strike based upon the prospective juror's acquaintance with a reluctant prosecution witness who could become more reluctant to testify if he recognized someone on the jury. The court properly accepted that explanation as a race-neutral and nonpretextual reason for the challenge (*see People v Allen*, 122 AD3d 1423, 1424 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015], *reconsideration denied* 25 NY3d 1197 [2015]; *People v Gant*, 291 AD2d 912, 912 [4th Dept 2002], *lv denied* 98 NY2d 675 [2002]). With respect to the second prospective juror, the prosecutor explained that he challenged her because her close family member was convicted of murder and another member of her family was murdered. Again, the court did not err in determining that the prosecutor's explanation constituted a race-neutral and nonpretextual reason for the prosecutor's challenge (*see People v Feliciano*, 228 AD2d 519, 519 [2d Dept 1996], *lv denied* 88 NY2d 1068 [1996]). A "trial court's determination whether a proffered race-neutral reason is pretextual is accorded 'great deference' on appeal" (*Hecker*, 15 NY3d at 656), and we see no reason, on this record, to disturb the court's determination that the prosecutor's explanations were not pretextual (*see People v Wheeler*, 124 AD3d 1136, 1137 [3d Dept 2015], *lv denied* 25 NY3d 993

[2015]).

Defendant further contends that the prosecutor's subsequent failure to challenge another prospective juror who, like the second prospective juror, had family members who were either murdered or charged with murder establishes that the prosecutor's challenges to the two prospective jurors were racially motivated. That contention is not preserved for our review inasmuch as "defendant did not renew his *Batson* application after the prosecutor failed to challenge the latter panelist" (*People v Jiles*, 158 AD3d 75, 79 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]; *see People v Toliver*, 102 AD3d 411, 412 [1st Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied* 21 NY3d 1077 [2013]). 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 Hodges*, 99 AD3d 629, 629-630 [1st Dept 2012], *lv denied* 20 NY3d 1062 [2013]). We also reject defendant's contention that the sentence imposed on the count of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]) must run concurrently with the sentence imposed on the count of intentional murder (§ 125.25 [1]). "Penal Law § 70.25 (2), which governs consecutive sentencing, prohibits consecutive sentences where either 'a single act [or omission] constitutes two offenses,' or 'a single act [or omission] constitutes one of the offenses and a material element of another' " (*People v Brown*, 21 NY3d 739, 750 [2013]; *see generally People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]). Where, however, "separate acts are committed against different victims during the same criminal transaction, the court may properly impose consecutive sentences in the exercise of its discretion" (*People v Lemon*, 38 AD3d 1298, 1299 [4th Dept 2007], *lv denied* 9 NY3d 846 [2007], *reconsideration denied* 9 NY3d 962 [2007]; *see People v Brathwaite*, 63 NY2d 839, 843 [1984]; *see generally People v Couser*, 126 AD3d 1419, 1421 [4th Dept 2015], *affd* 28 NY3d 368 [2016]).

Here, the act that caused the death of one victim and provided the basis for the intentional murder conviction was the act of shooting the victim who was seated in the passenger seat of a vehicle. That act " 'was separate and distinct from' " defendant's attempt to rob a different victim who was seated in the driver seat of the vehicle (*Houston*, 142 AD3d at 1399; *see People v Sims*, 105 AD2d 1087, 1087 [4th Dept 1984]). Moreover, the attempted robbery count alleged that defendant was "armed with a deadly weapon" during the commission of the crime (§ 160.15 [2]), not that he caused "serious physical injury" during the commission of or flight from the attempted robbery (§ 160.15 [1]; *cf*. *People v Laureano*, 87 NY2d 640, 644 [1996]; *Lemon*, 38 AD3d at 1299).

Relying on a change in the law that occurred after the date of his conviction but before he perfected this appeal (*see* CPL 420.35 [2-a], as amended by L 2020, ch 144, § 1), defendant asks this Court to waive the crime victim assistance fee and DNA databank fee based on the fact that he was under the age of 21 at the time of the offense. Even assuming, arguendo, that defendant can raise that request for the

first time on appeal (*cf. People v Parker*, 137 AD3d 1625, 1626 [4th Dept 2016]; *see generally* CPL 470.05 [2]), we decline to waive those fees inasmuch as defendant has failed to establish any of the statutory grounds upon which such fees could be waived (*see* CPL 420.35 [2-a] [a]-[c]). Finally, the sentence is not unduly harsh or severe.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-00548

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

JESSICA KAMMERER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LUIS ANGEL MERCADO, ET AL., DEFENDANTS,
AND AUBURN BUFFALO REALTY LLC,
DEFENDANT-RESPONDENT.

VANDETTE PENBERTHY LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (MARC A. SCHULZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered March 16, 2020. The order denied the motion of plaintiff for partial summary judgment against defendant Auburn Buffalo Realty LLC and granted the cross motion of that defendant for summary judgment dismissing the complaint against it.

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 injuries that she sustained when a caustic substance fell on her while she was working in a building owned by Auburn Buffalo Realty LLC (defendant). Plaintiff's employer, defendant James T. Medley, was a contractor hired to perform work in the building. At the time of the incident, plaintiff and Medley were attempting to fix a clogged pipe. Plaintiff was on the first floor of the building, standing on a makeshift scaffold and holding the pipe. Medley was on the second floor and, when he cut the pipe, liquid in the pipe fell on plaintiff and caused burns to her face, neck, arms and body.

Plaintiff moved for summary judgment with respect to defendant's liability under Labor Law §§ 240 (1) and 241 (6). Defendant cross-moved for summary judgment dismissing the complaint against it. Supreme Court denied plaintiff's motion, granted defendant's cross motion, and dismissed plaintiff's complaint and all claims against defendant. Plaintiff appeals and we affirm.

We note at the outset that plaintiff has abandoned any contention that the court erred in granting the cross motion with respect to the

Labor Law § 200 claim and common-law negligence cause of action against defendant inasmuch as plaintiff failed to address that claim and cause of action in her brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to plaintiff's contention, the court properly denied her motion and granted defendant's cross motion with respect to the Labor Law § 240 (1) claim. Assuming, arguendo, that plaintiff was engaged in repair work within the meaning of Labor Law § 240 (1) at the time of her injury (*see Crossett v Schofell*, 256 AD2d 881, 882 [3d Dept 1998]; *Benfanti v Tri-Main Dev.*, 231 AD2d 855, 855 [4th Dept 1996]; *cf. Leathers v Zaepfel Dev. Co., Inc.* [appeal No. 2], 121 AD3d 1500, 1501-1502 [4th Dept 2014], *lv denied* 24 NY3d 917 [2015]), we conclude that plaintiff's injury was not caused by a hazard against which the statute was intended to protect. Plaintiff was injured by a substance that fell from the pipe, and the substance in the pipe "was not a material being hoisted or a load that required securing" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *cf. Sniadecki v Westfield Cent. School Dist.*, 272 AD2d 955, 955 [4th Dept 2000]).

Contrary to plaintiff's further contention, the court also properly denied her motion and granted defendant's cross motion with respect to the Labor Law § 241 (6) claim. Again, assuming, arguendo, that plaintiff was engaged in repair work subject to the protections of section 241 (6) (*see* 12 NYCRR 23-1.4 [b] [13]), we conclude that plaintiff failed to establish a violation of 12 NYCRR 23-1.8 (c) (4) because she was not required to "use or handle" the substance in the pipe within the meaning of that regulation. To the extent that plaintiff contends on appeal that defendant violated other regulations that she alleged were violated in her bill of particulars, her contention is not properly before us inasmuch as plaintiff did not address those regulations in her motion or in opposition to defendant's cross motion (*see Ciesinski*, 202 AD2d at 985).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 17-01910

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD DARWISH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DIANNE C. RUSSELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 29, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree, criminal possession of a weapon in the third degree, grand larceny in the fourth degree, escape in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one through five and seven of the indictment.

Memorandum: In this prosecution arising from the knifepoint robbery of a vehicle from a woman and her teenage daughters in the parking lot of a shopping mall, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [3]). Defendant contends that County Court committed reversible error by failing to conduct an inquiry into his complaints about defense counsel at several junctures during the proceedings. We agree with defendant in part.

Although "[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option . . . , the right to be represented by counsel of one's own choosing is a valued one, and a defendant may be entitled to new assigned counsel upon showing 'good cause for substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824 [1990]; *see People v Porto*, 16 NY3d 93, 99 [2010]). "[A] court's duty to consider . . . a motion [for substitution of counsel] is invoked only where a defendant makes a 'seemingly serious request[ ]' " for new counsel (*Porto*, 16 NY3d at 99-100; *see Sides*, 75

NY2d at 824). When a defendant's request for substitution of counsel is supported by "specific factual allegations of 'serious complaints about counsel[,]' . . . the court must make at least a 'minimal inquiry' " into " 'the nature of the disagreement or its potential for resolution' " (*Porto*, 16 NY3d at 100; *see People v Smith*, 30 NY3d 1043, 1044 [2017]; *Sides*, 75 NY2d at 825; *People v Medina*, 44 NY2d 199, 207 [1978]). In addition, "where potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication, the trial court is obligated to make a minimal inquiry" (*Porto*, 16 NY3d at 101).

Contrary to defendant's contention, the court was not obligated to make a minimal inquiry based on his statements prior to a suppression hearing inasmuch as " 'the record reflects that both defendant and the court understood that defendant sought an adjournment . . . and did not request new assigned counsel' " (*People v Raghnal*, 185 AD3d 1411, 1413 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020], quoting *People v Johnson*, 94 AD3d 1496, 1497 [4th Dept 2012], *affd* 20 NY3d 990 [2013]; *see generally Porto*, 16 NY3d at 99-100). We similarly reject defendant's contentions that the court was required to conduct a minimal inquiry following his submission of two letters to the court containing allegations of various shortcomings in defense counsel's performance and that his subsequent pro se motion to reopen the suppression hearing contained complaints about defense counsel that warranted an inquiry by the court. Neither the letters nor the motion "contained a request that the court provide defendant with substitute counsel" (*Raghnal*, 185 AD3d at 1412), and thus "it cannot be said that the court erred in failing to conduct an inquiry to determine whether good cause was shown to substitute counsel" (*People v Singletary*, 63 AD3d 1654, 1654 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009]; *see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]; *People v La Bar*, 16 AD3d 1084, 1085 [2005], *lv denied* 5 NY3d 764 [2005]; *cf. Sides*, 75 NY2d at 824-825).

We agree with defendant, however, that the court committed reversible error by failing to conduct an inquiry following defense counsel's submission of a letter seeking to be relieved from the case and in light of defendant's responses to that letter. In particular, the record establishes that defense counsel—prompted by defendant's prior specific complaints about her failure to file motions, seek relevant evidence through discovery such as surveillance video of the incident, investigate specified witnesses, and engage in meaningful consultation and preparation—expressed a breakdown in trust and communication based on her interactions and appearances with defendant and sought to be relieved from representing defendant on the ground that she was unable to handle his case (*see People v Gibson*, 126 AD3d 1300, 1301 [4th Dept 2015]). In his responsive letter, which included a request for substitution of counsel, defendant expressly stated that there had been "a breakdown in communication between attorney and client." Defendant's subsequent response also indicated that he was requesting new counsel on the basis of his complaints and the breakdown in the relationship. Defendant's specific complaints remained uncontradicted by defense counsel inasmuch as she failed to address them in her letter or at a later appearance when defendant

once again voiced his complaints (*see People v Beard*, 100 AD3d 1508, 1511 [4th Dept 2012]). We thus conclude on this record that "[d]efendant's request on its face suggested a serious possibility of irreconcilable conflict with his lawyer, as evidenced by the [acknowledgment] of counsel that a complete breakdown of communication and lack of trust had developed in their relationship" (*Sides*, 75 NY2d at 824-825). "[W]here[, as here,] potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication, the trial court is obligated to make a minimal inquiry" (*Porto*, 16 NY3d at 101; *see Sides*, 75 NY2d at 824-825; *People v Tucker*, 139 AD3d 1399, 1400 [4th Dept 2016]).

The court failed to fulfill its obligation. Instead, by summarily dismissing defendant's request on the ground that defendant had discharged prior attorneys and had requested earlier in the proceedings that defense counsel be assigned, the court violated its "*ongoing* duty" to " 'carefully evaluate serious complaints about counsel' " (*People v Linares*, 2 NY3d 507, 510 [2004] [emphasis added]; *see People v McClam*, 60 AD3d 968, 970-971 [2d Dept 2009]). Indeed, the court "erred by failing to ask even a single question about the nature of the disagreement or its potential for resolution" (*Sides*, 75 NY2d at 825; *see Tucker*, 139 AD3d at 1400). Although "[t]he court might well have found upon limited inquiry that defendant's request was without genuine basis, . . . it could not so summarily dismiss th[at] request" (*Sides*, 75 NY2d at 825; *see People v Edwards*, 173 AD3d 1615, 1617 [4th Dept 2019]; *Tucker*, 139 AD3d at 1400-1401). We therefore reverse the judgment and grant a new trial on counts one through five and seven of the indictment (*see Edwards*, 173 AD3d at 1617).

In light of our determination, there is no need to address defendant's remaining contentions.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-00801

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

ROBERT RANDALL BOMER, IN SUBSTITUTION FOR
JOYCE B. DEAN, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID F. DEAN, M.D., DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

ALLEN & O'BRIEN, ROCHESTER (STUART L. LEVISON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered May 29, 2020. The order, insofar as appealed from, granted the motion of Robert Randall Bomer to be substituted in the place of the deceased plaintiff, and denied those parts of the cross motion of defendant with respect to decedent's claims for spousal support under Family Court Act article 4 and attorneys' fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, and those parts of the cross motion seeking to dismiss the claims for spousal support under article 4 of the Family Court Act ancillary to and prosecuted under Index No. 2014/3166 and for attorneys' fees under Index Nos. 2016/7447 and 2014/3166 are granted.

Memorandum: Defendant and Joyce B. Dean (decedent) were married in 1997. Although they had no children together, decedent had two children from a prior marriage, one of whom is plaintiff. Defendant and decedent moved from Texas to Monroe County in March 2013. Shortly thereafter, decedent visited plaintiff in Texas, but never returned. A few months later, she removed defendant as her power of attorney, appointing plaintiff in defendant's stead. In March 2014, decedent commenced a divorce action against defendant. In July 2016, Supreme Court dismissed most of the 2014 divorce action on jurisdictional grounds and converted the remaining aspects of that action—i.e., requests for maintenance, medical and dental coverage, and medical expenses—into a spousal support proceeding under Family Court Act article 4 (2014 support action).

Shortly thereafter, decedent commenced another divorce action (2016 divorce action) that was practically identical to the action commenced in 2014. In May 2019, decedent died while both the 2016

divorce action and the 2014 support action were still pending. Several months later, decedent's attorney moved to substitute plaintiff—who served as decedent's executor in a probate proceeding in Texas—as plaintiff in both the 2014 support and the 2016 divorce actions so that he could pursue decedent's claims for retroactive spousal support and attorneys' fees. Defendant opposed the motion and made an oral cross motion to dismiss the claims for retroactive spousal support and attorneys' fees in the 2014 support and 2016 divorce actions, which he maintained had both abated upon decedent's death. In his written cross motion, he also sought, inter alia, sanctions against decedent's estate pursuant to 22 NYCRR 130-1.1. Defendant appeals from an order insofar as it effectively granted the motion to substitute plaintiff in both actions and denied those parts of the cross motion with respect to decedent's claims for spousal support under Family Court Act article 4 and attorneys' fees in both actions, and we reverse the order to that extent.

We agree with defendant that, under the circumstances of this case, both the 2014 support action and the 2016 divorce action abated upon decedent's death, precluding the court from taking any further measures in either action. It is well settled that a divorce action abates upon the death of either party to the action because the marital relationship ceases to exist at that time (*see Cornell v Cornell*, 7 NY2d 164, 169 [1959], *rearg denied* 7 NY2d 995 [1960], *mot to amend remittitur granted* 7 NY2d 996 [1960]; *Adams v Margulis*, 191 AD3d 1478, 1480 [4th Dept 2021]; *First Metlife Invs. Ins. Co. v Filippino*, 170 AD3d 672, 674 [2d Dept 2019]). When abatement occurs, the court lacks jurisdiction to act (*see First Metlife Invs. Ins. Co.*, 170 AD3d at 674; *Bordas v Bordas*, 134 AD3d 660, 660 [2d Dept 2015]; *King v Kline*, 65 AD3d 432, 433 [1st Dept 2009]). The abatement rule also typically applies to ancillary issues, such as maintenance and attorneys' fees sought in a divorce action, which are "necessarily dependent on the existence of a divorce action" (*King*, 65 AD3d at 433) and, with respect to those issues, applies regardless of which spouse—payee or payor—has died (*see generally id.*; *Flaherty v Lynch*, 292 AD2d 340, 341 [2d Dept 2002], *lv denied* 99 NY2d 529 [2002]).

There are, however, some exceptions to the rule that divorce actions abate upon the death of a party. Specifically, courts have recognized that abatement does not occur when a party's rights have vested prior to the death or when all that remains to be done in the action following a party's death is for the court to effectuate a ministerial act (*see e.g. Cornell*, 7 NY2d at 169-170; *Charasz v Rozenblum*, 128 AD3d 631, 632 [2d Dept 2015]; *Matter of Agliata*, 222 AD2d 1025, 1025 [4th Dept 1995]).

Here, neither exception applies with respect to the 2016 divorce action inasmuch as decedent had not acquired any vested rights with respect to maintenance or attorneys' fees, nor were only ministerial acts remaining in that action. Consequently, we conclude that, despite properly concluding that the maintenance and equitable distribution relief sought in the 2016 divorce action abated upon decedent's death, the court erred to the extent that it granted that

part of the motion to substitute plaintiff in that action and to the extent that it converted any portion thereof into a proceeding for spousal support. Thus, the court also erred in denying the cross motion with respect to the claim for attorneys' fees asserted in the 2016 divorce action, which also abated upon decedent's death. In short, once the 2016 divorce action abated upon decedent's death, the court lacked power to do anything in that action (*see generally Bordas*, 134 AD3d at 660; *King*, 65 AD3d at 433).

Similarly, we conclude that the 2014 support action, including any related claim for attorneys' fees, also abated upon decedent's death and should have been dismissed. Akin to the abatement rule that applies in the context of a divorce action, we note that any order of support terminates upon the death of either party (*see* Family Ct Act § 412 [10] [d]). Inasmuch as no order of support was ever entered on decedent's behalf with respect to the 2014 support action, we conclude that decedent did not acquire any vested rights to spousal support or any other ancillary relief in that action prior to her death, and therefore that action fully abated upon decedent's death (*see generally Sperber v Schwartz*, 139 AD2d 640, 642 [2d Dept 1988], *lv dismissed* 73 NY2d 871 [1989], *lv denied* 74 NY2d 606 [1989]; *cf. generally Peterson v Goldberg*, 180 AD2d 260, 263-264 [2d Dept 1992], *lv dismissed* 81 NY2d 835 [1993]).

Indeed, to conclude otherwise would essentially convert an unresolved and unliquidated spousal support claim into a vested right to the same. In substance, that would elevate that claim over any right to maintenance in the 2016 divorce action, which the court properly concluded had abated upon decedent's death. Absent legislation to the contrary, we decline to adopt that view. Also supporting our conclusion that unresolved and unliquidated spousal support claims abate upon the death of a party, much like maintenance claims do, we note that legislative revisions to the statute governing the computation of spousal support suggest that it should be treated identically to maintenance claims (*see* Merril Sobie, Supp Practice Commentaries, McKinney's Cons Laws of NY, 2015 Electronic Update, Family Ct Act § 412). Consequently, the court erred in granting that part of the motion to substitute plaintiff in the 2014 support action and in denying those parts of the cross motion with respect to the claims for spousal support and attorneys' fees asserted in that action.

Finally, we agree with plaintiff that defendant's contention with respect to sanctions is not properly before us because defendant did not appeal from that part of the order denying his cross motion insofar as it sought sanctions (*see generally* CPLR 5515 [1]; *Matter of Long Is. Pine Barrens Socy., Inc. v Central Pine Barrens Joint Planning & Policy Commn.*, 113 AD3d 853, 855 [2d Dept 2014]; *City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 517 [2d Dept 1997]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-00700

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

GAIL M. ROTE AND GREGORY J. MALEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOHN A. GIBBS, DEFENDANT-RESPONDENT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GERALD J. VELLA, SPRINGVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered December 23, 2019. The judgment dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the complaint is reinstated and judgment is granted in favor of plaintiffs as follows:

> It is ORDERED, ADJUDGED and DECLARED that plaintiffs are the lawful owners of the disputed parcel as depicted in the Survey of 10151 Point Peter Road by Nussbaumer & Clarke, Inc. dated October 1, 2015.

Memorandum: Plaintiffs commenced this action pursuant to RPAPL article 15 seeking a determination that they are the lawful owners of specified real property based on their adverse possession of that property. Following a nonjury trial, Supreme Court concluded that plaintiffs failed to establish that they acquired title to the subject property by adverse possession and issued a judgment dismissing the complaint. We agree with plaintiffs that the court erred and that they are the lawful owners of the subject property.

In 1948, Frank and Elvina Rote purchased property in the Town of Persia, Cattaraugus County (Rote property). One or both of them owned it until 2012, when the last one of them died. Plaintiff Gail M. Rote was their eldest child, and she and her husband, plaintiff Gregory J. Maley, purchased the property from Frank Rote’s estate in 2014. The Rote property undisputably consists of all of the titled property to the south of Point Peter Road. North of that road is an area of land, consisting of steep ravines and wilderness, which is bounded on the north by Cattaraugus Creek (disputed parcel).

The Rotes and Maley (collectively, Rote family) have at all relevant times believed that they owned the disputed parcel, and that belief was buttressed by the fact that tax maps listed them as the owners of that property and the fact that they paid taxes on that property from 1948 until 2015. The creek is the boundary line between the Town of Persia, Cattaraugus County and the Town of Collins, Erie County.

In 2011, defendant purchased property to the north of the creek in the Town of Collins from Edward Lillie, who had purchased that property from his father's estate. Despite the fact that the Town of Persia tax maps listed the Rote family as the owners of the disputed parcel, the deeds in defendant's chain of title established that he was the deeded owner of that land. Once defendant showed his deed to Town of Persia employees in 2015, they corrected the tax maps, prompting plaintiffs to commence this action.

At trial, plaintiffs presented evidence that the Rote family and their friends continuously used the disputed parcel ever since the family purchased the Rote property in 1948. Although friends of the Rote family knew that they had permission to use the disputed parcel, they nevertheless repeatedly sought permission from members of the Rote family to use the disputed parcel for, inter alia, dumping, trapping, hunting and fishing. The Town of Persia likewise sought permission from the Rote family to dump debris and snow onto the disputed parcel, and an oil company obtained an easement from the Rote family over the disputed parcel for the purpose of installing pipes. The Department of Environmental Conservation (DEC) also sought an easement over the disputed parcel from the Rote family, but the family denied that request.

Throughout the time that the Rote family owned their property, their septic and water systems drained onto the disputed parcel and, at one point, they had a portion of the disputed parcel excavated with a backhoe to clear their septic line. The Lillie family, owners of defendant's property from 1941 until 2011, never disputed the Rote family's ownership of the disputed parcel, and the Lillie family did not assert any claim of ownership in that land during the 70 years they held title to the disputed parcel.

At trial, witnesses for plaintiffs and defendant conceded that, despite many people asking the Rote family for permission to use the disputed parcel, "[a] lot of people," including people from outside the area, used the creek for kayaking, tubing and fishing. According to defendant, "[h]alf of Gowanda" used the creek or disputed parcel in the summers without asking for permission from anyone. Following the trial, the court found in favor of defendant and dismissed the complaint.

As a preliminary matter, no one disputes that the pre-2008 version of the RPAPL applies inasmuch as plaintiffs' claim, as alleged in the complaint and the supporting documentation submitted by plaintiffs, would have vested before 2008 (*see Yee v Panousopoulos*,

176 AD3d 1142, 1144 [2d Dept 2019]; *Franza v Olin*, 73 AD3d 44, 47 [4th Dept 2010]). "To establish a claim of adverse possession under the pre-2008 version of the RPAPL, a plaintiff is required to show that possession of the disputed property was: '(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period' " (*Slacer v Kearney*, 151 AD3d 1602, 1603-1604 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018], quoting *Walling v Przybylo*, 7 NY3d 228, 232 [2006]; *see Corigliano v Sunick*, 56 AD3d 1121, 1121 [4th Dept 2008]).

Where a party's claim of right to property is not founded upon a written instrument, "the party asserting title by adverse possession must establish that the land was 'usually cultivated or improved' or 'protected by a substantial inclosure' " (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012], quoting RPAPL former 522). Inasmuch as the law disfavors the acquisition of title by adverse possession, the elements thereof "must be proven by clear and convincing evidence" (*id.*; *see Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]).

On review of a determination following a bench trial, "we independently review the weight of the evidence and may grant the judgment warranted by the record, while according due deference to the trial judge's factual findings particularly where . . . they rest largely upon credibility assessments" (*Eddyville Corp. v Relyea*, 35 AD3d 1063, 1064 [3d Dept 2006] [internal quotation marks omitted]; *see Shawangunk Conservancy v Fink*, 305 AD2d 902, 903-904 [3d Dept 2003]; *see also Dryden Mut. Ins. Co. v Goessl*, 117 AD3d 1512, 1513 [4th Dept 2014], *affd* 27 NY3d 1050 [2016]).

Here, the facts are generally not in dispute, and the issue presented is whether those facts establish by clear and convincing evidence the requisite elements of adverse possession. On our independent review of the evidence (*see Smiley v State of New York* [appeal No. 2], 188 AD3d 1661, 1662 [4th Dept 2020]), we agree with plaintiffs that they established each element by the requisite degree of proof.

"A party claiming title by adverse possession 'is not required to show enmity or specific acts of hostility in order to establish the element of hostility' . . . Th[at] element is satisfied where an individual asserts a right to the property that is 'adverse to the title owner and also in opposition to the rights of the true owner' " (*Estate of Becker*, 19 NY3d at 81). "The element of hostility may be established by a distinct assertion of a right hostile to the owner," and "hostility may be presumed if all of the other elements of adverse possession have been established" (*Dekdebrun v Kane*, 82 AD3d 1644, 1646 [4th Dept 2011] [internal quotation marks omitted]).

In our view, plaintiffs established that element by clear and convincing evidence inasmuch as there was no "indication that [the Rote family's] possession was with the consent or permission of defendant[]" or the Lillies (*Tubolino v Drake*, 178 AD2d 951, 952 [4th Dept 1991]). Additionally, the Rote family asserted rights in the disputed parcel adverse to the title owner by paying taxes on that

property, granting others permission to use that property, granting an oil company an easement over the disputed parcel, denying permission for the DEC to allow public fishing on that property, draining their septic and water onto that property and excavating areas of that property to clear the septic line (*see id.*).

With respect to the element of actual possession, "[t]he issue is 'actual occupation,' not subjective knowledge" of ownership (*Walling*, 7 NY3d at 233). In other words, "[c]onduct will prevail over knowledge, particularly [where, as here,] the true owners have acquiesced in the exercise of ownership rights by the adverse possessors" (*id.* at 232-233; *see Children's Magical Garden, Inc. v Norfolk St. Dev., LLC*, 164 AD3d 73, 84 [1st Dept 2018]). Based on the Rote family's acts of dominion and control and the 70-year acquiescence of the Lillies, i.e., the prior title owners of defendant's property, and the Rote family's exercise of ownership, we conclude that plaintiffs established the element of actual possession.

"The element of 'open and notorious' requires that the possession be sufficiently visible such that a casual inspection by the owner of the property would reveal the adverse possessor's occupation and use thereof" (*Weinstein Enters., Inc. v Pesso*, 231 AD2d 516, 517 [2d Dept 1996]). Here, the evidence at trial demonstrated that everyone in the community, including state and local government agencies and defendant's predecessor in title, believed that the Rote family were the owners of the disputed parcel, and many recognized a need to obtain their permission to use the property. Even a casual inspection of the disputed parcel would have revealed that the Rote family were draining their water and sewage onto that property and dumping their yard debris and snow on that property. In our view, such evidence satisfies the "open and notorious" element.

"To establish the 'exclusivity' element, the adverse possessor must alone care for or improve the disputed property as if it were his/her own . . . The focus is on whether the party claiming title by adverse possession exercised exclusive possession and control of the property. Thus, allowing others to use the property does not necessarily negate 'exclusivity.' When the party claiming adverse possession permits others to use the property, exclusivity exists where the claimant's use of the property is 'separate and exclusive from the general use' " (*Estate of Becker*, 19 NY3d at 83; *see Air Stream Corp. v 3300 Lawson Corp.*, 99 AD3d 822, 825-826 [2d Dept 2012], *lv denied* 21 NY3d 852 [2013]).

Plaintiffs established by clear and convincing evidence that their use of the disputed parcel was separate and exclusive from the general use. At the outset, we note that we must distinguish between use of the *creek*, and use of the *land* within the disputed parcel. Most of the testimony at trial centered on the seasonal use of the creek, with some occasional use of the disputed parcel by fishers and a few other people who used the property to access the creek.

The seasonal use of the disputed parcel by some members of the public does not change the fact that the Rote family's use of that

property was " 'separate and exclusive from the general use' " (*Estate of Becker*, 19 NY3d at 83). For example, only the Rote family used the disputed parcel for sewage and drainage, and only the Rote family excavated sections of that property to repair drainage pipes. Only the Rote family granted or denied permission to government officials or private companies who asked to use the disputed parcel for the dumping of debris or for recreational use.

"[T]he requirement of continuous possession is satisfied when the adverse claimant's acts of possessing the property, including periods during which the claimant exercises dominion and control over the premises or is physically present on the land . . . , are consistent with acts of possession that ordinary owners of like properties would undertake . . . In other words, '[t]he character of disputed property is crucial in determining what degree of control and what character of possession is required to establish adverse possession' " (*Ray*, 88 NY2d at 159-160).

Inasmuch as the disputed parcel consists of " 'wild and undeveloped land that is not readily susceptible to habitation, cultivation or improvement,' " plaintiffs were not required to establish the same " 'quality of possession as residential or arable land, since the usual acts of ownership are impossible or unreasonable' " (*id.* at 160). Plaintiffs established that the use of the disputed parcel by the Rote family was consistent with acts of possession that ordinary owners of such property would have undertaken, and no one disputes that plaintiffs can tack onto the period of possession of Gail Rote's parents to meet the 10-year requirement of continuity (*see Brocco v Mileo*, 144 AD2d 200, 201 [3d Dept 1988]; *see generally Belotti v Bickhardt*, 228 NY 296, 302-304 [1920]).

Even assuming, arguendo, that plaintiffs' claim to the disputed parcel is not based on a written instrument such as the Town of Persia's tax maps, we conclude that plaintiffs also established that, although the disputed parcel was not " 'protected by a substantial inclosure,' " it was " 'usually cultivated or improved' " (*Estate of Becker*, 19 NY3d at 81, quoting RPAPL former 522). "The requisite character of the acts of improvement sufficient to supply the record owner with notice of an adverse claim will vary with 'the nature and situation of the property and the uses to which it can be applied' . . . and must 'consist of acts such as are usual in the ordinary cultivation and improvement of similar lands by thrifty owners' " (*Ray*, 88 NY2d at 160; *see West v Hogan*, 88 AD3d 1247, 1248 [4th Dept 2011], *affd* 19 NY3d 1073 [2012]). Plaintiffs established that the use of the disputed parcel by the Rote family was the usual use of that wild and undeveloped land, which included steep ravines. Indeed, defendant did not cultivate or improve the property in any way after he asserted title to it, establishing that the Rote family's use was the same as owners of similar lands.

We thus conclude that plaintiffs established each and every element of adverse possession by clear and convincing evidence and we therefore reverse the judgment, reinstate the complaint and award

judgment in favor of plaintiffs.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

189

KA 18-02085

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE ROBINSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 May 2, 2018. The judgment convicted defendant upon a jury verdict of robbery in the third degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and the indictment is dismissed without prejudice to the People to re-present any appropriate charges to another grand jury.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05), defendant contends that County Court erred in denying his request for new counsel without conducting a minimal inquiry concerning his serious complaints about defense counsel. We agree.

Defendant was indicted on a count of robbery in the first degree (Penal Law § 160.15 [4]). During a pretrial appearance, defendant requested new counsel and explained: "I have asked my attorney over and over again to come by and see me, bring me paperwork and talk about matters. I have nothing. It's been like about nine months . . . He still hasn't responded to me . . . my lawyer is not taking this case very seriously." The court stated that this was "a problem." Defendant added: "I didn't even know I was indicted on this charge," referring to an unrelated burglary charge that was also pending. The court noted that defendant was in court when he was arraigned on the burglary charge, and stated that defense counsel had "filed every single piece of paper that he needs to file to defend this case." With respect to defendant's allegation that his attorney had ignored his repeated inquiries over the preceding nine months, the court stated: "I understand that every defendant who's in custody would like their attorney to come over once a week or sooner, but it's just not the way it works." The court assured defendant that he would have

"all the paperwork" that he needed and that defense counsel would be fully prepared, adding that the case "should be worked out" by plea bargain.

Over two months later, defendant followed up on his prior complaints, stating that he had not seen defense counsel between court appearances and still did not have the paperwork that was previously discussed. Defendant also stated: "we have a lot of conflict, him and I, in terms of the case itself. He is saying things I didn't say and I am telling him he did say. And we are just going back and forth." The court assured defendant that it was "sure" defense counsel would provide "whatever paperwork" defendant wanted and noted that defendant and his attorney had been present together in court during pretrial appearances. The court, however, explained: "If there is someone you want to hire instead . . . , no problem. You feel free. The law states we have to give you an attorney. I have given you . . . one of the best defense attorneys in this County . . . maybe he is not the best baby-sitter of all time, but he is one of the best lawyers . . ."

Defendant was acquitted of robbery in the first degree after a jury trial, but was convicted of the lesser included offense of robbery in the third degree.

"Our State and Federal Constitutions guarantee the right to counsel to indigent defendants in criminal proceedings" (*People v Stackhouse*, 194 AD3d 113, 122 [4th Dept 2021]; *see People v Smith*, 18 NY3d 588, 592 [2012]; *People v Porto*, 16 NY3d 93, 99 [2010]). "Although the right does not encompass the right to an attorney of one's own choosing . . . , an indigent person's right to counsel is just as important as that of a person who can afford to retain counsel. Indeed, the right to counsel is not merely a right to the pro forma assignment of a member of the bar . . . Counsel must provide effective representation . . . , and it is well established that the courts have an ongoing duty to safeguard that right" (*Stackhouse*, 194 AD3d at 122 [internal quotation marks omitted]; *see People v Medina*, 44 NY2d 199, 207 [1978]). Consistent with that duty, where a defendant makes a seemingly serious request for new counsel, the court must make some minimal inquiry to determine whether the claim is meritorious (*see People v Sides*, 75 NY2d 822, 824-825 [1990]). The purpose of such an inquiry is to "discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement or its potential for resolution' " (*Porto*, 16 NY3d at 100; *see Stackhouse*, 194 AD3d at 122). The court must upon a showing of " 'good cause' " grant a defendant's request for new counsel (*Porto*, 16 NY3d at 100; *see Stackhouse*, 194 AD3d at 122). A complete breakdown of communication between an attorney and his or her client, if established, constitutes good cause for substitution (*see Sides*, 75 NY2d at 824-825; *People v Gibson*, 126 AD3d 1300, 1302 [4th Dept 2015]).

Here, we conclude that defendant's complaints were sufficiently serious to trigger the court's duty to inquire (*see People v Smith*, 30 NY3d 1043, 1043-1044 [2017]; *People v Edwards*, 173 AD3d 1615, 1616-

1617 [4th Dept 2019]). Indeed, the complaints suggested on their face the possibility of a complete breakdown of communication with defense counsel, either owing to or exacerbated by defense counsel's alleged unwillingness to respond to any of defendant's repeated inquiries over nearly 12 months of representation; were evidenced by defendant's apparent confusion over the status of the separate indictments; and were never refuted by defense counsel, who remained silent in response to defendant's repeated in-court complaints (*see generally Sides*, 75 NY2d at 824-825). Further, the court itself appeared to acknowledge that defendant's complaints, if true, established that there was "a problem" with the representation.

Thus, the court had a duty to conduct a minimal inquiry, which the court failed to do (*see id.*; *Edwards*, 173 AD3d at 1617). Rather than conduct such an inquiry, the court merely assured defendant that his attorney was competent and representing him effectively, would be fully prepared for trial, and would provide copies of defendant's "paperwork," the nature of which is unclear because the court never clarified what paperwork, if any, was outstanding or whether the paperwork had any import to the defense.

Even assuming, arguendo, that the court conducted a minimal inquiry, as our dissenting colleagues contend, we conclude that the inquiry was inadequate because the court did not explore " 'the nature of the disagreement or its potential for resolution' " (*Porto*, 16 NY3d at 100).

Because defendant was convicted of robbery in the third degree as a lesser included offense of robbery in the first degree, the indictment must be dismissed without prejudice to the People to re-present any appropriate charges to another grand jury (*see People v Fagan*, 24 AD3d 1185, 1187 [4th Dept 2005]). In light of our determination, we do not consider defendant's challenge to the severity of his sentence.

All concur except WHALEN, P.J., and PERADOTTO, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we conclude that County Court conducted the requisite minimal inquiry into defendant's complaints about defense counsel prior to denying his request for new counsel.

"[T]he right to be represented by counsel of one's own choosing is a valued one, and a defendant may be entitled to new assigned counsel upon showing 'good cause for a substitution' " (*People v Sides*, 75 NY2d 822, 824 [1990]). The imposition of a duty of inquiry on the court is to ensure that there is, inter alia, no "conflict of interest or other irreconcilable conflict with [defense] counsel" that would constitute such good cause (*id.*). Here, defendant raised a concern that defense counsel had not been to see him and requested new counsel because he "believe[d] there's a conflict of interest." We agree with the majority that defendant arguably made a "seemingly serious request[]" for new counsel, particularly where the record reflects that the parties were temporarily confused at that time over the existence of a separate burglary charge (*id.*; *cf. People v Barnes*,

156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]). In our opinion, however, the court did make a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*Sides*, 75 NY2d at 825; *see also People v Brady*, 192 AD3d 1557, 1558 [4th Dept 2021]).

Specifically, the court permitted defendant to "articulate his complaints about defense counsel" and the perceived conflict (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]). Defendant's further responses clarified for the court that there was no actual conflict between defendant and defense counsel, rather defendant was concerned about a perceived lack of communication and that defense counsel was "not taking this case very seriously." The court then appropriately considered " 'whether present [defense] counsel [wa]s reasonably likely to afford [this] defendant effective assistance' " (*People v Smith*, 18 NY3d 588, 592 [2012]) by addressing the specific work that defense counsel had performed on the case to date. The court provided defendant another opportunity to be heard on defense counsel's performance and conducted a similar inquiry several months later when defendant raised another general concern about defense counsel. Thus, this is not a case where the court "erred by failing to ask even a single question about the nature of the disagreement or its potential for resolution" (*Sides*, 75 NY2d at 825). Instead, because the court "repeatedly allowed defendant to air his concerns about defense counsel" and reasonably concluded after listening to those concerns that they "were insufficient to demonstrate good cause for substitution of counsel" (*People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016] [internal quotation marks omitted]), we would affirm.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-00127

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

JACQUELINE ABATE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD ABATE, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, ERIE COUNTY SHERIFF'S OFFICE, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

THE FITZGERALD FIRM, BUFFALO (BRIAN P. FITZGERALD OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 22, 2020. The order, among other things, denied the motion of defendants County of Erie and Erie County Sheriff's Office for summary judgment and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants County of Erie and Erie County Sheriff's Office in part, dismissing the amended complaint against defendant Erie County Sheriff's Office and dismissing the fourth cause of action against defendant County of Erie, and as modified the order is affirmed without costs.

Memorandum: The decedent, plaintiff's late husband, died while trapped in his car during a significant snowstorm, and plaintiff commenced this action to recover damages upon allegations that the decedent's death was caused by the alleged negligence of, among others, the County of Erie (County) and the Erie County Sheriff's Office (ECSO) in failing to rescue the decedent. The County and ECSO (defendants) moved for summary judgment dismissing the amended complaint against them, and plaintiff cross-moved for, inter alia, summary judgment on the issue of liability. Supreme Court denied both defendants' motion and plaintiff's cross motion. Defendants appeal, and plaintiff cross-appeals.

A sheriff's office has no legal identity separate from its corresponding county, "and thus an 'action against the Sheriff's [Office] is, in effect, an action against the [corresponding] County

itself' " (*Johanson v County of Erie*, 134 AD3d 1530, 1532 [4th Dept 2015]; *see Maio v Kralik*, 70 AD3d 1, 10 [2d Dept 2009]). We therefore agree with defendants, on their appeal, that the court erred in denying their motion insofar as it sought summary judgment dismissing the amended complaint against ECSO. Moreover, because "[t]here is no recovery for loss of consortium in a wrongful death action" (*Kaplan v Sparks*, 192 AD2d 1119, 1120 [4th Dept 1993]), we further agree with defendants that the County is entitled to summary judgment dismissing plaintiff's cause of action against it for loss of consortium. We modify the order accordingly.

We reject defendants' further contention, however, that the court also erred in denying their motion insofar as it sought summary judgment dismissing any vicarious liability claim against the County for the alleged negligence of ECSO's civilian employees. Although a "county may not be held responsible for the negligent acts of the Sheriff and his [or her] deputies on the theory of respondeat superior" (*Mosey v County of Erie*, 117 AD3d 1381, 1385 [4th Dept 2014] [internal quotation marks omitted]; *see Wilson v Sponable*, 81 AD2d 1, 9-12 [4th Dept 1981], *appeal dismissed* 54 NY2d 834 [1981]), we conclude that a county may be vicariously liable for the negligent acts of the sheriff's civilian employees given the general rule that a sheriff's office does not exist separately from its corresponding county (*see Johanson*, 134 AD3d at 1531-1532; *Maio*, 70 AD3d at 10; *see generally Riss v City of New York*, 22 NY2d 579, 581 [1968]). Moreover, and contrary to defendants' further contention, the County is not entitled to immunity under Executive Law § 25 because that statute was not pleaded as an affirmative defense in the answer (*see* CPLR 3018 [b]; *see generally Pitts v State of New York*, 166 AD3d 1505, 1506 [4th Dept 2018]).

Finally, contrary to the contentions of both defendants on their appeal and plaintiff on her cross appeal, there are triable issues of fact regarding the element of special duty and the affirmative defense of governmental function immunity. The court thus properly denied both defendants' motion and plaintiff's cross motion insofar as they sought summary judgment on the issue of liability with respect to the County (*see generally Coleson v City of New York*, 24 NY3d 476, 482-483 [2014]; *Xenias v City of New York*, 191 AD3d 453, 453-454 [1st Dept 2021]; *Williams v City of New York*, 188 AD3d 442, 442 [1st Dept 2020]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

224

CA 20-00485

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF CLARENCE H., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

KEVIN D. WILSON, ACTING DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK L. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered January 28, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, 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.

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.

We reject petitioner's contention that the evidence at the hearing was insufficient to establish that he has a mental abnormality as defined by the Mental Hygiene Law, i.e., "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). Respondent's expert opined that petitioner suffers from a mental abnormality within the meaning of the Mental Hygiene Law based on a diagnosis of antisocial personality disorder and "the condition of psychopathy," which is sufficient to establish the "condition, disease or disorder" prong of the mental abnormality test (*see Matter of State of New York v Jerome A.*, 137 AD3d 557, 558 [1st Dept 2016]; *see generally Matter of Suggs v State of New York*, 142 AD3d 1283, 1284 [4th Dept 2016]). Respondent's expert further linked those diagnoses to petitioner's predisposition to engage in

conduct constituting the commission of sex offenses (*see Matter of State of New York v Dennis K.*, 27 NY3d 718, 744 [2016], *cert denied* — US —, 137 S Ct 579 [2016]). Thus, viewing the evidence in the light most favorable to respondent (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014]), we conclude that it is legally sufficient to establish by clear and convincing evidence " 'the predisposition prong of the mental abnormality test' " (*Matter of State of New York v Anthony B.*, 180 AD3d 688, 691 [2d Dept 2020], *lv denied* 35 NY3d 913 [2020]; *see generally Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609 [4th Dept 2016]).

We reject petitioner's further contention that Supreme Court's determination that he suffers from a mental abnormality is against the weight of the evidence. Although petitioner presented expert testimony that would support a contrary finding, "that merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its 'opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting expert testimony' " (*Matter of Luis S. v State of New York*, 166 AD3d 1550, 1554 [4th Dept 2018], *appeal dismissed* 35 NY3d 985 [2020]).

Contrary to petitioner's further contention, respondent established by clear and convincing evidence (*see* Mental Hygiene Law § 10.09 [h]; *see generally Matter of Groves v State of New York*, 124 AD3d 1213, 1214 [4th Dept 2015]) that petitioner has "serious difficulty in controlling" his sexual conduct (§ 10.03 [i]; *see Matter of Edward T. v State of New York*, 185 AD3d 1423, 1425 [4th Dept 2020]). Although petitioner's behavior while confined, including, inter alia, acts of aggression, dominance and control, did not involve sexual conduct, those behaviors are related to his risk to reoffend because the sexual offenses of which he was convicted involved those behaviors. Moreover, the experts of both petitioner and respondent opined that petitioner needs sexual offender treatment, but petitioner failed to complete the recommended sexual treatment programs while confined (*see generally Matter of Edward T.*, 185 AD3d at 1425). We thus conclude that respondent met its burden of establishing that petitioner "is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control [his] behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]; *see generally Matter of State of New York v Michael M.*, 24 NY3d 649, 658-659 [2014]).

We have considered petitioner's remaining contention and conclude that it is academic.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-01070

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

KIM M. CAPOZZOLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARCANGELO CAPOZZOLO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HOGANWILLIG, PLLC, BUFFALO (KENNETH A. OLENA OF COUNSEL), FOR DEFENDANT-APPELLANT.

TRISHÉ L.A. HYNES, CORFU, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered August 14, 2020. The order, among other things, sanctioned defendant for his willful violation of a court order.

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

Memorandum: In appeal No. 1, defendant appeals from an order that, inter alia, sanctioned him for his willful violation of a prior order of Supreme Court. The prior order was entered approximately nine months earlier and, among other things, denied defendant's motion for modification of his spousal maintenance obligation and ordered him to pay his arrears within five business days. No appeal was taken from the prior order. In appeal No. 2, defendant appeals from an order that, inter alia, directed the County Clerk to enter a money judgment against him in the amount of his then-current arrears and purported to supersede the prior order with respect to the amount owed. In both appeals, defendant contends only that the court erred in denying his motion for modification of his spousal maintenance obligation. Because the court's denial of that motion was embodied in a prior order from which no appeal was taken, we are foreclosed from reviewing defendant's contention (*see Weichert v Delia*, 1 AD3d 1058, 1058-1059 [4th Dept 2003], *lv denied* 1 NY3d 509 [2004]). We note that the order in appeal No. 2 does not address defendant's motion and therefore does not supersede the prior order insofar as it denied that motion (*see Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 427, 428 [1st Dept 2014]). Furthermore, we reject defendant's contention, raised for the first time at oral argument, that the orders on appeal constitute final judgments necessarily affected by the prior order (*cf.* CPLR 5501 [a] [1]). Inasmuch as defendant has not raised any issues with respect to the orders on appeal, he has abandoned any

contentions with respect thereto, and therefore the appeals from those orders must be dismissed (*see Weichert*, 1 AD3d at 1058-1059; *see also Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

266

CA 20-01188

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

KIM M. CAPOZZOLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARCANGELO CAPOZZOLO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HOGANWILLIG, PLLC, BUFFALO (KENNETH A. OLENA OF COUNSEL), FOR DEFENDANT-APPELLANT.

TRISHÉ L.A. HYNES, CORFU, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered September 3, 2020. The order, among other things, directed the County Clerk to enter a money judgment against defendant.

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

Same memorandum as in *Capozzolo v Capozzolo* ([appeal No. 1] — AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

297

KA 18-00379

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AKEEM E. HARRIS, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 14, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). The conviction arose from an incident in which defendant's brother fired seven shots from a handgun at a man with whom defendant and his brother had a dispute, injuring that man and killing an innocent bystander.

Defendant contends that the evidence with respect to his conviction on the murder and attempted murder counts is legally insufficient to establish his liability as an accomplice. We reject that contention. The evidence at trial established that defendant brandished a handgun while telling the intended victim that he should shoot him in the face. When the intended victim grabbed him, defendant directed his brother to take the gun. The brother did so and immediately began to fire. Based on those facts and the surrounding circumstances, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found" that defendant shared his brother's intent to kill and intentionally aided him in doing so by supplying the gun (*People v Steinberg*, 79 NY2d 673, 682 [1992]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Lostumbo*, 182 AD3d 1007, 1008 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Although a different verdict would not have been unreasonable, on this record we cannot conclude that the jury " 'failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). With respect to defense counsel's failure to object to elicitation by the prosecutor of testimony regarding nicknames of defendant and his brother, "it is well settled that '[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success' " (*People v Harris*, 147 AD3d 1328, 1330 [4th Dept 2017]).

Defendant further contends that he was denied his right to counsel of his choosing when, six days before the trial was scheduled to commence, County Court denied his request to replace his assigned counsel with retained counsel and adjourn the trial. When the court revisited the issue two days later, defendant chose to proceed as scheduled with assigned counsel. Thus, defendant waived the issue (*see People v Dukes*, 122 AD3d 1370, 1371 [4th Dept 2014], *lv denied* 26 NY3d 928 [2015]; *People v Jones*, 79 AD3d 1665, 1665 [4th Dept 2010]; *see also People v DeJesus*, 240 AD2d 224, 224 [1st Dept 1997], *lv denied* 90 NY2d 903 [1997]).

Finally, we reject defendant's contention that the court erred in imposing a consecutive sentence on the conviction for "simple" weapon possession (Penal Law § 265.03 [3]). When a defendant is charged with simple possession, "[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751 [2013]). Contrary to defendant's contention, the evidence is "legally sufficient to establish that he possessed the murder weapon in the [van] on the way to the shooting," and thus the possessory crime was completed before the shooting took place (*People v Evans*, 132 AD3d 1398, 1399 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

305

KA 17-00533

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES HARRIS, DEFENDANT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (NIKKI KOWALSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 21, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that Supreme Court erred in refusing to suppress the evidence seized pursuant to an eavesdropping warrant. We reject that contention.

Contrary to defendant's contention that the warrant application did not meet the requirements of article 700 of the CPL, the record supports the court's determination that the application for the eavesdropping warrant established that "normal investigative procedures ha[d] been tried and ha[d] failed, or reasonably appear[ed] to be unlikely to succeed if tried, or to be too dangerous to employ" (CPL 700.15 [4]; *see People v Rabb*, 16 NY3d 145, 152-153 [2011], *cert denied* 565 US 963 [2011]). In affidavits supporting that warrant application, task force members detailed the traditional investigative techniques, including physical surveillance and the use of confidential informants, that they utilized prior to seeking the eavesdropping warrant. The task force members further averred that, despite their continued attempts, those traditional investigative techniques alone would not permit them to identify and successfully prosecute all members of the drug distribution ring that they were investigating (*see People v Gray*, 57 AD3d 1473, 1474 [4th Dept 2008], *lv denied* 12 NY3d 854 [2009]; *see generally People v Fonville*, 247 AD2d 115, 118-119 [4th Dept 1998]). Furthermore, based on the

information provided in the supporting affidavits, "it cannot be said that the [task force] relied solely on past investigations into [drug conspiracies] in general to support the[ ] assertion that normal investigative techniques would be generally unproductive in the [current] investigation" (*Rabb*, 16 NY3d at 154).

Additionally, we reject defendant's contention that there was no probable cause to support issuance of the eavesdropping warrant. "The probable cause necessary for issuance of an eavesdropping warrant is measured by the same standard applicable to issuance of a search warrant" (*People v Truver*, 244 AD2d 990, 991 [4th Dept 1997]; *see People v Tambe*, 71 NY2d 492, 500 [1988]), and it is well settled that "[p]robable 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 the evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). Here, we conclude that information in the warrant application provided the court with probable cause to issue the eavesdropping warrant (*see People v Tillan*, 125 AD3d 1389, 1389 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]; *People v Lazo*, 16 AD3d 1153, 1153-1154 [4th Dept 2005], *lv denied* 4 NY3d 887 [2005]). Contrary to defendant's contention, the task force members' analyses of the language used in the telephone conversations between defendant and other known drug dealers were properly accepted by the court because " 'cryptic and ambiguous conversations may serve as a predicate for probable cause when reasonably interpreted by an experienced investigator' " (*People v Harper*, 236 AD2d 822, 823 [4th Dept 1997], *lv denied* 89 NY2d 1094 [1997]; *see People v Murgas*, 255 AD2d 987, 987-988 [4th Dept 1998]).

We have considered defendant's contentions concerning the search warrant, and we conclude that they do not require reversal or modification of the judgment.

Finally, defendant asks this Court to reduce the sentence. Contrary to the People's contention, this Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and we may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]). Nevertheless, the sentence is not unduly harsh or severe.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

312

CA 20-00937

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

MATTHEW MCLAREN, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MID-TOWN ATHLETIC CLUB, LLC, MID-TOWN ATHLETIC CLUB, L.P., ROCHESTER REGIONAL HEALTH, AND ROCHESTER GENERAL PHYSICAL THERAPY & SPORTS REHABILITATION, DEFENDANTS-RESPONDENTS-APPELLANTS.

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

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered February 11, 2020. The order denied the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he tripped on a stool and fell while attending a physical therapy appointment at defendants' facility. According to plaintiff, he tripped on the stool after moving off of a treatment table because the room was dark, obscuring his ability to see the stool that had allegedly been left in his path. Defendants moved for summary judgment dismissing the complaint on the ground that, inter alia, the stool was an open and obvious condition that, as a matter of law, was not inherently dangerous. Plaintiff opposed the motion and filed a cross motion for summary judgment on the complaint. Plaintiff appeals and defendants cross-appeal from an order denying the motion and cross motion, and we affirm.

Contrary to defendants' contention on their cross appeal, they failed to meet their initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although defendants contend that the stool was not a dangerous condition, the determination of such an issue " 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury' " (*Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533

[4th Dept 2012]). Here, defendants submitted, inter alia, the deposition testimony of plaintiff, wherein he described the dark lighting conditions in the area where he fell. Thus, defendants' own submissions raised a triable issue of fact whether the stool constituted an unreasonably dangerous condition when considered in conjunction with the surrounding circumstances, including the lighting (*see generally Sawyers v Troisi*, 95 AD3d 1293, 1294 [2d Dept 2012]; *Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219 [4th Dept 2003]). We likewise conclude that defendants failed to establish as a matter of law that the hazard posed by the stool was open and obvious and thus that they had no duty to warn plaintiff (*see Hayes*, 100 AD3d at 1533). " 'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances' . . . [and] '[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' " (*Calandrino v Town of Babylon*, 95 AD3d 1054, 1056 [2d Dept 2012]; *see Hayes*, 100 AD3d at 1533). Based on the circumstances presented here, we conclude that defendants' submissions created a triable issue of fact whether the danger was so obvious that it would necessarily be noticed by any careful observer (*see Hayes*, 100 AD3d at 1534).

We also reject plaintiff's contention on his appeal, however, that Supreme Court erred in denying his cross motion. Plaintiff's own submissions raised issues of fact precluding summary judgment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), including factual questions as to the lighting conditions at the time of the alleged trip, the location of the stool, what plaintiff was or was not able to see prior to tripping, and whether the incident as described by plaintiff actually occurred at defendants' facility.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

316

CA 20-00185

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

RENEE LAPOINT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN CLAYPOOLE, DEFENDANT-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT.

WESLEY CLARK & PESHKIN LLP, ROCHESTER (SARAH E. WESLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Gail Donofrio, J.), entered December 30, 2019 in a divorce action. The judgment, inter alia, equitably distributed the parties' marital assets.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by awarding defendant a separate property credit in the amount of $116,919.60 and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, equitably distributed the parties' marital assets. We agree with defendant that Supreme Court erroneously determined that defendant's contribution of $116,919.60 toward the down payment on the marital home constituted marital property subject to equitable distribution. " '[T]he initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal' " (*Pooler v Pooler*, 154 AD3d 1305, 1305-1306 [4th Dept 2017], quoting *Fields v Fields*, 15 NY3d 158, 161 [2010]). Although funds deposited into a jointly-owned bank account are presumed to be marital property (*see* Banking Law § 675 [b]; *Richter v Richter*, 77 AD3d 1470, 1471 [4th Dept 2010]; *Frost v Frost*, 49 AD3d 1150, 1151 [4th Dept 2008]), a party may rebut that presumption by establishing that "such deposits were made as a matter of convenience, without the intention of creating a beneficial interest" (*Noble v Noble*, 78 AD3d 1386, 1389 [3d Dept 2010] [internal quotation marks omitted]; *see also Terasaka v Terasaka*, 130 AD3d 1474, 1475 [4th Dept 2015]). Here, defendant offered uncontroverted testimony, supported by documentary evidence, that he placed funds acquired from the sale of stocks he had purchased prior to the marriage into the parties' joint bank account because it was his only checking account and he could not access the funds directly from the platform from which he sold the stock (*see Noble*, 78

AD3d at 1389). The funds remained in the account for only a matter of weeks before defendant withdrew a majority of them to pay a portion of the down payment for the marital home (*see Terasaka*, 130 AD3d at 1475). Thus, defendant established that the account was used "only as a conduit" for the sale of his stock (*Brugge v Brugge*, 245 AD2d 1113, 1114 [4th Dept 1997]). The funds therefore maintained their character as separate property, and defendant is entitled to a credit for his portion of the down payment (*see generally Rivera v Rivera*, 126 AD3d 1355, 1356 [4th Dept 2015]). We therefore modify the judgment accordingly and remit the matter to Supreme Court to recalculate the distributive award based on that credit.

We reject defendant's contention, however, that the court erred in failing to award him credits for certain carrying costs and expenses relating to the repair and sale of the marital home. To the extent that defendant challenges the court's ruling that documentary evidence regarding those expenses was inadmissible, we note that defendant failed to include the transcripts and relevant papers related to that ruling in the record on appeal, and therefore he, " 'as the appellant[], must suffer the consequences of having submitted an incomplete record' " (*Vanyo v Vanyo*, 120 AD3d 1536, 1537 [4th Dept 2014]; *see Cherry v Cherry*, 34 AD3d 1186, 1186 [4th Dept 2006]). We have reviewed defendant's remaining contentions, and we conclude that they are without merit.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

328

CA 20-00519

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

IN THE MATTER OF THE ESTATE OF KATHERINE E. KEOUGH, DECEASED. OPINION AND ORDER

ELEANOR SCHWARZ BEAMER, PETITIONER-APPELLANT;

SUE S. STEWART, RESPONDENT-RESPONDENT.

BRENNA BOYCE PLLC, ROCHESTER (DAVID C. SIELING OF COUNSEL), FOR PETITIONER-APPELLANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (ERIC J. WARD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered March 19, 2020. The order dismissed the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, and judgment is granted in favor of petitioner as follows:

> It is hereby ORDERED, ADJUDGED AND DECREED that the payments made to the estate of Katherine E. Keough under 34 USC § 20144 are after-acquired assets that shall be distributed pursuant to the laws of intestacy to the estate of Fred Schwarz.

Opinion by CENTRA, J.P.:

Introduction

The issue raised in this appeal is whether assets acquired by a testator's estate after the death of the testator should be distributed pursuant to the terms of a will or by the laws of intestacy. We conclude that the after-acquired assets must pass by intestacy.

Facts and Procedural History

William F. Keough (William) was one of the hostages who was held captive in Iran for 444 days between 1979 and 1981. William had three children, including Steven Keough (Steven). William died in 1985, and his wife, Katherine E. Keough (Katherine) died testate in September 2004. In her will, Katherine devised the residuary of her estate to

her stepson, Steven. Katherine's sole distributee under New York's laws of intestacy was her brother, Fred Schwarz (Fred) (*see* EPTL 4-1.1 [a] [5]). Fred died intestate in August 2018; petitioner is Fred's cousin and the administrator of Fred's estate.

In 2015, Congress enacted the Justice for United States Victims of State Sponsored Terrorism Act (Act), which provided monetary compensation to former Iranian hostages and their family members (34 USC § 20144). Under the Act, William was entitled to $4.4 million; Katherine was entitled to $600,000; and each child of William was entitled to $600,000 (34 USC § 20144 [c] [2] [B], [C]). Under the Act, if a person entitled to compensation is deceased, payment from the fund is to be made "to the personal representative of the estate of that person" (34 USC § 20144 [d] [1]).

In 2019, by amended petition petitioner sought declaratory relief and named as interested parties Sue S. Stewart, who is the executrix of Katherine's estate (respondent), and Steven. Petitioner asserted that the award under the Act to Katherine's estate is not property that Katherine was entitled to dispose of at the time of her death, and thus such property is not subject to the will and must be distributed by the laws of intestacy. Petitioner therefore sought a declaration that the payments now becoming a part of Katherine's estate are after-acquired assets that pass to Fred's estate by the laws of intestacy. Respondent filed an answer and objections to the amended petition, arguing that the payments should be distributed under the residuary clause of Katherine's will. Surrogate's Court agreed with respondent and dismissed the amended petition, and we now reverse.

Discussion

EPTL 3-3.1 provides that, "[u]nless the will provides otherwise, a disposition by the testator of all his [or her] property passes all of the property he [or she] was entitled to dispose of at the time of his [or her] death." Under the common law, a devise of personal property related to the time of the death of the testator, but a devise of real property related to the time of the execution of the will (*see Lynes v Townsend*, 33 NY 558, 563-564 [1865]; *Van Vechten v Van Veghten*, 8 Paige Ch 104, 116 [Ch Ct 1840]; *Matter of Charles*, 3 AD2d 119, 121-123 [2d Dept 1957]; *Hirsch v Bucki*, 162 App Div 659, 664-665 [1st Dept 1914]; *Matter of Oliverio*, 99 Misc 2d 9, 15 [Sur Ct, Cattaraugus County 1979]). Thus, real property acquired after the making of the will but before the testator's death could not pass by the will (*see Dodge v Gallatin*, 130 NY 117, 124 [1891]). The common-law rule was changed by section 14 of the former Decedent Estate Law, and thereafter EPTL 3-3.1, to provide that a devise of all property will pass all personal and real property owned by the testator at the time of his or her death (*see Oliverio*, 99 Misc 2d at 15-16).

Regarding property acquired by an estate after the death of the testator, case law is sparse, but is consistent with the language in EPTL 3-3.1 providing that only property that a testator is entitled to

devise "at the time of his [or her] death" may be distributed pursuant to the terms of the will (*see In re Van Winkle's Will*, 86 NYS2d 597, 600 [Sur Ct, Broome County 1949]; *Shaw Family Archives Ltd. v CMG Worldwide, Inc.*, 486 F Supp 2d 309, 315 [SD NY 2007]). We are particularly persuaded by the decision in *Shaw Family Archives Ltd.*, which involved a dispute over ownership interest in Marilyn Monroe's right of publicity after her death. The court determined that New York law did not permit a testator to dispose by will of property that she did not own at the time of her death (*id.* at 315). The court cited to EPTL 3-3.1 and held that "[t]he corollary principle recognized by the courts is that property not owned by the testator at the time of his [or her] death is not subject to disposition by will" (*id.*; *see Nordwind v Rowland*, 584 F3d 420, 432 [2d Cir 2009] [citing *Shaw Family Archives Ltd.* with approval]).

We agree with the reasoning in *Shaw Family Archives Ltd.* that the New York rule is grounded in the testator's lack of capacity to devise property he or she does not own at the time of death (*see id.* 315). It is well settled that a proponent of a will must establish that the testator possessed testamentary capacity (*see* EPTL 3-1.1). When determining whether a testator possessed testamentary capacity, courts examine the following factors: "(1) whether [the testator] understood the nature and consequences of executing a will; (2) whether [the testator] knew the nature and extent of the property [he or] she was disposing of; and (3) whether [the testator] knew those who would be considered the natural objects of [his or] her bounty and [his or] her relations with them" (*Matter of Kumstar*, 66 NY2d 691, 692 [1985], *rearg denied* 67 NY2d 647 [1986] [internal quotation marks omitted]). Here, Katherine did not have the testamentary capacity to dispose of assets she did not own at the time of her death because she could not have "kn[own] the nature and extent" of such assets at that time (*id.*).

Respondent and the Surrogate rely on *Marcus v Dufour* (796 F Supp 2d 386 [ED NY 2011], *affd sub nom. Marcus v Haaker*, 481 Fed Appx 19 [2d Cir 2012]), but that reliance is misplaced. In that case, the dispute involved an award made by the Austrian General Settlement Fund (GSF), which was established by the Austrian government to compensate victims of past Nazi persecution in Austria (*id.* at 388). The GSF made an award to claimant Olga Dufour, who was the sole distributee of the will of her deceased mother, Amy Furmansky (*id.* at 389). The other claimants, who were the children of Dufour's deceased sister, Ilsa Haaker (hereafter, Haaker claimants), contended that they were entitled to half the award made to Dufour (*id.*). The Haaker claimants argued that, under New York law, a person's will generally distributes only assets that he or she possessed at the time of death and, because Furmansky did not own the award at the time of her death, the GSF should have treated the award as if she died intestate (*id.* at 390, 393). The court analyzed the case under the doctrine of international comity, pursuant to which foreign decisions are generally enforced unless they were procured by fraud or decided by an unfair foreign court system (*id.* at 392). The court held that, based on the principles of international comity, the GSF's decision should be

enforced (*id.*). In determining that the GSF's decision was not unfair, the court acknowledged the legal principles set forth in EPTL 3-3.1 and the decision in *Shaw Family Archives Ltd.*, but held that "there is no ruling stating that GSF should be bound by New York's trusts and estates law in awarding reparations payments" (*Marcus*, 796 F Supp 2d at 393). In affirming the decision of the District Court, the Second Circuit held that the District Court correctly deferred to the GSF's determination under the principles of international comity (*Marcus*, 481 Fed Appx at 20). The court explained that "the Haaker claimants provide no authority nor any compelling reason why New York intestacy law should govern a determination made by a foreign adjudicative body such as the GSF" (*id.*).

Thus, the award in *Marcus* was made by a foreign adjudicative body, and the courts decided to uphold the award under the principles of international comity. The courts in *Marcus* did not determine what the distribution of the award would be under New York law, but they certainly appeared to agree with the District Court in *Shaw Family Archives Ltd.* that, under New York Law, the distribution would be pursuant to the laws of intestacy.

Conclusion

We therefore conclude that, under EPTL 3-3.1 and the general law of testamentary capacity, a testator may not dispose by will of property that is not owned by him or her at the time of his or her death. Accordingly, we reverse the order, reinstate the amended petition, and grant judgment in favor of petitioner, and we declare that the payments made to Katherine's estate under the Act must be distributed pursuant to the laws of intestacy to Fred's estate.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

354

CA 20-00629

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF ELMWOOD VILLAGE
CHARTER SCHOOL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO CITY SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR PETITIONER-APPELLANT.

NATHANIEL J. KUZMA, GENERAL COUNSEL, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 30, 2020 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondent to dismiss the petition.

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

Memorandum: This litigation concerns funding payments that respondent is required to make to petitioner regarding students with disabilities (*see* Education Law § 2856 [1] [b]). Respondent, after an audit by the New York State Comptroller's Office, determined that it had overpaid petitioner for those expenses for a period of approximately 12 years, ending in 2018. Respondent thereafter informed petitioner that it would correct the amount of future payments, and that it would recoup the overpayment by deducting the amount of the overpayment from the next four scheduled payments to petitioner. Petitioner commenced this CPLR article 78 proceeding, seeking, among other relief, to enjoin respondent from making such deductions, based on allegations that, inter alia, the recoupment was arbitrary and capricious. Petitioner now appeals from a judgment that granted respondent's motion to dismiss the petition on the ground that petitioner failed to exhaust its administrative remedies. We affirm.

On appeal, petitioner contends that it was not required to exhaust its administrative remedies because the case presents a pure question of law that this Court may decide without regard to exhaustion (*see e.g. Matter of Buffalo Council of Supervisors & Adm'rs, Local 10 v Cash*, 174 AD3d 1462, 1464 [4th Dept 2019]). That contention is not properly before us inasmuch as it is raised for the

first time on appeal (*see Matter of Brown v Town of Waterloo*, 187 AD3d 1493, 1494 [4th Dept 2020]; *Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.*, 163 AD3d 1517, 1520 [4th Dept 2018], *lv denied* 32 NY3d 1191 [2019]; *see generally Matter of Schlosser v Board of Educ. of E. Ramapo Cent. School Dist.*, 47 NY2d 811, 813 [1979]), and this Court has "no discretionary authority to review it in this CPLR article 78 proceeding" (*J.C. Smith, Inc.*, 163 AD3d at 1520; *see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]). Moreover, even assuming, arguendo, that "the general rule requiring exhaustion of administrative remedies does not apply where the issue raised involves a pure question of law" (*Matter of Cady v Clark*, 176 AD2d 1055, 1056 [3d Dept 1991]; *cf. Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375-376 [1975]; *see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57-58 [1978]), this case does not present a pure question of law. The applicable Department of Education regulation states that, "[i]n the event of the failure of a school district to fulfill the financial obligation required by section 2[8]56 of the Education Law equal to the amounts calculated pursuant to this section, upon notification by the charter school, the commissioner shall certify the amounts of the unpaid obligations to the comptroller to be deducted from State aid due the school district and paid to the applicable charter schools" (8 NYCRR 119.1 [e] [2]). That statute provides that "[a]mounts payable under this subdivision shall be determined by the commissioner" (Education Law § 2856 [1] [b]). Consequently, "[i]t is for the Commissioner [of Education] in the first instance, and not for the courts, to establish and apply criteria" regarding the propriety and administration of recoupment of alleged funding overpayments (*Matter of Davis v Mills*, 98 NY2d 120, 125 [2002]; *see generally Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 58 n 7 [2004]). Therefore, Supreme Court properly granted respondent's motion and dismissed the petition based on petitioner's failure to exhaust its administrative remedies.

We have considered petitioner's remaining contentions and conclude that they do not require modification or reversal of the judgment.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

381

KA 20-00738

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. WEBER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, 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 (Vincent M. Dinolfo, J.), entered December 20, 2019. 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 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.*). On a prior appeal, we reversed an order determining that defendant was a level three risk, concluding that County Court erred in assessing points for the use of forcible compulsion (*People v Weber*, 176 AD3d 1631, 1631-1632 [4th Dept 2019]). Although we vacated the risk level determination, we also remitted the matter to County Court " 'for further proceedings to determine whether an upward departure from defendant's presumptive risk level [was] warranted' " (*id.* at 1632). Defendant now appeals from an order that granted the People's request for an upward departure and again classified him as a level three sex offender.

Contrary to defendant's initial contention, the court did not err in considering the People's request for an upward departure. We remitted the matter for such a determination (*id.*), and it " 'is well settled that a trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith' " (*Wiener v Wiener*, 10 AD3d 362, 363 [2d Dept 2004]; *see e.g. People v Dennis*, 148 AD3d 927, 928 [2d Dept 2017]; *People v Garcia*, 145 AD3d 1032, 1033 [2d Dept 2016]). Moreover, although the People did not request such a departure during the original SORA proceeding, there was no reason for them to do so inasmuch as the court had classified defendant as a

level three risk based upon the presumptive risk level yielded by the score on his risk assessment instrument (*see People v Swain*, 46 AD3d 1157, 1159 [3d Dept 2007]; *cf. People v Bryant*, 187 AD3d 1657, 1659 [4th Dept 2020]; *see generally People v Brown*, 148 AD3d 1705, 1707 [4th Dept 2017]).

Contrary to defendant's further contention, the court did not err in granting an upward departure. It is well settled that "[a] court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[,] . . . [the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007] [internal quotation marks omitted]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), and the People bear the burden of establishing such a factor by clear and convincing evidence (*see People v Seabolt*, 148 AD3d 1650, 1650 [4th Dept 2017]; *see generally Gillotti*, 23 NY3d at 861-862). Here, the court found that defendant "was unsuccessful on interim probation" inasmuch as he committed unrelated sexual assaults while on probation and was eventually adjudicated a youthful offender after pleading guilty to charges resulting from those assaults. The events underlying those offenses "were 'not adequately taken into consideration by the risk assessment guidelines and [were] properly considered as justification for the upward departure' " (*People v Castaneda*, 173 AD3d 1791, 1793 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019], *lv denied* 34 NY3d 1126 [2020]; *see also People v Mangan*, 174 AD3d 1337, 1338 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

386

KA 17-00192

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN F. BRADY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN 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 (Vincent M. Dinolfo, J.), rendered December 8, 2016. The judgment convicted defendant upon a jury verdict of robbery in the second degree (two counts).

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 Monroe County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). 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 victim testified that he was waiting in his vehicle when he was approached by defendant and defendant's codefendant, both of whom the victim knew from a prior interaction. After defendant and the codefendant fought with the victim, defendant grabbed a bag containing money from the back seat, and defendant and the codefendant then ran to the codefendant's vehicle, which was nearby. The victim testified that he chased after that vehicle on foot, sustaining injuries, and the victim's testimony about the incident was corroborated by two eyewitnesses. Forensic testimony at trial linked fingerprints found on the victim's vehicle to defendant, and linked DNA evidence recovered from the codefendant's vehicle to the victim's DNA profile. Furthermore, the weight of the evidence supports the jury's conclusion that defendant forcibly stole property (*see* § 160.00), as well as its conclusion that he used physical force in order to "[p]revent[ ] or overcom[e] resistance to

the taking of the property or to the retention thereof" (§ 160.00 [1]; *see People v Vullo*, 153 AD3d 1630, 1630 [4th Dept 2017], *lv denied* 30 NY3d 1064 [2017]), and the jury was entitled to resolve issues of credibility pertaining to the victim and the two eyewitnesses in favor of the People (*see People v Shedrick*, 104 AD2d 263, 274 [4th Dept 1984], *affd* 66 NY2d 1015 [1985], *rearg denied* 67 NY2d 758 [1986]). Contrary to defendant's contention, "the failure to recover the stolen [property] does not preclude a robbery conviction" (*Vullo*, 153 AD3d at 1631).

Finally, as defendant further contends and the People correctly concede, County Court erred in failing to "pronounce sentence on each count" of the conviction (CPL 380.20). Although the certificate of conviction states that defendant was sentenced on each count to concurrent terms of incarceration of nine years with five years of postrelease supervision, the court, at sentencing, "failed to impose a sentence for each count of which defendant was convicted" (*People v Bradley*, 52 AD3d 1261, 1262 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]; *see* CPL 380.20). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

387

KA 19-00346

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER TUCKER, DEFENDANT-APPELLANT.

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 September 20, 2018. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96), defendant contends that reversal is required because County Court erred in denying his request to include certain language from the bill of particulars in the jury instructions and that, based on the victim's testimony and the instructions that were ultimately given, the jury could have convicted him based on a theory that differed from the one set forth in the indictment as limited by the bill of particulars. We reject that contention.

It is well settled that, "[w]here the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory" (*People v Graves*, 136 AD3d 1347, 1348 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]). Here, although the victim testified about incidents in addition to those mentioned in the bill of particulars, there was no "evidence from which the trial jury could have concluded that defendant accomplished his crime[]" under any theory other than the one alleged (*People v Grega*, 72 NY2d 489, 496 [1988]). Any discrepancy between the accusations and the testimony "does not amount to a material

change in the theory of the prosecution but constitutes merely an alteration in . . . factual incident[s] that is still consistent with the theory presented in the bill of particulars" (*People v Beard*, 148 AD3d 1745, 1746 [4th Dept 2017], *lv denied* 29 NY3d 1076 [2017] [internal quotation marks omitted]; *see also Grega*, 72 NY2d at 495). Based on the testimony at trial and the instructions that were given, we conclude that "the jury's guilty verdict could only have been based on the evidence of [the crime] as charged in the indictment" as limited by the bill of particulars (*Grega*, 72 NY2d at 496). We further conclude that the indictment and bill of particulars provided defendant with "fair notice of the accusations made against him, so that he [was] able to prepare a defense" (*People v Iannone*, 45 NY2d 589, 594 [1978]; *see Grega*, 72 NY2d at 495; *People v Dawson*, 79 AD3d 1610, 1611 [4th Dept 2010], *lv denied* 16 NY3d 894 [2011]).

Contrary to defendant's further contention, 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 victim's testimony "was not so unworthy of belief as to be incredible as a matter of law . . . and thus it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Rufus*, 56 AD3d 1175, 1175 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009] [internal quotation marks omitted]; *cf. People v O'Neil*, 66 AD3d 1131, 1133-1134 [3d Dept 2009]). Defense counsel raised the same contentions concerning the victim's credibility to the jury as defendant raises on appeal, and the jury rejected them. It is well settled that the jury's resolution of credibility issues is entitled to great deference (*see generally People v Romero*, 7 NY3d 633, 644-645 [2006]), and we perceive no reason to overturn the jury's credibility determinations here.

Defendant contends that he was deprived of a fair trial by several instances of prosecutorial misconduct that occurred during summation, including allegations that the prosecutor commented upon defendant's prearrest silence, vouched for the credibility of the witnesses, inflamed the jurors, and shifted the burden of proof. Defendant failed to preserve those contentions for our review because he failed to object to most of the alleged improprieties at trial (*see* CPL 470.05 [2]; *People v Atkinson*, 185 AD3d 1447, 1448 [4th Dept 2020], *lv denied* 35 NY3d 1111 [2020]; *People v Benton*, 106 AD3d 1451, 1451 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]), and the two objections that he interposed were "on different grounds from those raised on appeal" (*People v Moses*, 305 AD2d 184, 184 [1st Dept 2003], *lv denied* 100 NY2d 585 [2003]; *see generally People v Romero*, 7 NY3d 911, 912 [2006]). In any event, defendant's contentions regarding prosecutorial misconduct are without merit. We reject defendant's contention that certain of the prosecutor's comments shifted the burden of proof; rather, those comments were fair responses to defendant's repeated arguments in summation that the victim was lying (*see People v Johnson*, 183 AD3d 77, 90 [3d Dept 2020], *lv denied* 35 NY3d 993 [2020]; *see also People v Bailey*, 181 AD3d 1172, 1175 [4th

Dept 2020], *lv denied* 35 NY3d 1025 [2020]; *People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]). Similarly, even assuming, arguendo, that the prosecutor made any arguments during summation that constituted a comment on defendant's prearrest silence (*cf. People v Clark*, 37 AD3d 487, 489 [2d Dept 2007], *lv denied* 9 NY3d 841 [2007]), the rule prohibiting a prosecutor from commenting on a defendant's silence in summation "does not apply where, as here, a defendant speaks to the police and omits exculpatory information which he [or she] presents for the first time at trial" (*People v Salsbery*, 78 AD3d 1624, 1626 [4th Dept 2010], *lv denied* 16 NY3d 836 [2011] [internal quotation marks omitted]). The remaining instances of alleged impropriety on the part of the prosecutor "were either fair comment on the evidence . . . or appropriate response to arguments made in defendant's summation" (*People v Speaks*, 28 NY3d 990, 992 [2016]). Furthermore, even assuming, arguendo, that any of the prosecutor's comments were improper, viewing the prosecutor's "summation as a whole, those comments 'were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *see People v Milczakowskyj*, 73 AD3d 1453, 1454 [4th Dept 2010], *lv denied* 15 NY3d 754 [2010]). Inasmuch as defendant was not deprived of a fair trial by any alleged improprieties on the part of the prosecutor, we conclude that defense counsel's failure to preserve his contentions regarding prosecutorial misconduct did not deprive him of effective assistance of counsel (*see People v Bagley*, — AD3d —, —, 2021 NY Slip Op 02964, *1 [4th Dept 2021]; *People v Brooks*, 183 AD3d 1231, 1232 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]; *People v Koonce*, 111 AD3d 1277, 1278-1279 [4th Dept 2013]).

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

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

416

CAF 19-02018

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

IN THE MATTER OF THE ADOPTION OF SOPHIA

TAMMY M.W. AND JAMES M.W.,
PETITIONERS-RESPONDENTS,

MEMORANDUM AND ORDER

V

IRHAD R., RESPONDENT-APPELLANT.

IN THE MATTER OF THE ADOPTION OF MADELYN

TAMMY M.W. AND JAMES M.W.,
PETITIONERS-RESPONDENTS,

V

IRHAD R., RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

COHEN & COHEN, UTICA (RICHARD A. COHEN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

JOHN G. KOSLOSKY, UTICA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered October 21, 2019. The order adjudged that respondent's consent to the adoption of the subject children was not required.

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

Memorandum: Respondent Irhad R., the biological father of the subject children, appeals from an order determining, following an evidentiary hearing, that his consent to the adoption of the children by petitioners is not required pursuant to Domestic Relations Law § 111. We affirm.

Contrary to the father's contention, the record supports Family Court's determination that he failed to meet his threshold burden of establishing his right to consent to the adoption of his out-of-wedlock child (*see* Domestic Relations Law § 111 [1] [d]; *Matter of Angelina K. [Eliza W.—Michael K.]*, 105 AD3d 1310, 1311 [4th Dept

2013], *lv denied* 21 NY3d 860 [2013]). At the time of the hearing, the father had not visited the child in almost four years, nor had he attempted to call her or send cards or gifts. Although the father was diagnosed with a mental illness, his condition "did not provide an adequate explanation for his failure to maintain substantial contact with the child" (*Matter of Ethan S. [Tarra C.—Jason S.]*, 85 AD3d 1599, 1600 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011]), particularly inasmuch as he did not make efforts to see her for more than a year after he began receiving regular treatment.

Contrary to the father's further contention, even assuming, arguendo, that the father established his right to consent to the adoption of his out-of-wedlock child, we conclude that the court properly dispensed with his consent with respect to both children inasmuch as petitioners established by clear and convincing evidence that he abandoned both children by his "failure for a period of six months to visit the child[ren] and communicate with the child[ren] or person having legal custody of the child[ren], although able to do so" (Domestic Relations Law § 111 [2] [a]; *see Matter of Brianna B. [Swazette S.—Shacoya L.]*, 175 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]). Although the father filed two petitions for modification of visitation, he made no other attempts to contact the children. Thus, we conclude that the father's efforts were so "insubstantial or infrequent" that they did not preclude a finding of abandonment (§ 111 [6] [b]; *see Matter of Colby II. [Chalmers JJ.]*, 140 AD3d 1484, 1485 [3d Dept 2016]; *Matter of Jenny-Beth L. v Bryan C.W.*, 23 AD3d 1069, 1069 [4th Dept 2005]).

Finally, we reject the father's contention that the court abused its discretion in considering evidence of abandonment outside of the six months immediately preceding the filing of the petitions for adoption. The court properly considered the father's "contact with the child[ren] during the period of time, whether six months or longer, immediately preceding the filing of the adoption petition" (*Matter of Adreona C. [Andrew C.—Andrew R.]*, 79 AD3d 1768, 1769 [4th Dept 2010]; *see Angelina K.*, 105 AD3d at 1312).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

423

CA 20-00615

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

ROBERT P. MCALEAVEY AND AMY MCALEAVEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHAUTAUQUA PATRONS INSURANCE CO.,
DEFENDANT-RESPONDENT.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (ERIC T. BORON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Thomas E. Moran, J.), entered May 15, 2020. The order granted defendant's cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's cross motion is denied, the complaint is reinstated, plaintiffs' motion is granted, and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the following memorandum: Plaintiffs owned a seasonal home insured by defendant. Insofar as relevant here, the policy excluded loss to an unoccupied home or its contents caused by "freezing or the resulting discharge, leakage, or overflow from" any "plumbing, heating or air-conditioning system" *unless* the policyholder took "reasonable care to . . . maintain heat in the building." The policy does not define "reasonable care" in this context. At some point in January or February 2018, the heating system failed and the home subsequently suffered extensive water damage when the plumbing system froze and burst from the lack of heat. Defendant denied plaintiffs' ensuing claim for coverage on the ground that plaintiffs failed to use "reasonable care" to maintain the heat.

Plaintiffs thereafter commenced this action and alleged that defendant breached the insurance policy by denying the claim. Supreme Court subsequently granted defendant's cross motion for, inter alia, summary judgment dismissing the complaint and "dismissed"—presumably as moot—plaintiffs' motion for partial summary judgment on the issue of liability. Plaintiffs now appeal, and we reverse.

" 'Before an insurance company is permitted to avoid policy

coverage, it must satisfy' its burden of establishing that the policy does not cover the loss or that an exclusion or exemption applies, and that the policy provisions are clear and 'subject to no other reasonable interpretation' " (*Place v Preferred Mut. Ins. Co.*, 190 AD3d 1208, 1209 [3d Dept 2021], quoting *Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]; *see Gallo v Midstate Mut. Ins. Co.*, 45 AD3d 1492, 1493 [4th Dept 2007]). "Policy provisions must be interpreted according to common speech and consistent with the reasonable expectation of the average insured, and ambiguities are to be construed against the insurer" (*Place*, 190 AD3d at 1209 [internal quotation marks omitted]; *see Lobello v New York Cent. Mut. Fire Ins. Co.*, 152 AD3d 1206, 1209 [4th Dept 2017]).

Here, the parties correctly recognize that their dispute turns entirely on whether plaintiffs used "reasonable care" to maintain the heat in the subject house. If they did, then the loss is covered under the policy; if they did not, then the loss is not covered.

To this end, in support of their motion for partial summary judgment, plaintiffs established as follows: the home's heating system was recently installed, was regularly maintained, and had never required repairs; Robert P. McAleavey (plaintiff) winterized the property by setting the internal temperature to approximately 50 degrees in the late fall of 2017; plaintiff checked on the home approximately 15 times during the winter of 2017-2018; during those visits, plaintiff ensured that the temperature was appropriate, that no windows were broken, that the toilets flushed, and that the water ran; and plaintiff last visited the house on January 11 or 12, 2018, at which point the interior temperature was "comfortable." Although plaintiff was unable to visit the property between mid-January and late February 2018 due to a broken leg and his resulting hospitalization, plaintiffs' submissions established that, during such period, they had no notice or reason to suspect that anything was wrong with the premises or the heating system. Moreover, plaintiffs' neighbors and realtor periodically checked on the property's exterior.

In our view, the term "reasonable care" as used in the policy is ambiguous inasmuch as it is susceptible of at least two reasonable interpretations, at least one of which supports plaintiffs' contention that they exercised reasonable care, and this ambiguity was not resolved by extrinsic evidence (*see generally Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1334 [4th Dept 2020]). " '[U]nder [these] circumstances, the ambiguity must be resolved against the insurer which drafted the contract' " (*id.*; *see Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]; *Randolph v Nationwide Mut. Fire Ins. Co.*, 242 AD2d 889, 889 [4th Dept 1997]). We thus conclude that plaintiff's loss is specifically covered under the policy and that the exclusion relied on by defendant does not unambiguously apply in this case (*see Gallo*, 45 AD3d at 1494; *see also Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]).

Contrary to defendant's assertion and the court's conclusion, nothing in *Stephenson v Allstate Indem. Co.* (160 AD3d 1274 [3d Dept

2018], *lv denied* 32 NY3d 904 [2018]) establishes a per se rule that a policyholder's failure to conduct regular interior inspections at specific intervals, irrespective of any other efforts, constitutes a failure to use "reasonable care" to maintain heat. Rather, *Stephenson* granted summary judgment to the insurer because, in that case, it was "undisputed that [the policyholder] did not arrange for inspection of the premises or *take any other action* to ensure that adequate levels of heat were actually maintained during [the winter months]" (*id.* at 1276 [emphasis added]). The policyholder's wholesale neglect in *Stephenson* stands in stark contrast to plaintiffs' reasonable—albeit unsuccessful—efforts to maintain the heat in this case.

In light of the foregoing, the court erred in denying plaintiffs' motion and granting defendant's cross motion (*see Gallo*, 45 AD3d at 1493). We therefore reverse the order, deny defendant's cross motion, reinstate the complaint, grant plaintiffs' motion, and remit the matter to Supreme Court for an inquest on damages (*see Smith v Safeco Ins. Co. of Am.*, 159 AD3d 1536, 1537 [4th Dept 2018], *lv denied* 32 NY3d 913 [2019]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

458

CA 20-00282

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

4545 TRANSIT LLC, AS ASSIGNEE OF MDC EASTERN HILLS, LLC, AS SUCCESSOR BY MERGER TO GLENMONT MDC EASTERN HILLS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCKY'S BIG CITY GAMES & SPORTS BAR, INC., DAVID SCRIVANI AND DAWN SCRIVANI, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

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

COLLIGAN LAW, LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 28, 2020. The order, among other things, denied defendants' cross motion to dismiss the third and fourth causes of action in plaintiff's complaint and to cancel the UCC-1 financing statement filed by plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion in part and dismissing the fourth cause of action insofar as it seeks damages beyond those permitted by the limited guaranty, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages and the possession of chattels after defendant Rocky's Big City Games & Sports Bar, Inc. (Rocky's) defaulted on a lease. Defendants cross-moved to dismiss the third cause of action, for replevin of the chattels, and the fourth cause of action, based on a limited guaranty executed by the individual defendants, and to cancel the UCC-1 financing statement filed by plaintiff. Although Supreme Court stated in its order that it was denying the cross motion in its entirety, in its bench decision the court in essence granted the cross motion in part by limiting the damages available under the fourth cause of action. We therefore modify the order accordingly to conform to the court's decision (*see Kelly D. v Niagara Frontier Tr. Auth.*, 177 AD3d 1261, 1264 [4th Dept 2019]; *Ramirez Gabriel v Johnston's L.P. Gas Serv., Inc.*, 143 AD3d 1228, 1230 [4th Dept 2016]).

Contrary to defendants' contention, the court properly denied

those parts of their cross motion seeking to dismiss the third cause of action and to cancel the UCC-1 financing statement (*see* CPLR 3211 [a] [1], [7]). We decline to disturb the court's determination to deny, with leave to renew after further discovery, that part of the cross motion seeking to dismiss the third cause of action on the ground of plaintiff's alleged failure to plead a demand for the chattel and a refusal of that demand (*see Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105-106 [1927]; *Iovinella v General Elec. Credit Corp.*, 79 AD2d 748, 749 [3d Dept 1980], *lv denied* 53 NY2d 607 [1981], *appeal dismissed* 53 NY2d 937 [1981]; *Schanbarger v Dott's Garage*, 61 AD2d 243, 245-246 [3d Dept 1978]; *see also Chemical Bank v Society Brand Indus., Inc.*, 624 F Supp 979, 982 [SD NY 1985]). We agree with the court that the description of the chattels in the complaint is sufficiently specific to sustain a cause of action based on the Uniform Commercial Code or common-law replevin inasmuch as the complaint "reasonably identifies" the chattels by category, location, and a delineated period of time (UCC 9-108 [a]; *see* UCC 9-108 [b] [2], [6]; *General Elec. Capital Commercial Automotive Fin. v Spartan Motors*, 246 AD2d 41, 44, 52 [2d Dept 1998], *appeal dismissed* 93 NY2d 870 [1999]; *cf. 1380 Hous. Dev. Fund v Carlin*, 138 AD3d 613, 613 [1st Dept 2016]; *see also Matter of Southern Illinois Railcar Co.*, 301 BR 305, 309-310 [Bankr SD Ill 2002]; *see generally* CPLR 3013). We further agree with the court that, when Rocky's authenticated a security agreement in the lease, it authorized plaintiff's predecessor in interest to file a UCC-1 financing statement perfecting the security interest in the categories of property covered by the security agreement (*see* UCC 9-509 [b]). Thus, contrary to defendants' contention, the terms of the lease did not require plaintiff's predecessor or plaintiff to obtain an additional signature from Rocky's in order to authorize the perfection of the security interest before filing the UCC-1 financing statement.

Finally, we reject defendants' contention that the fourth cause of action should be dismissed in its entirety. Rather, we conclude that, with respect to the fourth cause of action, the court properly granted only that part of the cross motion seeking to limit damages pursuant to the provisions of the limited guaranty signed by the individual defendants (*see* CPLR 3211 [a] [1]; *see also Diaz v Little Remedies Co., Inc.*, 81 AD3d 1419, 1420 [4th Dept 2011]; *Rice v University of Rochester Med. Ctr.*, 46 AD3d 1421, 1423 [4th Dept 2007]; *Stern v Charter Oak Fire Ins. Co.*, 38 AD3d 1288, 1288 [4th Dept 2007]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

481

CAF 19-02049

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF VANESSA VEGA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

IVAN DELGADO, RESPONDENT-RESPONDENT.

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

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

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered October 17, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole custody and primary physical residency 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 mother appeals from an order that, inter alia, awarded sole custody and primary physical residency of the subject child to respondent father, with visitation to the mother. The parties are the parents of a child born in 2009. In 2017, Family Court issued an order on the mother's default granting the father custody of the child. The mother thereafter sought to vacate the default order and, when that application was denied, she moved for leave to renew that application. On appeal, we reversed the order denying her application to vacate the default order and remitted the matter to Family Court, concluding that the mother was entitled to a traverse hearing to determine whether she was properly served with the father's petition for custody (*Matter of Delgado v Vega*, 171 AD3d 1457, 1458 [4th Dept 2019]). During the pendency of that appeal, the parties filed multiple violation petitions against each other. On remittal, the parties agreed to withdraw all prior petitions and proceed to an initial custody determination.

We conclude that, contrary to the mother's contention, the Attorney for the Child (AFC) did not improperly substitute her

judgment for that of the child by advocating a position that was contrary to the child's express wishes. An AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]) and, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680 [4th Dept 2015]). Where, however, the AFC "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC is] justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]; *see Viscuso*, 129 AD3d at 1680; *see generally Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]).

Here, the record supports the determination that "the mother's persistent and pervasive pattern of alienating the child from the father 'is likely to result in a substantial risk of imminent, serious harm to the child' " (*Viscuso*, 129 AD3d at 1680-1681, quoting 22 NYCRR 7.2 [d] [3]; *see Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1320 [4th Dept 2016]). We thus conclude that the AFC acted in accordance with her ethical duties by informing the court of the child's wishes and then advocating for a result different from the child's position (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1530 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *Viscuso*, 129 AD3d at 1681).

We reject the mother's additional contention that there is not a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award the father sole custody and primary physical residence. The record establishes that the court "carefully weighed the appropriate factors, and the determination of the court, 'which [was] in the best position to evaluate the character and credibility of the witnesses, must be accorded great weight' " (*Wideman v Wideman*, 38 AD3d 1318, 1319 [4th Dept 2007]; *see Hendrickson v Hendrickson*, 147 AD3d 1522, 1523 [4th Dept 2017]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

488

CA 20-01360

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF SPORTSMEN'S TAVERN LLC,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY,
RESPONDENT-DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PAUL J. CAMBRIA, JR., OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered October 15, 2020 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, adjudged that respondent-defendant is permanently enjoined from enforcing its Incidental Music Guidelines (i) prohibiting advertised and/or ticketed live music at licensed bars or restaurants; and (ii) restricting live music at licensed bars and restaurants to only live music that is "incidental to the dining experience and not the draw itself."

It is hereby ORDERED that said appeal is unanimously dismissed without costs and the judgment is vacated.

Memorandum: Petitioner-plaintiff, Sportsmen's Tavern LLC (Sportsmen's), commenced this hybrid CPLR article 78 proceeding and declaratory judgment action challenging COVID-19 pandemic-related guidance issued by respondent-defendant New York State Liquor Authority (SLA). That guidance, which Sportsmen's was required to abide by pursuant to certain executive orders, prohibited advertised and ticketed main-draw music shows at licensed bars or restaurants and restricted live music at such establishments to only that which was incidental to the dining experience and not the draw itself. SLA appeals from a judgment that declared that the guidance constituted an unlawful content-based restriction, both facially and as applied, under the First Amendment of the United States Constitution and corresponding provisions of the New York State Constitution; declared that the guidance was arbitrary, capricious, and an abuse of discretion; and permanently enjoined SLA from enforcing the guidance. We conclude for the reasons that follow that the appeal should be dismissed as moot.

Although neither party contends that the appeal should be dismissed as moot, "mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court *sua sponte*" (*Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311 [1988], *cert denied* 488 US 966 [1988] [hereinafter, *Grand Jury Subpoenas*]; *see People ex rel. Allen v Warden, GMDC, N.Y. State Div. of Parole*, 61 AD3d 541, 542 [1st Dept 2009]). Indeed, the jurisdiction of this Court "extends only to live controversies . . . [, and w]e are thus prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions' " (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]; *see Matter of Harris v Seneca Promotions, Inc.*, 149 AD3d 1508, 1509 [4th Dept 2017]). Courts are thus generally "precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances' " (*City of New York v Maul*, 14 NY3d 499, 507 [2010], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). "[A]n appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see Maul*, 14 NY3d at 507; *Hearst Corp.*, 50 NY2d at 714).

Here, due to recent easing of pandemic-related restrictions, the prohibitions challenged in this case are no longer in effect. We thus conclude that "the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot" (*Hearst Corp.*, 50 NY2d at 714).

"An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts" (*Coleman*, 19 NY3d at 1090). Where the issue "falls within the well-recognized exception[,] . . . courts may exercise their extraordinary discretion to entertain the appeal notwithstanding mootness" (*Grand Jury Subpoenas*, 72 NY2d at 311; *see Saratoga County Chamber of Commerce*, 100 NY2d at 811; *see also Matter of Duarte v City of New York*, 20 NY3d 1067, 1068 [2013]; *Ayoub v Ayoub*, 14 NY3d 921, 922 [2010]).

We conclude that the exception to the mootness doctrine does not apply here. In our view, although the issue of the lawfulness of the prior challenged guidance implemented as part of the extraordinary response to the COVID-19 pandemic is substantial and novel, that issue is not *likely* to recur (*see generally Saratoga County Chamber of Commerce*, 100 NY2d at 811-812; *People v Rikers Is. Corr. Facility Warden*, 112 AD3d 1350, 1351 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Moreover, "the issue is not of the type that typically evades review" (*Wisholek v Douglas*, 97 NY2d 740, 742 [2002]). Indeed, as the parties have acknowledged, the guidance at issue here prohibiting advertised and ticketed main-draw music shows has been reviewed on the merits by at least two other courts (*see generally*

Matter of Kirkland v Annucci, 150 AD3d 736, 738 [2d Dept 2017], *lv denied* 29 NY3d 918 [2017]). In any event, under the circumstances of this case, we would "decline to invoke the mootness exception" (*Duarte*, 20 NY3d at 1068; *see Ayoub*, 14 NY3d at 922).

Finally, " 'in order to prevent [the] judgment which is unreviewable for mootness from spawning any legal consequences or precedent,' " we vacate the judgment (*Matter of Thrall v CNY Centro, Inc.*, 89 AD3d 1449, 1451 [4th Dept 2011], *lv dismissed* 19 NY3d 898 [2012], quoting *Hearst Corp.*, 50 NY2d at 718; *see Matter of Olney v Town of Barrington*, 162 AD3d 1610, 1612 [4th Dept 2018]; *see generally Saratoga County Chamber of Commerce*, 100 NY2d at 812).

Mark W. Bennett

Entered: June 17, 2021

Clerk of the Court

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

496

KA 19-00987

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. STACK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated March 26, 2019. 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 affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points under both risk factor 5 and risk factor 6. We reject that contention. "The assessment of points for both the age of the victim under risk factor 5 and the fact that she was asleep and therefore physically helpless under risk factor 6 [does] not constitute impermissible double counting" (*People v Orlopp*, 191 AD3d 1357, 1357 [4th Dept 2021] [internal quotation marks omitted]; *see People v Augsbury*, 156 AD3d 1487, 1488 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). Inasmuch as the evidence established that one of defendant's victims was asleep at the time defendant engaged in sexual contact with her, the People established that "the victim's physical helplessness was not the result of, or in any way connected with, her age" (*People v Caban*, 61 AD3d 834, 835 [2d Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see e.g. Augsbury*, 156 AD3d at 1488; *People v Edwards*, 93 AD3d 1210, 1211 [4th Dept 2012]; *cf. People v Fisher*, 22 AD3d 358, 358-359 [1st Dept 2005]).

Defendant's contention that the court should have granted him a downward departure from his presumptive risk level is not preserved for our review (*see Orlopp*, 191 AD3d at 1358). Although defense counsel challenged the risk factor determinations, he "never asked [the] [c]ourt to use its discretion to depart from the Board's

recommendation. He made only legal arguments, directed at the interpretation of the [g]uidelines" (*People v Johnson*, 11 NY3d 416, 421 [2008]). In any event, while defendant argues that he should be granted a downward departure because he completed sex offender and substance abuse treatment while incarcerated, "the case summary [here] did not show that the defendant's response to treatment was exceptional, and the defendant did not submit any other evidence to so demonstrate" (*People v Pendleton*, 112 AD3d 600, 601 [2d Dept 2013]), and thus defendant did not establish "by a preponderance of the evidence, a mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (*Orlopp*, 191 AD3d at 1358 [internal quotation marks omitted]; *see People v Antonetti*, 188 AD3d 1630, 1631-1632 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *Pendleton*, 112 AD3d at 601).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Although "[a] sex offender facing risk level classification under SORA has a right to the effective assistance of counsel" (*People v Willingham*, 101 AD3d 979, 979 [2d Dept 2012]), we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation, defendant received effective assistance of counsel" (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

500

CAF 19-01289

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

IN THE MATTER OF ADAM M.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SUSAN M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ELIZABETH J. CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

DAVID J. HAYLETT, JR., LOCKPORT, FOR PETITIONER-RESPONDENT.

JASON J. CAFARELLA, NIAGARA FALLS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered June 25, 2019 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 these proceedings pursuant to Family Court Act articles 10 and 6, respondent mother appeals in appeal No. 1 from an order that, inter alia, adjudged the subject child to be neglected. In appeal No. 2, respondent mother appeals from an order that, inter alia, placed the subject child in the custody of the petitioners in appeal No. 2, his maternal aunt and uncle (petitioners). We reject the mother's contention in appeal No. 1 that Family Court erred in determining that the petitioner in appeal No. 1, Niagara County Department of Social Services (DSS), established, by a preponderance of the evidence, that she neglected the child (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *see generally Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1345-1346 [4th Dept 2017]). Contrary to the mother's contention, the evidence at the fact-finding hearing established that the "child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and . . . that the actual or threatened harm to the child is a consequence of the failure of the [mother] to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* §§ 1012 [f] [i] [B]; 1046 [b] [i]; *see generally Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 78-79 [1995]).

Here, DSS established that the mother was not properly feeding the child and that there was no refrigerator or stove in the mother's apartment (*see Matter of Joshua Hezekiah B. [Edgar B.]*, 77 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 716 [2010]; *Matter of Terry S.*, 55 AD2d 689, 689 [3d Dept 1976]; *see generally Matter of Carpenter v Puglese*, 94 AD3d 1367, 1369 [3d Dept 2012]). DSS also established that the mother's mental condition impaired her ability to care for the child (*see Matter of Hannah T.R. [Soya R.]*, 179 AD3d 700, 701-702 [2d Dept 2020]; *Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403-1404 [4th Dept 2016]), and the mother had missed a medical appointment for the child, and the child's immunizations were not up to date (*see Matter of Notorious YY.*, 33 AD3d 1097, 1098 [3d Dept 2006]). DSS further established that, despite the availability of child care assistance from DSS, the mother's failure to comply with a work requirement resulted in a reduction to her public assistance benefits, upon which she relied for, inter alia, food, shelter and healthcare for herself and the child (*see generally Matter of Jaheem M. [Cymon M.]*, 174 AD3d 610, 611 [2d Dept 2019]).

We also reject the contention of the mother in appeal No. 2 that the court erred in determining that it was in the best interests of the child for custody to be awarded to petitioners. Initially, we conclude that the court's determination of neglect in the Family Court Act article 10 proceeding at issue in appeal No. 1 provided the requisite threshold showing that extraordinary circumstances existed to warrant an inquiry into whether an award of custody to a nonparent is in the child's best interests (*see Matter of Emma D. [Kelly V.(D.)]*, 180 AD3d 1331, 1332-1333 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]; *Matter of Donald EE. v Cheyenne EE.*, 177 AD3d 1112, 1114-1115 [3d Dept 2019], *lv denied* 35 NY3d 903 [2020]; *see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]).

We further conclude in appeal No. 2 that the court's determination that it is in the child's best interests to be in the custody of petitioners has a sound and substantial basis in the record (*see generally Matter of Stent v Schwartz*, 133 AD3d 1302, 1304 [4th Dept 2015], *lv denied* 27 NY3d 902 [2016]). The evidence established that the child, who turned two during the custody hearing, was removed from the mother and placed in foster care when he was nine months old. At the time of the hearing, the child had been living with petitioners for approximately four months and was doing very well (*see Matter of William AA.*, 24 AD3d 1125, 1127-1128 [3d Dept 2005], *lv denied* 6 NY3d 711 [2006]). The mother had no contact with the child since his removal more than one year earlier and had not availed herself of the resources or services offered to her by DSS (*see generally Matter of Teresa J. v Tanya H.*, 50 AD3d 1599, 1600 [4th Dept 2008]). Petitioners ensured that the child was receiving the appropriate medical care, and they were in a better position to provide for the child's emotional, physical, and financial well being (*see generally*

Matter of King v King, 191 AD3d 881, 882 [2d Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

502

CAF 20-00218

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

IN THE MATTER OF JASMINE MALDONADO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS C. CAPPETTA, RESPONDENT-APPELLANT.

THOMAS C. CAPPETTA, RESPONDENT-APPELLANT PRO SE.

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP, NEW YORK CITY (KATHERINE ANNE BOY SKIPSEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered July 12, 2019 in a proceeding pursuant to Family Court Act article 4. The order granted in part and denied in part respondent's objection to an order of the Support Magistrate.

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

Memorandum: Petitioner mother commenced this Family Court Act article 4 proceeding seeking an upward modification of a 2014 order of child support with respect to the parties' two children. Respondent father raised a defense of parental alienation. The Support Magistrate referred that issue to Family Court, and a hearing was held. In addition, the father filed a petition seeking to modify a prior order of custody, which the court also addressed at the same hearing. By an order entered in December 2018, the court (Seager, J.) found that there was no custodial interference, but it modified the custody order by granting the father sole legal and physical custody of the daughter and the mother sole legal and physical custody of the son. The Support Magistrate then granted the mother's petition and modified the order of child support. The father filed an objection, and in July 2019, the court (Nelson, J.) granted in part and denied in part the father's objection. The father now appeals from the July 2019 order.

Initially, the father's contention that the court erred in its determination on his parental alienation defense is properly before us inasmuch as that part of the December 2018 order resolving that issue is considered a nonfinal order, and we address his contention in the appeal from the July 2019 order (*see Matter of O'Brien v Rutland*, 180 AD3d 1183, 1183 n 2 [3d Dept 2020]; *Matter of Curley v Klausen*, 110 AD3d 1156, 1156 n 1 [3d Dept 2013]). To the extent, however, that the

father contends that the court erred in granting the mother sole legal and physical custody of the son, that issue is not properly before us because the father did not appeal from the December 2018 order (*see Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1387 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *Matter of Jones v Jamieson*, 162 AD3d 1720, 1721 [4th Dept 2018]; *Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014]).

"Child support payments may be suspended . . . where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent" (*Matter of McNichol v Reid*, 176 AD3d 713, 714 [2d Dept 2019] [internal quotation marks omitted]; *see Matter of Jurgielewicz v Johnston*, 114 AD3d 945, 946 [2d Dept 2014]; *Curley*, 110 AD3d at 1157). "Such a suspension is warranted only where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's [parental access] rights" (*McNichol*, 176 AD3d at 714 [internal quotation marks omitted]; *see Curley*, 110 AD3d at 1157). Here, we agree with the court that the father failed to establish that the mother deliberately frustrated his visitation rights to such an extent that suspension or termination of support payments was warranted (*see Matter of Fielder v Fielder*, 189 AD3d 1231, 1233 [2d Dept 2020]; *Matter of Saunders v Aiello*, 59 AD3d 1090, 1092 [4th Dept 2009]; *see generally Matter of Coleman v Murphy*, 89 AD3d 1500, 1501 [4th Dept 2011]). Although the record establishes that the parents have an acrimonious relationship, the mother testified that she never hindered access to the father or encouraged either child not to visit the father. To the contrary, the mother testified that she encouraged the son to speak with and visit the father, and she explained that, as the children got older, they began dealing directly with the father to schedule parenting time.

We reject the father's further contention that the mother failed to establish a change in circumstances to justify reconsideration of the child support obligation. Inasmuch as three years had passed since the 2014 child support order, the mother "was not obligated to demonstrate a substantial change in circumstances" (*Matter of Khost v Ciampi*, 189 AD3d 1409, 1410 [2d Dept 2020]; *see* Family Ct Act § 451 [3] [b] [i]; *Matter of Siouffi v Siouffi*, 186 AD3d 1789, 1790 [3d Dept 2020], *lv dismissed in part and denied in part* 36 NY3d 1042 [2021]). Contrary to the father's contention, the Support Magistrate did not abuse his discretion in not imputing income to the mother and instead using her actual earnings in calculating child support (*see generally Matter of Montgomery v List*, 173 AD3d 1657, 1657-1658 [4th Dept 2019]; *Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180 [4th Dept 2007]). We reject the father's contention that the award of child support was "unjust or inappropriate" (Family Ct Act § 413 [1] [f]).

Finally, we have considered the father's remaining contentions

and conclude that they are without merit.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

505

CAF 20-00124

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

IN THE MATTER OF SALLY M. AND DARREN M.,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

SUSAN M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ELIZABETH J. CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

THOMAS J. CASERTA, JR., NIAGARA FALLS, FOR PETITIONERS-RESPONDENTS.

JASON J. CAFARELLA, NIAGARA FALLS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), dated January 3, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted custody of the subject child to petitioners.

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

Same memorandum as in *Matter of Adam M. (Susan M.)* (— AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

525

CAF 20-00158

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF DANIEL J. DOBSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMBER MESSERVEY, DANN MESSERVEY AND
MICHELLE MESSERVEY, RESPONDENTS-RESPONDENTS.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-RESPONDENT AMBER MESSERVEY.

SHARON ALLEN, KEUKA PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered November 20, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical placement of the child with respondent Amber Messervey.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph insofar as it awarded primary physical placement of the subject child to respondent Amber Messervey and awarding such placement to petitioner with visitation to that respondent, and vacating the second, third, eighth, and ninth ordering paragraphs, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior order of custody and visitation that was entered on the consent of the parties. We agree with the father that the record lacks a sound and substantial basis for Family Court's determination that an award of primary physical placement to respondent Amber Messervey, the child's mother, was in the best interests of the child (*see generally Matter of Braga v Bell*, 151 AD3d 1924, 1925 [4th Dept 2017], *lv denied* 30 NY3d 905 [2017]; *Matter of Agyapon v Zungia*, 150 AD3d 1226, 1227 [2d Dept 2017]). In determining the best interests of the child, the courts consider "(1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) quality of the child's home environment and that of the parent seeking custody; (3) the ability of each parent to provide

for the child's emotional and intellectual development; (4) the financial status and ability of each parent to provide for the child; (5) the individual needs and expressed desires of the child; and (6) the need of the child to live with siblings" (*Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]; *see Braga*, 151 AD3d at 1925).

Although an existing custody arrangement established by agreement of the parties is " 'a weighty factor' " (*Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]), we conclude with respect to the first factor that the father was the more stable parent (*see Braga*, 151 AD3d at 1925-1926). Particularly troubling is the mother's continued abuse of illegal narcotics. In three separate incidents during the six-month period before the hearing, the mother overdosed and had to be revived with Narcan, was found passed out in a parking lot, and went missing over a weekend, leaving the child in the care of the maternal grandfather. The mother testified during the hearing that her addiction affected her ability to parent, acknowledging in particular that the child's poor attendance in school was in part due to her continued abuse of narcotics. In contrast, although the father admitted to abusing narcotics in the past, his testimony established that he had not used illegal drugs in the 5½ years preceding the hearing.

In addition, we conclude that the father demonstrated that he is relatively more fit with respect to the quality of his home environment and his ability to provide for the child's emotional and intellectual development, particularly her educational needs (*see generally Fox*, 177 AD2d at 210-211). With respect to the relative financial status of the parties, the father worked full time, whereas the mother had not worked in the two years leading up to the hearing.

We therefore modify the order by vacating the first ordering paragraph insofar as it awarded primary physical placement of the child to the mother and awarding such placement to the father with visitation to the mother and vacating the second, third, eighth, and ninth ordering paragraphs, and we remit the matter to Family Court to fashion an appropriate visitation schedule (*see Braga*, 151 AD3d at 1926).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

539

KA 20-00138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE H. SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), entered November 19, 2019. 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 affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) after a conviction of two counts of rape in the third degree (Penal Law § 130.25 [2]), defendant contends that County Court failed to set forth its findings of fact and conclusions of law in accordance with Correction Law § 168-n (3). We agree. The court merely stated that it had reviewed the recommendation of the Board of Examiners of Sex Offenders (Board), "as well as the submitted evidence, relevant materials, and established facts," listed the factors and points that had been assessed against defendant, and briefly distinguished from the bench one case defendant had cited in support of his request for a downward departure (*see People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]; *People v Cameron*, 87 AD3d 1366, 1366-1367 [4th Dept 2011]; *People v Long*, 81 AD3d 1432, 1433 [4th Dept 2011]). We nevertheless conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering remittal unnecessary (*see People v Carlton*, 78 AD3d 1654, 1655 [4th Dept 2010], *lv denied* 16 NY3d 782 [2011]; *People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

In evaluating defendant's risk level, we have examined the certificate of conviction; defendant's letter dated April 18, 2019, to the Board; a postconviction, presentencing memorandum (PM) compiled on

defendant's behalf; the risk assessment instrument (RAI) and case summary (CS) prepared by the Board; defendant's memorandum of law submitted to the court in anticipation of the SORA hearing; and the transcript of the SORA hearing (*see* Correction Law § 168-n [3]; *see generally People v Mingo*, 12 NY3d 563, 572-574 [2009]; *People v Leach*, 158 AD3d 1240, 1242 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]).

The above materials establish that the 21-year-old defendant began a sexual relationship with the 13-year-old female victim. Over several months, he engaged in a continuing course of sexual misconduct with her, which eventually resulted in the victim becoming pregnant. Those undisputed facts support the assessment against defendant of 25 points under risk factor 2, for sexual intercourse, 20 points under risk factor 4, for a continuing course of sexual misconduct, and 20 points under risk factor 5, for the age of the victim. The assessment of 5 points against defendant under risk factor 9, for the number and nature of prior crimes, is supported by undisputed statements in the CS and PM concerning defendant's prior misdemeanor convictions. The assessment of 15 points against defendant under risk factor 11, for drug and alcohol abuse, is supported by undisputed statements in the CS and PM that defendant claimed to "smoke about $200 dollars' worth of marijuana per day," to drink alcohol consistently in the form of "a pint, liter or fifth of liquor," and to use on occasion other drugs such as cocaine, ecstasy, molly, Lortabs, and Percocet. The assessment of 15 points against defendant under risk factor 12, for refusal of treatment, is supported by statements in the CS and defendant's letter to the Board that he discontinued a sex offender treatment program (*see People v Graves*, 162 AD3d 1659, 1660 [4th Dept 2018], *lv denied* 32 NY3d 906 [2018]). The assessment of 10 points against defendant under risk factor 13, for unsatisfactory conduct while confined, is supported by undisputed statements in the CS that defendant had been found guilty of and disciplined for various behavioral violations while incarcerated. With a total of 110 points pursuant to the RAI, defendant is presumptively a level three risk (*see People v Miller*, 186 AD3d 1095, 1097 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020]).

We conclude that the court properly denied defendant's application for a downward departure to a level two risk. Defendant advances three arguments in support of a downward departure. First, in his letter to the Board, defendant writes that he tried a sex offender treatment program while incarcerated but discontinued it because he "was getting [harassed] by the [correction officers] at the program." We agree with defendant that it is proper to consider his reasons for refusing treatment in the context of a request for a downward departure (*see Graves*, 162 AD3d at 1660). Even assuming, arguendo, that defendant's statement is sufficient to meet the required preponderance of the evidence standard (*see People v Gillotti*, 23 NY3d 841, 864 [2014]), we question the credibility of the statement in the absence of any other supporting evidence and conclude that the statement alone merits "little if any weight" in justifying a downward departure (*People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]; *see People v Martinez*, 104 AD3d 924, 924-925 [2d Dept 2013], *lv denied* 21 NY3d 857 [2013]; *see also Gillotti*, 23 NY3d at 861; *People v*

Walker, 125 AD3d 1516, 1517 [4th Dept 2015]; *People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Defendant's second argument in support of a downward departure is based on his statement in his letter to the Board that the victim deceived him by telling him that she was 18 years old. Our analysis of that statement is the same as our analysis of the statement concerning harassment by correction officers, and we likewise conclude that defendant's account alone merits "little if any weight" in justifying a downward departure (*June*, 150 AD3d at 1702). Moreover, we note that defendant does not detail when the victim's alleged deception concerning her age occurred.

Defendant's third argument in support of a downward departure is based on the possibility that points on the RAI may be overassessed in cases of statutory rape (*see People v Carter*, 138 AD3d 706, 707 [2d Dept 2016]; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006]). We found that to be true in *People v George* (141 AD3d 1177 [4th Dept 2016]), a case relied on by defendant in his memorandum of law, in which the record on appeal shows that the defendant was 19 years old, the victim was 14 years old, the victim's nonconsent was based only on her age, there was a single incident of sexual intercourse between the defendant and the victim, and the defendant completed a dual treatment program for chemically addicted sex offenders. The court in the instant case did not find *George* persuasive authority for defendant's position, and neither do we. Here, the age span between defendant and the victim was eight years, defendant engaged in a continuing course of sexual misconduct with the victim, the course of sexual misconduct resulted in pregnancy, defendant acknowledged in his letter to the Board that, following an argument in which defendant pressed the victim to have an abortion, he expelled the pregnant victim from the residence he had paid for her to stay in, and defendant refused sex offender treatment.

Even assuming, arguendo, that defendant has alleged mitigating circumstances that are not adequately taken into account by the SORA Guidelines and that he has met his burden of proof in establishing that such circumstances exist in this case, our examination of the totality of the circumstances does not lead us to conclude that his presumptive RAI score has "overassessed the risk that he presents to public safety" (*People v Augsbury*, 156 AD3d 1487, 1488 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]; *see Gillotti*, 23 NY3d at 861). Contrary to defendant's contention, attentive consideration to his letter to the Board and the PM does not portray him in a light that supports his position. We are cognizant that defendant has had a traumatic and heartbreaking upbringing and family life, but we cannot ignore the facts that he admits to having "anger problems," that he was removed from high school after a "physical altercation" with the principal, that he has sold drugs as a means of supporting himself, that he consistently consumed alcohol and used marijuana, that his "level of functioning is much lower than that of an average individual," including compromised reading ability and comprehension, and that he may have undiagnosed and untreated mental health issues. We accordingly determine that defendant is a level three risk to

public safety under SORA.

To the extent that defendant's contention challenging the performance of his assigned counsel during the SORA hearing is not obviated by our analysis and determination, we conclude that, in light of the evidence, the law, and the circumstances of this particular case, viewed in totality and as of the time of the representation, defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

540

KA 19-00981

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COLTON PRICE, DEFENDANT-APPELLANT.

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

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, WATERLOO (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Richard M. Healy, A.J.), rendered August 27, 2018. The judgment convicted defendant, upon a plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [1]), arising from allegations that defendant and his brother engaged in sexual misconduct with the victim. Defendant contends that his waiver of indictment was jurisdictionally defective on the ground that County Court (Bender, J.), while acting in its capacity as the local criminal court, violated CPL 195.10 by failing to properly hold defendant for action of a grand jury. Although we agree with defendant that this particular contention need not be preserved for our review (*see People v Boston*, 75 NY2d 585, 589 n [1990]; *cf. People v Thomas*, 34 NY3d 545, 568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), is not forfeited by his guilty plea (*see People v Anderson*, 149 AD3d 766, 766-767 [2d Dept 2017]), and would not be precluded by a valid waiver of the right to appeal (*see People v Waid*, 26 AD3d 734, 734-735 [4th Dept 2006], *lv denied* 6 NY3d 839 [2006]), we nevertheless conclude that it lacks merit.

CPL 195.10 (1) provides that "[a] defendant may waive indictment and consent to be prosecuted by superior court information when," among other requirements, "a local criminal court has held the defendant for the action of a grand jury" (CPL 195.10 [1] [a]). "Being so 'held' for the action of a [g]rand [j]ury involves the filing of a felony complaint on which defendant has been arraigned and a finding after a preliminary hearing (unless waived by defendant) that reasonable cause exists to believe that defendant committed a felony" (*People v Barber*, 280 AD2d 691, 692 [3d Dept 2001], *lv denied*

96 NY2d 825 [2001]; *see People v D'Amico*, 76 NY2d 877, 879 [1990]).

Here, despite the absence of an order issued by the court, the record establishes that defendant was properly held for the action of a grand jury inasmuch as defendant acknowledged that he received the felony complaint upon which he was arraigned and waived his right to a preliminary hearing (*see People v Gassner*, 193 AD3d 1182, 1184 [3d Dept 2021]; *Anderson*, 149 AD3d at 767), and the court immediately transferred over the case from its capacity as the local criminal court to its capacity as County Court (*see People v Fox*, 158 AD3d 591, 591 [1st Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *People v Cicio*, 157 AD3d 651, 651 [1st Dept 2018], *lv denied* 31 NY3d 982 [2018]; *People v Davenport*, 106 AD3d 1197, 1197 [3d Dept 2013], *lv denied* 21 NY3d 1073 [2013]). We also note that defendant signed in open court the waiver of indictment in which he consented to being prosecuted by superior court information (SCI), and the court's order approving the waiver stated that the waiver complied with the provisions of CPL 195.10 (*see Gassner*, 193 AD3d at 1184; *People v Simmons*, 110 AD3d 1371, 1372 [3d Dept 2013]; *Barber*, 280 AD2d at 693). We thus reject defendant's contention that the waiver of indictment was jurisdictionally defective.

Contrary to defendant's contention, his further challenge to the SCI was forfeited by his guilty plea (*see generally Thomas*, 34 NY3d at 569) and, in any event, is not preserved for our review inasmuch as "[a] purported error or insufficiency in the facts of an indictment or information to which a plea is taken does not constitute a nonwaivable jurisdictional defect and must be raised in the trial court" (*People v Milton*, 21 NY3d 133, 137 n [2013]; *see generally People v Iannone*, 45 NY2d 589, 600 [1978]).

Defendant next contends that County Court (Healy, A.J.) abused its discretion in denying his motion to withdraw his guilty plea following a hearing. Although defendant's contention would survive even a valid waiver of the right to appeal (*see Thomas*, 34 NY3d at 558; *People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]), we nonetheless conclude that it lacks merit for the reasons that follow.

Defendant asserts in particular that his plea was entered under duress because the plea bargain was linked to that offered to his brother, thereby making it difficult to independently decide whether to accept the plea, and because he was pressured into accepting that bargain by his former attorney. It is well established that, "so long as the plea agreement is voluntarily, knowingly and intelligently made, the fact that it is linked to the prosecutor's acceptance of a plea bargain favorable to a third person does not, by itself, make [a] defendant's plea illegal" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). "[W]hile a connected plea entailing benefit to a third person can place pressure on a defendant, the 'inclusion of a third-party benefit in a plea bargain is simply one factor for a [trial] court to weigh in making the overall determination whether the plea is voluntarily entered' " (*id.* at 545; *see People v Schrecengost*,

273 AD2d 937, 938 [4th Dept 2000], *lv denied* 95 NY2d 938 [2000]).

Here, the hearing testimony of the former attorneys for defendant and his brother belies defendant's claim that he was coerced and had insufficient time to discuss the linked plea bargain during a meeting prior to the plea proceeding, and we see no basis to disturb the court's determination to credit the testimony of the former attorneys over that of defendant (*see People v Henderson*, 169 AD3d 1521, 1522 [4th Dept 2019], *lv denied* 33 NY3d 977 [2019]; *People v Stephens*, 6 AD3d 1123, 1124 [4th Dept 2004], *lv denied* 3 NY3d 663 [2004], *reconsideration denied* 3 NY3d 682 [2004]; *see generally People v Santos*, 244 AD2d 897, 897 [4th Dept 1997]). With respect to the advice provided during the meeting, "the fact '[t]hat [former defense] counsel made defendant aware of his sentencing exposure cannot be a basis for finding coercion' " (*People v Humber*, 35 AD3d 1209, 1209 [4th Dept 2006], *lv denied* 8 NY3d 923 [2007]; *see People v Days*, 150 AD3d 1622, 1624 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]). Likewise, "[former] defense counsel's advice that [defendant] was unlikely to prevail at trial and that he would likely receive a harsher sentence if convicted after trial . . . does not constitute coercion" (*People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]; *see People v Schluter*, 136 AD3d 1363, 1364 [4th Dept 2016], *lv denied* 27 NY3d 1138 [2016]). Upon weighing the totality of the circumstances, we conclude that the record establishes that defendant's plea was entered voluntarily, knowingly and intelligently (*see Fiumefreddo*, 82 NY2d at 545-547; *Schrecengost*, 273 AD2d at 938; *Santos*, 244 AD2d at 897).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

541

KA 19-00703

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CROSBY, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 20, 2018. The judgment convicted defendant upon a jury verdict of attempted assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]), defendant contends, inter alia, that County Court erred in denying his pro se motion to dismiss the indictment on the ground that he was not afforded an opportunity to testify before the grand jury pursuant to CPL 190.50 (5) (a). The People argue that defendant waived that contention by failing to make a timely motion for dismissal on that ground (*see* CPL 190.50 [5] [c]; *People v Hibbard*, 27 AD3d 1196, 1196 [4th Dept 2006], *lv denied* 7 NY3d 790 [2006]). The court, however, did not state on the record its reasons for denying defendant's motion to dismiss the indictment, and we cannot say whether it denied the motion on the basis of timeliness (*see generally People v Concepcion*, 17 NY3d 192, 198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]). We therefore hold the case, reserve decision, and remit the matter to County Court to state for the record its reasons for denying defendant's motion.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

556

KA 20-01298

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN P. KNORR, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Monroe County Court (Vincent M. Dinolfo, J.), rendered September 24, 2020. Defendant was resentenced upon a conviction of sexual abuse in the first degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). On a prior appeal, we modified the judgment of conviction by vacating the sentence imposed thereon and remitted the matter to County Court for resentencing (*People v Knorr*, 186 AD3d 1090, 1092 [4th Dept 2020]). Defendant now appeals from the resentence. We affirm.

Assuming, arguendo, that defendant's waiver of the right to appeal is invalid or otherwise does not encompass his challenge to the severity of the resentence (*see generally People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]), we nevertheless conclude that the resentence is not unduly harsh or severe.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

580

KA 19-00984

PRESENT: CARNI, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR SIERRA-GARCIA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered February 13, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]), defendant contends that his waiver of the right to appeal is invalid and that his plea was "legally insufficient" for various reasons. Even assuming, arguendo, that the waiver of the right to appeal is invalid (*see People v Smith*, 191 AD3d 1243, 1244 [4th Dept 2021]), we conclude that defendant failed to preserve his substantive contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Rosario*, 188 AD3d 1678, 1678 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), and this case does not fall within the narrow exception to the preservation requirement recognized in *People v Lopez* (71 NY2d 662, 666 [1988]). In any event, we perceive no basis to vacate the plea.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

596

KA 18-00912

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAESEAN HALL, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered March 7, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant pleaded guilty to assault in the second degree (Penal Law § 120.05 [1]) and was sentenced to probation. Supreme Court subsequently determined, following a hearing, that defendant had violated a condition of his probation by attacking a stranger on a street corner. The court therefore revoked defendant's probation and imposed a different sentence. Defendant appeals, and we affirm.

Defendant contends that he did not violate his probation because he justifiably attacked the victim in self-defense (*see generally* Penal Law § 35.15 [1]). Even assuming, arguendo, that the defense of justification applies at a probation violation hearing to the same extent as at a criminal trial (*cf. People v Miller*, 289 AD2d 704, 705 [3d Dept 2001]; *People v West*, 283 AD2d 721, 722 [3d Dept 2001], *lv denied* 96 NY2d 836 [2001]), we reject defendant's contention for the following three reasons. First, defendant's own testimony explicitly characterized the underlying incident as a "mutual fight" in which he "got the best of" the victim, and the defense of justification is statutorily unavailable for "combat by agreement not specifically authorized by law" (§ 35.15 [1] [c]; *see Matter of Kim H.*, 112 AD2d 160, 161 [2d Dept 1985]). Second, defendant's own testimony demonstrated that he "lacked a subjective belief that his use of . . . physical force was necessary to protect himself against [any] use or imminent use of . . . physical force" by the victim (*People v Box*, 181

AD3d 1238, 1240 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *see People v Grady*, 40 AD3d 1368, 1371 [3d Dept 2007], *lv denied* 9 NY3d 923 [2007]). Third, any "right to use [physical] force [in self-defense] terminate[d] at the point where [defendant could] no longer reasonably believe that the [victim] still pose[d] a threat to him" (*People v Colecchia*, 251 AD2d 5, 6 [1st Dept 1998], *lv denied* 92 NY2d 895 [1998]), and the police officer's eyewitness testimony established that defendant continued attacking the victim even after the victim was lying "helpless" and "unconscious" on the ground.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

611

KA 17-01510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISHMEAL ELMORE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered March 6, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). Contrary to defendant's contention, we conclude that County Court properly denied his request to charge criminal possession of a controlled substance in the seventh degree (§ 220.03) as a lesser included offense of the count of criminal possession of a controlled substance in the fifth degree. "A lesser included offense may not be submitted unless there appears on the whole record some identifiable, rational basis for the jury to reject evidence supportive of the greater crime yet accept so much of the evidence as would establish the lesser" (*People v Scott*, 120 AD3d 1573, 1573 [4th Dept 2014], *lv denied* 24 NY3d 1088 [2014] [internal quotation marks omitted]). Here, we conclude there was "no basis, other than sheer speculation, for the jury to find that the chemist inaccurately weighed the drugs, or to otherwise reject the portion of [her] testimony concerning the weight of the substance, while at the same time accepting the portion of [her] testimony identifying the substance" (*People v Johnson*, 66 AD3d 537, 538 [1st Dept 2009]; *see Scott*, 120 AD3d at 1574). We therefore conclude that "there is no reasonable view of the evidence that defendant committed the lesser offense but not the greater" (*People v Demus*, 82 AD3d 1667, 1668 [4th Dept 2011], *lv denied* 17 NY3d 815 [2011]; *see generally People v Davis*, 14 NY3d 20, 22-23 [2009]).

We reject defendant's further contention that he was denied effective assistance of counsel during the suppression hearing and at sentencing. On the record before us, we conclude that " 'the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defendant's two] attorney[s] provided meaningful representation' " (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that the court improperly penalized him for exercising his right to a jury trial when it imposed a sentence greater than that offered during plea negotiations (*see People v McClary*, 162 AD3d 1582, 1582-1583 [4th Dept 2018]; *People v Jackson*, 159 AD3d 1372, 1373 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we further conclude that the sentence imposed is not unduly harsh or severe.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

625

KA 19-01451

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VLADIMIR BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered March 8, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts), concealment of a human corpse 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, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), one count of concealment of a human corpse (§ 195.02), and one count of tampering with physical evidence (§ 215.40 [2]). We affirm.

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]). Contrary to defendant's further contention, County Court legally imposed consecutive sentences on the count of concealment of a human corpse and the count of tampering with physical evidence (*see generally People v Couser*, 28 NY3d 368, 376 [2016]). The sentence is not unduly harsh or severe. Defendant's remaining contentions are unpreserved for appellate review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

626

KA 18-00271

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN K. REDAR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 16, 2017. Defendant was resentenced upon his conviction of, inter alia, criminal sale of a controlled substance in the fifth degree.

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and, in appeal No. 1, he appeals from the resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 2 was superseded by the resentence in appeal No. 1, the appeal from the judgment in appeal No. 2 insofar as it imposed sentence must be dismissed (*see People v Smith*, 187 AD3d 1652, 1656 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *People v Habberfield*, 187 AD3d 1673, 1673 [4th Dept 2020], *lv denied* 36 NY3d 973 [2020]). We otherwise affirm the judgment in appeal No. 2 and affirm the resentence in appeal No. 1.

Defendant failed to preserve for our review his contention in appeal No. 2 that his plea was not knowingly, intelligently, and voluntarily entered inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction pursuant to CPL article 440 (*see People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *Sheppard*, 149 AD3d at 1569). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see*

CPL 470.15 [3] [c]; *People v Carlisle*, 120 AD3d 1607, 1608 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

Defendant's further contention in appeal No. 2 that he was denied effective assistance of counsel does not survive his guilty plea because he "failed to allege that he would have proceeded to trial absent counsel's alleged deficiencies and does not explain how those alleged deficiencies impacted his decision to enter a guilty plea" (*People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]; *see generally People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014]).

Finally, in appeal No. 1, we conclude that the resentence is not unduly harsh or severe.

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court

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

627

KA 21-00125

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN K. REDAR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered October 19, 2016. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal sale of a controlled substance in the fifth degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Same memorandum as in *People v Redar* ([appeal No. 1] — AD3d — [June 17, 2021] [4th Dept 2021]).

Entered: June 17, 2021

Mark W. Bennett
Clerk of the Court